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# The Administrative Procedure Act and the Military Departments

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# THE ADMINISTRATIVE PROCEDURE ACT AND THE MILITARY DEPARTMENTS

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## I. INTRODUCTION

To what extent does the Administrative Procedure Act (APA) 1/ apply to the military departments? What impact does the APA have on military department regulations, adjudications, and other administrative actions, and on judicial review of these activities? The answers to these questions are not simple because of the many different provisions of the APA and their varying applicability to assorted military activities. This article briefly outlines

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1/ Act of June 11, 1946, ch. 324, 60 Stat. 237 (1946) (current version at 5 U.S.C. §§ 551-559, 701-706 (1982)).

the applicability of the various provisions of the APA to administrative actions by the military departments. The article first provides an overview of the APA and then discusses the general applicability of the APA to the military departments. Next, it discusses exemptions from the APA that are particularly applicable to military department activities. Finally, it discusses the specific provisions of the APA applicable to military department activities and the potential impact these provisions might have on military operations.

## II. OVERVIEW OF THE APA

In the 1930's and 1940's, the size and functions of federal administrative agencies expanded greatly. 2/ This led to a growing concern about controlling the discretion of these agencies and insuring the uniformity, impartiality, and fairness of their procedures. 3/ As a result of this concern, in 1946, Congress enacted the Administrative Procedure Act.

The APA provides a set of basic procedures for use by federal administrative agencies in carrying out their functions. As its name implies, the Administrative Procedure Act's provisions are purely procedural. It does not provide any substantive rights 4/ nor even a jurisdictional basis for seeking judicial review of agency actions. 5/

The various provisions of the APA are now codified at 5 U.S.C. § 551 to 559 and 701 to 706. Basically, they cover the following major areas of agency administrative practice: (1) public information practices, such as publication in the Federal Register of agency organization and

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2/ See, e.g., K. Davis, 1 Administrative Law Treatise § 1.02 (1st ed. 1958).

3/ See, e.g., United States v. Morton Salt Co., 338 U.S. 632, 644 (1950); Wong Yang Sung v. McGrath, 339 U.S. 33, 37 (1950).

4/ Hill v. United States, 571 F.2d 1098 (9th Cir. 1978).

5/ Califano v. Sanders, 430 U.S. 99 (1977).

rules; 6/ (2) public participation in rulemaking through informal rulemaking procedures; 7/ (3) formal rulemaking and formal adjudication procedures; 8/ (4) basic requirements for other miscellaneous agency administrative actions; 9/ and (5) judicial review of agency action. 10/

## III. APPLICABILITY OF THE APA TO THE MILITARY DEPARTMENTS

The APA does not exclude the military departments per se from its coverage. The APA applies to each "agency", which is defined as "each authority of the Government of the United States". 11/ Although §§ 551 and 701 exclude certain military activities from their definition of "agency", and thus from almost all APA coverage, they deliberately do not exclude the military departments as organizations. The APA's legislative history explains: "[I]t has been the undeviating policy to deal with types of functions as such and in no case with administrative agencies by name. "Thus certain war and defense functions are exempted but not the War or Navy Departments in the performance of their functions." 12/ Courts considering the question have found the APA applicable to the military departments except to the

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6/ 5 U.S.C. § 552 (1982).

7/ Id. § 553.

8/ Id. §§ 553(c), 554, 556-557.

9/ Id. § 555.

10/ Id. §§ 701-706.

11/ Id. §§ 551(1), 701(b)(1) (1982). Courts have found this broad definition of agency to include nonappropriated fund instrumentalities such as post exchanges. See Young v. United States, 498 F.2d 1121 (5th Cir. 1974).

12/ Senate Committee on the Judiciary, Administrative Procedure Act Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. 191 (1947) (emphasis added) [hereinafter cited as Apa Legislative History]. See also id. at 138.

extent the APA specifically exempts certain of their functions. 13/

## IV. APA EXEMPTIONS PARTICULARLY APPLICABLE TO THE MILITARY

While not excluding the military departments generally, the APA does not apply, except for purposes of the public information requirements in 5 U.S.C. § 552, to "courts martial [sic] and military commissions" and "military authority exercised in the field in time of war or in occupied territory". 14/ In addition, the informal rulemaking 15/ and formal rulemaking and adjudication sections 16/ of the APA exempt certain activities, including those involving a "military function," from their coverage. This part of the article will discuss these exemptions from the APA.

### A. Exemption of Courts-Martial and Military Commissions

Neither the APA nor its legislative history defines the terms "courts martial [sic]" or "military commissions". However, under common usage, these terms have a well understood and limited meaning. A court-martial is a court of military or naval personnel for the trial of offenses against military law or the law of war, 17/ the formalities prescribed for convening courts-martial by the

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13/ Roelfs v. Secretary of the Air Force, 628 F.2d 594, 599 (D.C. Cir. 1980); Nicholson v. Brown, 599 F.2d 639, 648 (5th Cir. 1979) Jaffe v. United States, 592 F.2d 712, 719-20 (3d Cir. 1979); Ornato v. Hoffman, 546 F.2d 10, 14 (2d Cir. 1976); United States "ex rel." Schonbrun v. Commanding Officer, 403 F.2d 371, 375 n. 2 (2d Cir. 1968), Story v. Marsh, 574 F. Supp. 505, 512 (E.D. Mo. 1983).

14/ 5 U.S.C. §§ 551(1)(F), (G) (1982).

15/ Id. § 553.

16/ Id. §§ 553(c), 554, 556-557.

17/ Webster's New World Dictionary 339 (1964).

Uniform Code of Military Justice, 18/ the Manual for Courts-Martial, 19/ and regulations 20/ make it virtually impossible to confuse a court-martial with another type of military tribunal. Military commissions are far less common in military practice but still have a narrow function similar to that of a court-martial. These tribunals are courts

> convened by military authority for the trial of persons not usually subject to military law who are charged with violations of the laws of war; and in places subject to military government or martial law, for the trial of such persons when charged with violations of proclamations, ordinances, and valid domestic civil and criminal law of the territory concerned. 21/

Historically, "the distinctive name of 'military commission' has been adopted for the exclusionary war court, which functions for the court-martial proper in time of war". 22/

Courts have followed this narrow usage in determining whether various military tribunals or boards fall under the APA exemption for "courts martial [sic] or military commissions". In Roeloff v. Secretary of the Air Force, the District of Columbia Circuit held that military discharge review boards established under 10 U.S.C. § 1553 and boards for correction of military records established under 10 U.S.C. § 1552 did not fall under this exemption. 23/ Similarly, in Neal v. Secretary of the

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18/ 10 U.S.C. §§ 801-938 (1982) [hereinafter cited as UCMJ].

19/ Manual for Courts-Martial, United States, 1984.

