

October 1970

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Robert Gerwig, *Military Reservations: Forts or Parks?*, 12 Wm. & Mary L. Rev. 51 (1970),
<https://scholarship.law.wm.edu/wmlr/vol12/iss1/4>

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MILITARY RESERVATIONS: FORTS OR PARKS?

ROBERT GERWIG*

Military reservations in the United States customarily display warning notices at the entrance reading "This is a U.S. Military Reservation," or words to that effect. Today's visitor approaching the site in a motor vehicle is not apt to notice such indications, particularly if he should be waved in by a soldier posted at the gate. Absent evidence of suspicious motives, his passage is not likely to be barred.¹

Does this apparent open gate policy suggest that visitors are free to roam at will into and within the military post, and to disport themselves as they might in a public park? Are the premises open to demonstrators who, in the contemporary mode, desire to convey a dramatic message to the authorities? May leaflets and their equivalent be distributed within the gates? Has the concept of strict control over entry onto military bases been replaced by newer notions of free access? May military personnel assigned to the post carry on demonstrations, disseminate printed materials, or hold provocative group meetings, without approval of the commander?

As in many cases of governmental and institutional activity, the traditional power of a military commander over his post has come under attack by those who question established authority. Issues which formerly were regarded as nonjusticiable because of a strong disinclination by the judiciary to intervene in military affairs,² are now being

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1. Frequently, in the absence of special arrangements by the post commander, stringent troop requirements elsewhere result in unmanned gates at military stations.

2. *E.g.*, *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953) ("Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."); *Harper v. Jones*, 195 F.2d 705, 707 (10th Cir. 1952), *cert. denied*, 344 U.S. 821 (1952) ("What is necessary for the discipline of military personnel and to safeguard their health and welfare is to be determined by the commanding officers and not the courts."). In contrast to litigation merely testing a commander's authority over his post, note a suit by a professor of constitutional law (as a citizen and taxpayer) against the President to declare the military conflict in Viet Nam unconstitutional, dismissed on the ground that the appellant lacked standing to sue. *Velvel v. Johnson*, 287 F. Supp. 846 (D. Kans. 1968), *aff'd sub nom. Velvel v. Nixon*, 415 F.2d 236 (10th Cir. 1969). Though perhaps not understood by the public, the Army has historically recognized the right of appeal within the military. *See, e.g.*, Uniform Code of Military Justice, art. 138, 10 U.S.C.

tested in an effort to establish a new area of confrontation with authority. Under these circumstances, a brief survey of traditional precedents and recent cases asserting new theories of entry to military bases may bring into focus acceptable limits of the commander's authority vis-à-vis those who would enter or use the premises for purposes not normally related to the post's mission.

THE MILITARY POST IN TRADITIONAL FOCUS

Historical Perspective

In the mid-nineteenth century, the Secretary of War requested advice from the Attorney General concerning the report of a junior Army officer attesting that representatives of a railway company had trespassed on federal lands adjoining a military post and suggesting retaliatory action by injunction or otherwise. In his brisk reply, Attorney General J. S. Black stated that:

It was the practice of the Federal Government in early times to vindicate her right to the possession of the public property in a very short way. She turned out and kept out all lawless intruders, without stopping to ask leave of the courts. I do not know at what precise period she became humble enough to forego the privilege of self defense, or when she began to prefer the shelter of an injunction to the protection of her own right hand. In theory, she still denies her liability to be sued; but in practice that theory comes to very little, if any man or corporation who is impudent enough to invade her property, can compel her to abandon it, and get the decree of a court before she can retake it. If that be the rule, her immunity from law suits amounts to this: that she will not allow herself to be sued by an honest person who has a just claim, and seeks to enforce it in a legal way; but she will let any trespasser deprive her of her rights, and drive her into court to regain them.

§ 938 (1964); W. WINTHROP, *MILITARY LAW AND PRECEDENTS* 604 (2d ed. 1920) quoting the remarks of General Auguy as long ago as 1884:

The right of appeal from an immediate commander to a superior one is the right of every officer or soldier in the Army, and ought to be maintained untrammelled by fear of any resentment on the part of the officer whose acts or decisions are thus either expressly or impliedly questioned. To throw any impediment in the way of such appeal or to visit its exercise with confinement or threat of punishment, in the opinion of the commanding general, does violence alike to discipline, justice, and good order in the Army.