20/ E.g., U.S. Dep't of Army, Reg. No. 27-10, Legal Services - Military Justice, chs. 5, 12 (1 July 1984).

21/ U.S. Dep't of Army, Reg. No. 310-25, Military Publications--Dictionary of United States Army Terms, p. 168 (15 Sept. 1975).

22/ Roeloff v. Secretary of the Air Force, 628 F.2d 594, 599 n. 23 (D.C. Cir. 1980) (emphasis in opinion).

23/ 628 F.2d 594, 599 (D.C. Cir. 1980).

Navy, 24/ the Third Circuit found that a military administrative board acting on re-enlistment requests was not a court-martial or military commission under the APA.

B. Exemption of Military Authority Exercised in the Field in Time of War or in Occupied Territory

Neither the APA nor its legislative history offer any guidance regarding the meaning of the APA exemption for "military authority exercised in the field in time of war or in occupied territory". The exemption's language raises four possible interpretational issues. What is "military" authority under this exemption? What is "in the field"? What does "in time of war" mean? And, what is "occupied territory"?

Very few reported cases deal with this exemption, and they do so briefly. For example, in Kam Koon Wan v. E.E. Black, Ltd., 25/ the court noted briefly, in dicta, that "the Army in Hawaii legally was not 'in the field' or 'in occupied territory' even though it acted in that manner" in a case involving martial law in Hawaii in World War II. Jaffe v. United States 26/ considered briefly, without deciding, the question of whether nuclear tests conducted in Nevada during the Korean conflict involved military authority exercised "in the field in time of war".

These two cases offer no meaningful guidance as to what the exemption means. Thus, one must look to the common meaning and usage of the terms of the exemption and the policy considerations behind the exemption to resolve the four interpretational issues raised by it.

1. "Military Authority"

Multiple definitions and usage illustrate an interpretational issue regarding the term "military

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24/ 639 F.2d 1029 (3d Cir. 1981).

25/ 75 F. Supp. 553 (D. Hawaii 1948).

26/ 592 F.2d 712, 719-20 (3d Cir. 1979).

authority". Does the term mean "military" in the narrow sense of pertaining to soldiers and armies 27/ or in the broader sense of pertaining to war and defense functions? 28/ Congress' approach in the APA of focusing on functions rather than organizations 29/ suggests that "military" authority refers to authority exercised in furtherance of defense and war functions, even if exercised by civilian personnel, rather than limiting it to authority exercised solely by uniformed military personnel.

2. ""In the Field"

The term "in the field" is closely analogus to language in Article 2(10), UCMJ, 30/ which subjects persons to the UCMJ who accompany an armed force "in the field". Under Article 2, the words "in the field" imply military operations "with a view to an enemy". 31/ Courts have recognized that the term denotes activity rather than specific geographic location. For example, in Hines v. Mikell, 32/ the court held that forces training in temporary camps in the United States prepatory to service in an actual theater of war were "in the field". Similarly, courts have found that a merchant ship and crew transporting troops and supplies to a battle zone were "in the field". 33/ Presumably, the same kinds of emergency

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27/ See Webster's Third New International Dictionary 1432 (1961); Bonfield, "Military and Foreign Affairs Function Rulemaking Under the APA", 71 Mich. L. Rev. 249, 257 (1972).

28/ See Bonfield, supra note 27, at 257.

29/ See, e.g., APA Legislative History, supra note 12, at 191, 250, 303.

30/ 10 U.S.C. § 802(10) (1982).

31/ 14 Op. Att'y Gen. 22 (1872).

32/ 259 F.28, 34 (4th Cir. 1919).

33/ In re Berve, 54 F. Supp. 252 (S.C. Ohio 1944); McCune v. Kilpatrick, 53 F. Supp. 80 (E.D. Va. 1943). See also Ex

(Footnote Continued)

considerations that allow exercise of court-martial jurisdiction over persons "in the field," who normall are not subject to such jurisdiction, apply to exempting military authority from the APA's requirements when exercised "in the field".

3. "In Time of War"

The chief potential interpretational issue regarding the term "in time of war" is whether it refers only to a war declared by Congress or whether refers to other armed conflicts as well. One case construing the term "in time of war" in Article 2(10), UCMJ, supports a narrow interpretation. 34/ Several cases construing the phrase "in time of war" in Article 43, UCMJ, however, as well as its common usage and usage in international law, suggest a much broader functional interpretation. 35/ This latter, functional interpretation is more consistent with Congress' approach in the APA of focusing on functional classifications. 36/

4. "Occupied Territory"

The term "occupied territory" derives its meaning from international law, particularly the law of war.

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(Footnote Continued)
parte Gerlack, 247 F.2d 616 (S.D.N.Y. 1917); Hearings on H.R. 2998 Before a Subcomm. of the Comm. on Armed Serv., House of Representatives, 81st Cong., 1st Sess., 872-73 (1949).

34/ See United States v. Averette, 19 C.M.A. 363, 41 C.M.R. 363 (1971).

35/ See, e.g., United States v. Anderson, 19 C.M.A. 588, 38 C.M.R. 386 (1968); United States v. Michaud, 48 C.M.R. 379 (N.C.M.R. 1977); United States v. Reyes, 48 C.M.R. 832 (A.C.M.R. 1974); I. Brownlie, International Law and the Use of Force by States 401 (1963).

36/ See, e.g., APA Legislative History, supra note 12, at 191, 250, 303.

Under the law of war, "occupied territory" is territory placed under the authority of a hostile army. 37/. Occupied territory is distinguishable from a nation's own territory governed under martial law or from the territory of a friendly nation administered temporarily under a civil affairs agreement. 38/ Whether territory is occupied is a question of fact. 39/ United States practice is to issue an occupation proclamation, although international law does not require this measure. 40/ Currently, the only terri tory occupied by the United States is West Berlin. 41/

C. Military Functions Exemption

Both 5 U.S.C. § 553, which relates to agency rulemaking, and 5 U.S.C. § 554, which relates to formal, "on the record," agency adjudications, exempt "military functions" from their coverage. 42/ The APA does not define the term "military function". One commentator has complained that the term is "unduly vague, hard to define, and harder yet to apply". 43/ It is clear, however, that the term "military function" is not coextensive with all the activities of the military departments. Congress' failure to totally exempt the War and Navy Departments from the APA

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37/ Annex to Hague Convention No. 4, Regulations Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 42, 36 Stat. 2277, T.S. No. 539.

38/ U.S. Dep't of Army, Field Manual No. 27-10, The Law of Land Warfare, p. 139 (July 1956).

39/ Id.

40/ Id. at 140.

41/ For a discussion of Berlin's present legal status as an occupied city, see Hillenbrand, "The Legal Background of the Berlin Situation" in F. Hillenbrand, The Future of Berlin (1980).

42/ 5 U.S.C. §§ 553(a)(4) (1982). The exemptions refer to "a military or foreign affairs function".

43/ Bonfield, "Military and Foreign Affairs Function Rulemaking Under the APA," 71 Mich. L. Rev. 222 (1972).

and the APA's legislative history indicate that Congress did not intend the term "military function" to include all activities of the military departments. 44/ In particular, testimony before Congress distinguished between most of the War Department's activities, considered to be military functions, and activities by the Army Corps of Engineers involving navigable waters, which were considered civil functions. 45/

Courts have broadly construed the term "military function" to include a wide range of military department activities outside the Corps of Engineers civil works areas. These activities include excluding persons from a submarine launching area, 46/ determining whether military persons missing in action were deceased, 47/ declaring merchant seamen to be security risks 48/ or finding their presence on certain American merchant vessels inimical to the national security, 49/ determining whether doctors should be authorized delay in entering on active duty based on community hardship, 50/ and reviewing military

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44/ See APA Legislative History, supra note 12 and accompanying text.

45/ Hearings Before a Subcomm. of the Comm. on the Judiciary United States Senate, on S. 674, S. 675, and S. 918, 77th Cong, 1st Sess. 35-51 (1941).

46/ United States v. Aarons, 310 F.2d 341 (2d Cir. 1962).

47/ McDonald v. Lucas 371 F. Supp. 837 (S.D.N.Y. 1973), application for stay of judgment and other relief denied, 417 U.S. 905 (1974).

48/ Parker v. Lester, 112 F. Supp. 433 (N.D. Cal. 1953), rev'd on other grounds, 227 F.2d 709 (9th Cir. 1955).

49/ McBride v. Roland, 248 F. Supp. 459 (S.D.N.Y. 1965), aff'd 369 F.2d 65 (2d Cir. 1966), vacated on other grounds, 390 U.S. 411 (1968).

50/ Nicholson v. Brown, 599 F.2d 639, 648 n. 9 (5th Cir. 1979); Ornato v. Hoffman, 546 F.2d 10, 14 (2d Cir. 1976).

discharges. 51/ These decisions neither analyze the meaning of "military function" in great detail nor give any definition of the term.

The only in-depth analysis of the "military function" exemption appears in a single law review article by Professor Arthur Bonfield. 52/ Professor Bonfield argues that, based on the "plain meaning" of the words "military" and "function" and on the APA's legislative history, the exemption applies to the extent that there are "clearly and directly involved matters specifically fitted for, appropriate to, or expected of the armed forces in light of their peculiar nature and qualifications". 53/ This narrow definition is in contrast to the broader possible definition which would equate "military function" with "national defense function" or "war function". 54/

The latter, broader interpretation finds stronger support in court decisions, legislative history, longstanding administrative interpretation, and congressional acquiesence. Several court decisions have implicitly given the term "military function" its broadest possible definition. 55/ The APA's legislative history refers to wartime functions of a civilian agency as a military function. 56/ Similarly, the Attorney General's Manual on

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51/ Roeloff v. Secretary of the Air Force, 628 F.2d 594, 599 (D.C. Cir. 1980).

52/ Bonfield, "Military and Foreign Affairs Function Rulemaking Under the APA", 71 Mich. L. Rev. 222 (1972).

53/ Id. at 257.

54/ Id. at 249.

55/ See, e.g. Roelofs v. Secretary of the Air Force, 628 F.2d 594, 599 (D.C. Cir. 1980); United States v. Aarons, 310 F.2d 341 (2d Cir. 1962).

56/ APA Legislative History, supra note at 225. See also id. at 267 (substituting word "war" for "military" function), 355 (describing civilian defense authorities as "pure military" functions).

the Administrative Procedure Act, 57/ published shortly after the APA's enactment and regarded as an authoritative administrative interpretation of the APA, 58/ uses this same illustration. 59/ Further, the Department of Defense has repeatedly asserted to Congress that almost all its activities fall under the "military function" exemption. 60/ Courts normally defer to such longstanding interpretations. 61/

Regardless of whether the "military function" exemption is given the narrower interpretation urged by Professor Bonfield or the broader interpretation given by courts and administrative agencies, it clearly applies to many military department regulations and adjudications. In any event, its exact scope may be largely academic because the other major exemptions to informal rulemaking under § 553 cover most military regulations. Similarly, the formal rulemaking and adjudication procedures in §§ 556 and 557 only apply to rulemaking or adjudications "required by statute to be made on the record after opportunity for an agency hearings," 62/ which is not the case with most, if

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57/ U.S. Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act (1947) [hereinafter cited as Attorney General's Manual].

58/ See, e.g., G. Edles & J. Nelson, Federal Regulatory Process: Agency Practices and Procedures 9 (1982).

59/ Attorney General's Manual, supra note 57, at 26.

60/ House Committee on Government Operations, Survey and Study of Administration, Organization, Procedure, and Practice in the Federal Agencies, 85th Cong., 1st Sess., pt. 3 (1957); Bonfield, supra note 52, at 252-53.

61/ Udall v. Tallman, 380 U.S. 1, 16-17 (1965).

62/ 5 U.S.C. §§ 553(c), 554(a) (1982). The Supreme Court, in Wong Yong Sung v. McGrath, 339 U.S. 33, 50 (1950), indicated that hearings compelled by reason of due process are treated as "required by statute" for purposes of §§ 554, and 556-57. However, the modern judicial trend has been to match specific hearing elements to the circumstances rather than apply all elements of these sections to

(Footnote Continued)

not all, military department rulemaking and adjudication. 63/

## V. APPLICABILITY AND IMPACT OF SPECIFIC APA PROVISIONS ON MILITARY ACTIVITIES

As indicated previously, the APA does apply to the military departments generally but has two almost-blanket exceptions for "courts martial [sic] and military commissions" and "military authority exercised in the field in time of war or in occupied territory". Further, two other APA provisions--the rulemaking requirements of 5 U.S.C. § 553 and the formal adjudication requirements of 5 U.S.C. § 554 specifically exempt "military functions" from their requirements. This section of the article examines the applicability and potential impact of each of the five major parts of the APA on military activities.

### A. Information Practices and Regulations

Unlike other APA provisions, the information practices provision of the APA contained in 5 U.S.C. § 552 apply to the military departments without any exception for courts-martial or military commissions or for military authority exercised in the field in time of war or in occupied territory. Section 552 prescribes three ways agencies must make information available to the general public: (1) through publication in the Federal Register; 64/ (2) through making final opinions available to the public in reading rooms; 65/ and (3) through release of other information on request. 66/

A complete treatment of the impact of § 552 on the military departments and military activities is beyond the

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(Footnote Continued)
constitutionally required hearings. See, e.g., G. Edles & J. Nelson, Federal Regulatory Process: Agency Practices and Procedures § 5.2 (1982).

63/ See APA Legislative History, supra note 12, at 202.

64/ 5 U.S.C. § 552(a)(1) (1982).

65/ Id. § 552(a)(2).

66/ Id. § 552(a)(3).

scope of this article. The publication requirement is, however, of particular importance to military regulatory programs and the legal challenges to them because a person need not report to, or be adversely affected by, a matter required to be, but not, published in the Federal Register, except to the extent the person has actual and timely notice of it. 67/

What regulations must be published in the Federal Register? Section 552(a)(1) requires publication "for the guidance of the general public" of, inter alia, "substantive rules of general applicability adopted as authorized by law". 68/ The precise meaning of this requirement is unclear. 69/ Courts have stated, however, that, in order for a rule to be one of "general applicability," it must have "a direct and significant impact upon the substantive rights of the general public or a segment thereof". 70/ Many military regulations fall outside of this threshold requirement for publication because they arguably are not of "general applicability" and their publication is not needed for "the guidance of the public". 71/ In addition, the nine exemptions in 5 U.S.C. § 552(b), particularly exemption (b)(2) regarding matters "related solely to the internal personnel rules and practices of an agency," seem to provide an alternative justification for not publishing many military regulations in the Federal Register. 72/ Courts have

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67/ Id. § 552(a)(1).

68/ Id. § 552(a)(1)(D).

69/ K. Davis, 2 Administrative Law Treatise 341 (3d ed. 1979).

70/ National Ass'n of Veterans v. Secretary of Defense, 487 F. Supp. 192, 200 (D.C. Cir. 1979) (citing Lewis v. Weinberger, 415 F. Supp. 652, 659 (D.N.M. 1976)).

71/ Id.

72/ One might argue that the Supreme Court's decision in Department of the Air Force v. Rose, 425 U.S. 352 (1976) makes the (b)(2) exemption so narrow that it provides little justification for not publishing a regulation. However, Rose construed the (b)(2) exemption as it relates to a

(Footnote Continued)

rejected challenges to nonpublication of agency rules that, like most of the military departments', appear to be purely internal and not ones of "general applicability" needed "for the guidance of the public". 73/

Even if an agency fails to publish a regulation in the Federal Register when required by § 552, the regulation may still not be totally unenforceable. First, unpublished regulatory provisions will be binding on persons having actual and timely notice of them. 74/ Second, the unpublished regulation will still be effective against persons to the extent its nonpublication did not "adversely affect" them. 75/ Third, the remedy available to a person challenging an unpublished regulation is not necessarily nullification of the underlying regulation. 76/

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(Footnote Continued)
Freedom of Information Act (FOIA) request under 5 U.S.C. § 552(a(3). Arguably, the policies regarding publication under 5 U.S.C. § 552(a)(1) are different than those relating to release of information under FOIA. Further, in the case of publication under § 552(a)(1), the (b)(2) exemption must be read in conjunction with the (a)(1) requirements for publication, i.e., "for guidance of the general public" and "rules of general applicability".

73/ See, e.g., Pitts v. United States, 599 F.2d 1103, 1108 (1st Cir. 1979); Whelan v. Brinejar, 538 F.2d 924, 927 (2d Cir. 1976); National Ass'n of Concerned Veterans v. Secretary of Defense, 487 F. Supp. 192, 201 (D.D.C. 1979); Pifer v. Laird, 328 F. Supp. 649, 652 (N.D. Cal. 1971). See also United States v. Tolkach, 14 M.J. 239, 241 (C.M.A. 1982) (Federal Register publication not required for military service regulations relating solely to military personnel practices).

74/ See, e.g., United States v. Mowatt, 582 F.2d 1194 (9th Cir. 1978); United States v. Floyd, 477 F.2d 1194 (10th Cir. 1973). But see Anderson v. Butz 550 F.2d 459 (9th Cir. 1977).

75/ See, e.g., Neighborhood & Legal Services v. Legal Services Corp., 446 F. Supp. 1148 (D. Conn. 1979).

76/ Id.

B. APA Informal Rulemaking Procedures

Section 553 prescribes certain informal rulemaking procedures that agencies must follow in issuing substantive rules. The most notable of these provides the public an opportunity to comment on a proposed rule before the rule becomes effective. 77/ The section totally exempts two classes of activities from its scope: "(1) a military or foreign affairs function of the United States; or (2) a matter relating to agency management, personnel or to public property, loans, grants, benefits or contracts." 78/

The "military function" exemption was discussed in § III.C above. Most military regulations, except for those dealing with the Army Corps of Engineers Civil Works Commission, arguably fall under this exemption. 79/ In addition, the § 553 exemption for, among other things, matters relating to agency management, personnel, public property, benefits, or contracts 80/ provides an independent basis for exempting almost all military regulations from § 553.

C. APA Formal Rulemaking and Adjudication

§§ 556 and 557 prescribe procedures to be applied to certain agency rulemaking and adjudications. These procedures apply when rules or adjudications are "required by statute to be made on the record after opportunity for an agency hearing". 81/

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77/ 5 U.S.C. §§ 553(c)(d) (1982).

78/ Id. §§ 553(a)(1)(2).

79/ Agency regulations implementing 5 U.S.C. § 553 may themselves narrow the military functions exemption. For examples, 32 C.F.R. § 519.64(b)(2) (1983) narrows the exemption for Department of the Army rules to matters "which have been determined under the criteria of an Executive Order or statute to require a security classification in the interests of national defense or foreign policy".

80/ For a general discussion of this exemption see Annot., 41 A.L.R. Fed. 926 (1979).

81/ 5 U.S.C. §§ 553(c), 554(a),(c) (1982).

The formal rulemaking or adjudication procedures of §§ 556 and 557 will rarely, if ever, apply to military department proceedings for two reasons. First, § 554 has the same "military function" exemption as § 553. 82/ Second, there apparently are no statutes applicable to the Department of Defense or the military departments that require rulemaking or adjudications "on the record after opportunity for an agency hearing". 83/

The courts have held that either the words "on the record" must appear in a statute or Congress must clearly indicate its intent to trigger the formal, on the record, hearing provisions of the APA for §§ 556 and 557 to apply. 84/ The fact that a statute requires a hearing does not, by itself, necessarily trigger the procedures in these sections. 85/ An early Supreme Court decision, Wong Yong Sung v. McGrath, indicated that the provisions of §§ 556 and 557 apply absent this exact language when due process requires a hearing with a determination on the record. 86/ The exact reach of Wong Yong Sung is unclear, particularly when due process requires some elements of a hearing with a determination on the record and not other elements. 87/

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82/ The APA's legislative history indicates the two exemptions were to mirror each other. See APA Legislative History, supra note 12, at 202, 261. See also Attorney General's Manual, supra note 57, at 45.

83/ The APA's legislative history also notes that statutes rarely, if ever, require military functions to be exercised upon hearing. APA Legislative History, supra note 12, at 202, 261.

84/ See, e.g. West Chicago v. Nuclear Regulatory Comm'n, 701 F2d 632, 641 (7th Cir. 1983); United States Lines v. FMC, 584 F.2d 519, 536 (D.C. Cir. 1978). See also Camp v. Pitts, 411 U.S. 138 (1973); United States v. Florida East Coast Ry., 410 U.S. 224, 234-38 (1973); United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 756-58 (1972).

85/ Id.

86/ 339 U.S. at 50.

87/ K. Davis, 2 Administrative Law Treatise, 333-34 (2d ed. 1979).

However, the modern judicial trend is to not apply these sections' procedures simply because due process requires some aspects of a hearing on the record; 88/ more recent Supreme Court opinions, such as Matthews v. Eldridge, 89/ emphasize the need to tailor hearing elements to the particular circumstances. This modern trend is more consistent with the APA's legislative history than strict application of the provisions of §§ 556 and 557 in all instances when due process requires some kind of hearing. 90/

D. Miscellaneous Agency Actions and Section 555

Section 555 of the APA may have the greatest impact on military department activities. In particular, the provisions giving a right to counsel, personal appearance, and notice of reasons for denial of a petition in an agency proceeding 91/ could potentially affect military department administrative practice in a significant way.

Three courts have stated that § 555 applies to the military departments. 92/ In the leading case, Roeloff v. Secretary of the Air Force, 93/ the court held that § 555 applied to discharge review boards and boards for correction of military records. The court reasoned that § 551 did not exempt them from the APA per se since they were not "courts martial [sic] or military commissions," and § 555 applied "according to the provisions thereof, except as otherwise

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88/ See, e.g., G. Edles & J. Nelson, Federal Regulatory Process: Agency Practices and Procedures § 5.2 (1982).

89/ 424 U.S. 319 (1976).

90/ See APA Legislative History, supra note 12, at 21-22, 193, 202, 260, 268, 304, 315, 359.

91/ 5 U.S.C. § 555(b)(e) (1982).

92/ Roeloff v. Secretary of the Air Force, 628 F.2d 594, 599 (D.C. Cir. 1980); Nicholson v. Brown, 599 F.2d 639, 648 n. 9, (5th Cir. 1979); Wood v. Secretary of Defense, 496 F. Supp. 199 (D.D.C. 1980).

93/ 628 F.2d 594 (D.C. Cir. 1980).

provided by" the APA. 94/ Accordingly, the court required the Air Force Discharge Review Board and Board for Correction of Military Records to provide a statement of reasons under § 555(e) on why they denied a full discharge upgrade to an applicant.

Roeloff's reasoning is logical, although one could argue that the same "military function" exemption that appears in §§ 553 and 554 should apply to § 555. In fact, several courts have applied exemptions from § 554 to § 555. 95/ However, this approach is wholly inconsistent with the APA's language, 96/ its legislative history, 97/ and basic canons of statutory construction. 98/

One might also argue that a military exception to § 555 should be implied because strict application of the section would be inconsistent with Congress' general approach toward military personnel decisions and would lead to absurd results. Although the Supreme Court has noted that such exceptions to the APA "are not lightly to be

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94/ Id. at 599.

95/ See Cleveland Trust Co. v. United States, 421 F.2d 475, 482 (6th Cir.), cert. denied, 400 U.S. 819 (1970); Suess v. Pugh, 245 F. Supp. 661, 665 (N.D.W.Va. 1965).

96/ § 555 states that its provisions apply "according to the provisions thereof, except as otherwise provided by" the APA. The military function exceptions in §§ 553 and 554 make no reference to § 555.

97/ See APA Legislative History, supra note 12, at 194, 202, 263-267, 362.

98/ It is a basic canon of statutory construction that expressio unius est exclusio alterius (expression of one thing is the exclusion of another). 2 J. Sutherland, Statutory Construction § 4915-17, at 412-23 (4th ed. 1972). Thus Congress' express mention of military functions as excluded from 5 U.S.C. §§ 553, 554, but not from 5 U.S.C. § 555, arguably indicates an intent not to exclude military functions from § 555.

presumed," 99/ there is obvious merit to this argument, as well as support in current case law. 100/

What potential impact would application of § 555 procedures have on military administrative practice? To answer this question requires examination of several of the section's particular provisions.

1. Right to Counsel and to Personal Appearance Under § 555(b).

§ 555(b) provides in part:

> A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding.

§ 555(b) thus provides two rights regarding counsel and one regarding personal appearance.

A. Compelled Appearances

The first sentence gives a person "compelled to appear in person" before an agency's representative a right to be "accompanied, represented, and advised by counsel". This right is not limited to any particular type of agency action and thus its potential scope in the military is very broad. Given the APA's definitions of "agency" and

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99/ Marcello v. Bonds, 349 U.S. 302, 310 (1953).

100/ Clardy v. Levi, 545 F.2d 1241 (9th Cir. 1976), implied an exemption from the right-to-counsel requirements of the APA for prison disciplinary proceedings. Military interests in discipline and efficiency are much greater and support an implied exception for military activities. See also Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977) (explaining implied exception to the Federal Tort Claims Act for injuries incurred incident to military service as based on concern with interference of tort suits on military discipline).

"person," 101/ it literally would seem to apply to any situation in which a military member is ordered to appear before any higher authority. This could be carried to ridiculous extremes. For example, under the sentence's literal language, a private would have the right to bring counsel each time he was ordered to appear before his squad leader or company commander. Even if not carried to this extreme, the right certainly would literally apply to persons ordered to appear in more formal military actions, including service members receiving nonjudicial punishment under summarized proceedings 102/ and before investigations under Article 32, UCMJ 103/ and administrative investigations. 104/

There are, however, significant limiting principles to this right to counsel. First, the right does not require the government to provide counsel. 105/ Second, the right only applies when a person is "compelled" to appear and not when a person may appear as of right, but is not compelled to do so. 106/ Third, the right may not apply to

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101/ 5 U.S.C. § 551(1), (2) (1982).

102/ See U.S. Dep't of Army, Reg. No. 27-10, Legal Services--Military Justice, para. 3-16 (1 July 1984).

103/ 10 U.S.C.§ 832 (1982).

104/ U.S. Dep't of Army, Reg. No. 15-6, Boards, Commissions, and Committees-Procedure for Investigating Officers and Boards of Officers, para. 3-3 (c1, 15 June 1981), appears to give a narrower right to participation by counsel in Army administrative proceedings than the right granted in 5 U.S.C. § 555(b) for agency proceedings generally.

105/ See, e.g. Grover v. United States, 200 Ct. Cl. 337 (1973); Nees v. SEC, 414 F.2d 211 (9th Cir. 1969); Hyser v. Reed, 318 F.2d 225 (D.C. Cir.), cert. denied sub nom. Thompson v. United States Board of Parole, 375 U.S. 957 (1963).

106/ See Smith v. United States, 250 F. Supp. 803 (D.N.J. 1966), appeal dismissed, 377 F.2d 739 (3d Cir. 1967); Suess v. Pugh, 245 F. Supp. 661 (N.D.W.Va. 1965).

investigative, as opposed to adjudicatory, proceedings. 107/ Finally, the activities of counsel may be limited, as appropriate, to the type of agency action. 108/

B. Parties to Agency Proceedings

The second sentence of § 555(b) gives a "party" a right to appear in person or by or with counsel in an "agency proceedings". Although this sentence does not limit the right to counsel to compelled appearances, it has two other explicit limitations not present in the first sentence; it applies to a "party" rather than to a "person" and it applies only to "agency proceedings". Also, despite its plain language, courts have recognized that the right is not absolute and depends on the nature of the proceeding. 109/

i. Party.

The APA defines "party" to include "a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding". 110/ The common meaning of party includes "one (as a person or group) constituting alone or with others one of the two sides in a proceeding". 111/ The APA's legislative history states that "[t]he word party in the second sentence is to be understood as meaning any person showing the requisite interest in the matter, since the section applies in connection with the exercise of any agency authority whether or not formal proceedings are available". 112/ These definitions would appear to include

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107/ See Annot., 33 A.L.R. 229, 255 (1970).

108/ See FCC v. Schreiver, 329 F.2d 517 (9th Cir. 1964).

109/ See, e.g., DeVyver v. Warden, 388 F. Supp. 1213 (M.D.Pa. 1974).

110/ 5 U.S.C. § 551(3) (1982).

111/ Webster's Third New International Dictionary of the English Language, 1648 (1961).

112/ APA Legislative History, supra, note 12, at 263-64. See also id. at 13, 205.

applicants, respondents, or others who are the subject of various Army administrative boards or investigations as well as persons being offered punishment under Article 15, UCMJ. 113/

ii. Agency Proceeding.

The definition of an "agency proceeding" under the APA is a more complicated question. Section 551(12) defines "agency proceeding" as "rulemaking", "adjudication", or "licensing". These three terms obviously do not describe all agency activities. 114/ Thus, unless an agency action falls under one of these three terms, it is not subject to § 555.

The military departments do not typically engage in rulemaking involving parties or in licensing. 115/ However, many military department activities would appear to be considered "adjudication" under the literal language of the APA. 116/ The APA defines adjudication as an "agency process for formulation of an order". 117/ In turn, it defines "order" as "the whole or part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of

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113/ 10 U.S.C. § 815 (1982).

114/ See I.T.&T. Corp. v. Local 134, I.B.E.W., 419 U.S. 428 (1974).

115/ The APA defines licensing as "agency processing respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification or conditioning of a license". 5 U.S.C. § 551(8) (1982). Some military activities, such as allowing commercial activities on installations, would appear to fall under this definition.

116/ Courts have rejected the argument that the term adjudication is limited to the sense it is used in 5 U.S.C. § 554/ See, e.g., Mitchell v. Sigler, 389 F. Supp. 1012, 1014-19 (N.D. Ga. 1975).

117/ 5 U.S.C. § 551(7) (1982).

an agency in a matter other than rulemaking but including licensing". 118/

The potentially broad APA definitions of "party" and "agency proceeding" coupled with the right to counsel and personal appearance requirements of § 555(b) could have a significant effect on certain military actions. For example, under Department of Defense Directive 1332.14 119/ and Army Regulation 635-200, 120/ there is no express right to appear personally or with counsel in many administrative discharge proceedings. Instead, a "notification procedure" applies whereby the service member receives a written notice of proposed separation and may respond in writing. 121/ If the service member insisted on appearing personally with counsel before the separation authority, must the separation authority permit this? A literal reading of § 555(b) would indicate so. Similarly, claims to a right to appear personally with counsel could be made regarding complaints made under Article 138, UCMJ, 122/ reports of survey, proceedings under Article 15, UCMJ, 123/ applications to the correction boards, or consideration by promotion boards.

One might argue, however, that actions such as initial approval of an administrative separation are not "adjudications" because they are not "final

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118/ 5 U.S.C. § 551(6) (1982).

119/ Dep't of Defense Directive No. 1332.14, Enlisted Administrative Separations (28 Jan. 1982); 32 C.F.R. Pt. 41 (1983).

120/ Dep't of Army, Reg. No. 635-200, Personnel Separations--Enlisted Separations (1 Oct. 1982).

121/ See 32 C.F.R. § 41, App. A. at 3B (1983).

122/ 10 U.S.C. § 938 (1982).

123/ Id. § 815.

dispositions". 124/ Instead, one could argue that all military records are eventually subject to review by a board for correction of military records, 125/ and that any action involving a military record is, therefore, not a "final disposition" until the board review has occurred. The problem with this argument is that the APA defines "adjudication" as the "agency 'process for the formulation of'" the "whole or part of a final disposition". 126/ The Supreme Court did recognize in I.T.&T. v. Local 134, I.B.E.W., that an intermediate decision would not be considered an adjudication under the APA when it bound no one, had no determinative consequences for the parties, and was separate and distinct from the actual final disposition of a matter. 127/ However, as the court later indicated in NLRB v. Sears, Roebuck & Co., 128/ the fact that an agency decision may be overturned on administrative appeal does not affect its finality. The court in Sears instead focused on whether the administrative action at issue had "operative effect" without further administrative review. 129/ Thus, the fact that military administrative action such as awarding an administrative discharge is subject to appeal to a board for correction of military records would not affect a party's right to personal appearance and counsel under § 555(b). The administrative action would still be an "agency proceeding" if it has operative effect on its own or has determinative

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124/ The APA defines "adjudication" as "agency process for formulation of an order" and order as "the whole or part of a final disposition". 5 U.S.C. §§ 551(6), (7) (1982).

125/ Under 10 U.S.C. § 1552 (1982), Boards for Correction of Military Records (BCMR's) have authority to correct a military record "to correct an error or remove an injustice". The BCMR's represent the final and ultimate military administrative remedy.

126/ 5 U.S.C. 551(b), (7) (1982) (emphasis added).

127/ 419 U.S. 428, 442 (1974).

128/ 421 U.S. 132 (1975).

129/ Id. at 158-59 n. 25.

consequences for the parties. As such, the APA right to counsel and personal appearance, if applicable to military proceedings, would then apply.

C. Implicit Exception

Several courts have recognized that the rights to personal appearance or counsel under § 555(b) is not absolute. Instead, they require consideration of the nature of the proceeding. This reasoning has particular force in the military context.

Perhaps the leading case to recognize an implicit exemption to § 555(b) is Clardy v. Levi. 130/ In Clardy, the Ninth Circuit held that the provisions of the APA do not apply to prison disciplinary proceedings. The court recognized that, based on the literal language of the APA, the argument that § 555 applied to prison disciplinary proceedings was "technically impressive". 131/ Yet, the court refused to apply the APA to prison disciplinary proceedings because its application would "unduly inhibit prison management". 132/

Similarly, the court in DeVyver v. Warden 133/ held that 5 U.S.C. §§ 554, 555 did not apply to parole decisionmaking despite the literal language of the APA. Further, the court noted that, even if § 555(b) applied to parole decisionmaking, "the affirmative right to appear apparently bestowed by § 555(b) is not blindly absolute, without regard to the status or nature of the proceedings and concern for the orderly conduct of public business". 134/

The only reported case involving the argument that § 555(b) applies to a military administrative proceeding is

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130/ 545 F.2d 1241 (9th Cir. 1976).

131/ Id. at 1244.

132/ Id. at 1246.

133/ 388 F. Supp. 1213 (M.D.Pa. 1974).

134/ Id. at 1222.

Cody v. Scott. 135 Cody dealt with the separation of a cadet from the U.S. Military Academy for misconduct. The separation followed an investigative hearing in which the cadet's counsel was not permitted to participate. The cadet contended that the separation proceedings deprived him of his right to counsel guaranteed by the Constitution or by 5 U.S.C. § 555(b). 136/ The court found no right to counsel based on two court of appeals decisions that had failed to find a due process right to counsel in cadet disciplinary hearings. 137/ The court noted language from Hagopian v. Knowlton that "[t]he importance of informality in the proceeding militates against a requirement that the cadet be accorded the right to representation by counsel before the Academic Board". 138/ Although the court did not explicitly address the literal language of § 555(b), it is apparent that it viewed the same considerations that militated against finding a due process right to counsel as creating an implicit exception to § 555(b).

Judicial recognition of an implicit exception to 5 U.S.C. § 555(b) for military administrative proceedings would be closely analogous to judicial recognition of an implied exception to the Federal Tort Claims Act ("FTCA") 139/ for a service member's injuries incurred incident to service. The Supreme Court has repeatedly recognized this exception to the FTCA, known as the "Feres doctrine," 140/ despite the FTCA's failure to mention such an exception with other explicit exceptions applicable to

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135/ 565 F. Supp. 1031 (S.D.N.Y. 1983).

136/ Id. at 1034.

137/ Id. at 1034-35.

138/ Id. at 1035 (citing Hagopian v. Knowlton, 470 F.2d 201 (2d Cir. 1972)).

139/ 28 U.S.C. § 2680 (1982).

140/ See Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977); Feres v. United States, 340 U.S. 135 (1950).

activities by the armed forces. 141/ The most important reason for the Supreme Court's implying the Feres "incident to service" exception to the FTCA was its concern about the effect that tort actions by soldiers would have on military discipline. 142/ Similarly, strict application of § 555(b) to the military departments would have potentially devastating effects on military efficiency and discipline. This is apparent since there presently are over two million individuals in uniform in the United States and these individuals routinely take part in many agency proceedings without counsel or personal appearance rights and often are compelled to appear before agency authorities without counsel.

2. Right to Notice of Denial and Statement of Reasons under § 555(e).

Section 555(e) provides in part:

> (e) Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceedings. Except in affirming a prior denial or when the denial is self explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

Basically, this provision requires an agency to give a brief statement of its reasons when it denies a person's written request in connection with an agency proceeding. 143/ The section's legislative history indicates that such a "brief statement" must be "sufficient to

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141/ See Jacoby, "The Feres Doctrine," 24 Hastings L.J. 1281, 1282-85 (1973).

142/ See, e.g., Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 671-673 (1977); Note, "In Support of the Feres Doctrine and A Better Definition of 'Incident to Service,'" 56 St. John's L. Rev. 584, 500-04 (1982).

143/ See generally Annot., 57 A.L.R. Fed. 765 (1982).

appraise the party of the basis of the denial". 144/ Courts have applied the requirements of § 555(e) in a number of contexts, most notably to parole board decisions. 145/

The main limitation on this section is that it applies only to denials, of written applications, petitions or requests, of an interested person, in connection with an agency proceeding. The APA itself does not define "interested person". However, the Attorney General's Manual on the Administrative Procedure Act 146/ states that an "interested person" may "be defined generally as one whose interests are or will be affected by the agency which may result from the proceeding". 147/ As indicated previously in the discussion of § 555(b), the term "agency proceeding" is quite broad and would extend to any agency process for the formulation of the whole or part of a final agency disposition in a matter.

The actual burden that § 555(e) imposes is slight. The section requires only a brief statement. Pursuant to the stipulation of dismissal and the settlement agreement in Urban Law Institute of Antioch College, Inc. v. Secretary of Defense, 148/ boards for correction of military records and discharge review boards already give far more extensive explanations for their decisions than required by § 555(e). Similarly, the Army provides statements of reasons regarding denial of complaints under Article 138, UCMJ which are indexed and made available to the public pursuant to the settlement in Hodge v. Alexander. 149/ It seems unlikely that application of the requirement to other military

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144/ APA Legislative History, supra note 12, at 265; Attorney General's Manual, supra note 57 at 70.

145/ See, e.g., King v. United States, 492 F.2d 1337 (7th Cir. 1974).

146/ Attorney General's Manual, supra note 57.

147/ Id. at 70.

148/ No. 76-0530 (D.D.C. stipulation of dismissal filed Jan. 31, 1977) (order and settlement agreement July 30, 1982).

149/ No. 77-228 (D.D.C. May 13, 1977).

contexts would impose any significant burden. If, in fact, imposition of the requirement would significantly burden a military proceeding, then, arguably, the requirement should not apply. 150/

E. Judicial Review

The APA's provisions on judicial review are codified at 5 U.S.C. §§ 701-706. Congress intended these provisions to restate the law as it existed rather than establish new standards. 151/

Section 701 sets out the applicability of the APA's provisions on judicial review. As mentioned previously, because of the definition of "agency," "courts martial [sic] and military commissions" and "military authority exercised in the field in time of war or in occupied territory" are not reviewable under the APA. Section 701 also indicates that the judicial review provisions of the APA are not applicable to the extent that "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law". 152/ There do not appear to be any presently existing statutes that preclude judicial review of any military department's action. 153/ However, the phrase "agency action is committed to agency discretion by law" includes the concepts of nonjusticiability and nonreviewability. 154/

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150/ Cf. Roelofs v. Secretary of the Air Force, 628 F.2d 594, 601 (D.C. Cir. 1980) (justifying decision to require statement of reasons in part on fact that requirement imposed no significant burden on the military). See also supra text accompanying notes 129-41.

151/ Attorney General's Manual, supra, note 57, at 93.

152/ 5 U.S.C. §§ 701(a)(1), (2)) (1982).

153/ Some actions regarding national defense policy, however, are statutorily exempt from judicial review. See, e.g., 50 U.S.C. §§ 47(b), pp. 1216(6) (1982).

154/ See, e.g., United States "ex rel." Schonbrun v. Commanding Officer, 403 F.2d 371 (2d Cir. 1968).

Section 702, concerning right of review under the APA, is significant to the military departments because of its waiver of sovereign immunity for nonmonetary claims against agencies. 155/ All circuits considering the question have not recognized that the section's waiver applies to "nonstatutory" APA review of agency action under general federal question jurisdiction. 156/ However, courts recognize that this waiver does not apply to a suit that would work an intolerable burden on government operations. 157/ In addition, § 702 provides that it does not confer "authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought". 158/ Further, the Second Circuit has indicated that the waiver does not apply when Congress has established an exclusive scheme for judicial review of agency activity. 159/ Finally, the waiver of sovereign immunity in § 702 should not apply to activities such as courts-martial, military commissions, and military authority exercised in the field in time of war, which are not within the APA's judicial review provisions.

Sections 702 and 705 cover common concepts of judicial review such as standing, ripeness, and relief pending review. Their provisions do not appear to raise any special considerations for review of military department activities.

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155/ See Act of October 21, 1976, § 1, Pub. L. No. 94-574, 90, Stat. 2721.

156/ Sprecher v. Graber, 716 F.2d 968 (2d Cir. 1983); Schnapper v. Foley, 667 F.2d 102, 107 (D.C. Cir. 1981); Sheehan v. Army & Air Force Exchange Service, 619 F.2d 1132, 1138-39 (5th Cir. 1980, rev'd on other grounds, 456 U.S. 728 (1982); Jaffe v. United States, 592 F.2d 712 (3d Cir. 1979); Hill v. United States, 571 F.2d 1098, 1102 (9th Cir. 1978).

157/ See, e.g., Groves & Sons, Co. v. United States, 495 F. Supp. 201 (D. Colo. 1980) (no waiver under § 702 where remedy for contract dispute existed under the Tucker Act).

158/ See, e.g., McCartin v. Norton, 674 F.2d 1317, 1322 (D.C. Cir. 1982).

159/ Sprecher v. Graber, 716 F.2d 968 (2d Cir. 1983).

Section 705 covers the scope of judicial review of agency actions. This section provides in part that a reviewing court shall:

> (2) hold unlawful and set aside agency action, findings, and conclusions found to be--
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> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
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> (B) contrary to constitutional right, power, privilege, or immunity;
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> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
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> (D) without observance of procedure required by law;
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> (E) unsupported by substantial evidence in a case subject to §§ 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
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> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

One area in which judicial review differs from the language of the APA is in review of the adequacy of the record supporting a military department's denial of conscientious objector status. The language of § 706(2) would indicate an arbitrary and capricious standard applies. 160/

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160/ The "substantial evidence" standard only applies "in a case subject to sections otherwise reviewed on the record of an agency hearing 'provided by statute'". 5 U.S.C. § 706 (1982) (emphasis added). Inservice conscientious objector determinations are not made under any statutory mandate, they are purely regulatory. See 32 C.F.R. § 75 (1983). Absent a statutory "on the record" hearing requirement, the "arbitrary or capricious" standard applies. See Camp v. Pitts, 411 U.S. 138, 140-42 (1973); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 414-15 (1971).

In fact, courts almost universally apply a narrower "basis-in-fact" test, 161/ described as the narrowest standard known to judicial review. 162/ The Fifth Circuit, in Nicholson v. Brown, 163/ has adopted this narrower standard for judicial review of other internal military activities.

The standards for the scope of judicial review established by § 706 create some special problems when the review is of informal agency action, as is often the case with the military departments. Because many military department actions are not covered by the rulemaking or adjudication provisions of the APA, they are done informally without any detailed administrative record to justify them. Even when there is an administrative record, it may be incomplete. How then is a court to review such actions in the absence of a detailed or complete record? If courts would always require exhaustion of administrative remedies, if a formal administrative remedy existed for every potential claim against the military, and if the administrative remedy created a complete administrative record, this would not be a problem. Courts simply would review the complete administrative record created by an agency, such as the boards for correction of military records. Unfortunately, however, some courts do review claims without requiring exhaustion of administrative remedies and some administrative actions result in less than complete administrative records. What then?

Two Supreme Court cases, Camp v. Pitts 164/ and Citizens to Preserve Overton Park v. Volpe, 165/ provide the standard for review of such informal agency actions and address the question of an inadequate administrative record. These cases indicate that an "arbitrary and capricious" standard applies to review of agency action, absent a statutory, "on-the-record," hearing requirement. Further, in limited circumstances, the court has called for agency

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161/ See Annot., 10 A.L.R. Red. 15, at §§ 12, 13 (1972).

162/ See Estep v. United States, 321 U.S. 114 (1946).

163/ 599 F.2d 639 (5th Cir. 1979).

164/ 411 U.S. 138 (1973).

165/ 401 U.S. 402 (1971).

supplementation of an inadequate agency record. Courts have supplemented inadequate administrative records through remand, use of affidavits, evidentiary hearings involving agency officials, or allowing limited discovery. 166/

## V. CONCLUSION

The APA does not exempt the military departments in general from its provisions. It does contain almost blanket exceptions for "courts martial [sic] and military commissions" and "military authority exercised in the field in time of war". Further, it exempts military functions from its rulemaking and formal adjudication provisions.

While these exemptions are significant, there are several important requirements that the APA may impose on military administrative actions. First, the military departments must publish "substantive rules of general applicability" in the Federal Register "for guidance of the general public". Second, one could argue that the literal language of the APA requires the military departments to allow military members to be represented by counsel whenever they are compelled to appear before a military department representative or to appear personally and with counsel when they have an interest at stake in a military administrative action. However, a strong argument exists that there is an implicit exception to these requirements for the military. Third, the literal language of the APA, as interpreted by the courts, requires the military departments to provide a brief statement of reasons when they deny certain administrative requests. In addition to these requirements, the APA provides the standards of review for most judicial challenges to military administrative actions.

The area of the greatest potential litigation and development in military administrative practice involves the APA's rights to counsel, personal appearance, and notice of reasons for denial set out in 5 U.S.C. § 555. Courts have begun to apply the notice of reasons for denial requirements of § 555(e) to some military administrative actions. To date, courts have not applied the requirements of § 555(b)

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166/ See generally McMillan & Peterson, "The Permissible Scope of Hearings, Discovery, and Additional Factfinding During Judicial Review of Informal Agency Action," 1982 Duke L.J. 333.

regarding counsel and personal appearance to the military. Whether courts will do so, based on the section's literal language, or, instead, imply an exemption for the military because of concerns with discipline and effectiveness, remains to be seen.