Here, you tell me, is a railway corporation which has crossed over from Canada, and threatens to take possession of the land of the United States. If they can take a part of that property, they can take it all, or any other military station, dismantle the fort, turn out the garrison, and tear down the house where the commander has his quarters. The threat is, that they will thrust themselves on the public property by a naked, downright, and palpable wrong, with nothing to avouch the deed but their own mere will. It is not my opinion that any injunction is needed to prevent such an outrage. A few words of instruction to the officers of the army at Fort Porter, or near it, will be amply sufficient.³

A few years later, Mr. Black responded to a similar request by the Secretary to furnish advice to a subordinate Army commander concerning trespassers on a military facility. As to the right of the commander to protect a military post by force from occupation or injury at the hands of trespassers, he stated that "[t]here can be no doubt upon this point," although he cautioned against unnecessary or wanton harm to persons or property.⁴

In an opinion relating to the rights of residents and visitors of the United States Military Academy, an earlier Attorney General, Benjamin F. Butler, stated:

. . . It is obvious that, when persons in civil life who may be allowed to reside at or to resort to the post, obstruct the professors or their officers in the performance of their appropriate duties; or interfere with the studies or discipline of the academy; or encourage the cadets in acts of insubordination; or enter into correspondence with them, contrary to the regulation, their further presence at the post will become, according to the nature of the circumstances and the degree of aggravation, more or less injurious to the institution; and that, in flagrant cases of this sort, the prompt removal of the offenders may be indispensable. As they will not be amenable to a court-martial, there is no other way in which the ill consequences which might otherwise result from such misconduct can be prevented. In the exercise of a sound discretion, the commandant of the post may, therefore, order from it any person not attached to it by law, whose presence is, in his judgment, injurious to the interests of the academy. And, in case any person so ordered shall refuse to depart, after reasonable

3. 9 OP. ATT'Y GEN. 106, 107 (1857).

4. 9 OP. ATT'Y GEN. 476 (1860).

notice, and within a reasonable time, having regard to the circumstances of the case, I think the superintendent may lawfully remove him by force. . . .⁵

Attorney General Butler's response, together with the views of his successor, Mr. Black, furnish a valuable historical background for a consideration of the traditional authority of a post commander to exclude from a military reservation those whose presence is either detrimental to or incompatible with the basic military mission.

Command of a military installation or activity (*e.g.*, fort, camp, base, depot, arsenal) is normally the responsibility of the senior assigned officer. Such command is somewhat different from the unique disciplinary authority of an officer over troops in his charge and, for the purposes of this discussion, refers more particularly to the post commander's responsibility as a general manager of land, buildings and equipment, personnel, and related activities. In this capacity, his function is analogous to that of the superintendent of a large commercial plant or facility, or that of the governing official of a city.⁶ Early opinions of the Judge Advocate General of the Army contained no reservations concerning the legality of removing trespassers by force if necessary.⁷ The typical opinion declared that "[a] Post commander can, in his discretion, exclude all persons other than those belonging to his post from post and reservation grounds but should he admit everybody except one individual against whom no charge of wrongdoing existed, such action would be considered an abuse of discretion on the part of the post commander."⁸

Although the opinions generally refer to the authority of a post commander, more precisely it is the general constitutional power of the President, as Commander in Chief of the Army,⁹ that manifestly devolves upon the post commander. This power commonly may be reflected through appropriate departmental regulations or equivalent di-

5. 3 OP. ATT'Y GEN. 268, 272 (1837). Notable is the contemporary thrust of the rationale to certain aspects of the campus unrest problem.

6. DEP'T OF THE ARMY PAMPHLET 27-164, para. 10.1 (1965). The context is generally broad enough to include officers in charge of Navy, Air Force, Marine Corps, Coast Guard, and similar facilities.

7. See DIGEST OF OPINIONS OF THE JUDGE-ADVOCATES GENERAL OF THE ARMY, paras. 1700, 1704, 1713-15, 1717 (1901).

8. *Id.* at card 2682 (Oct. 1896).

9. U.S. CONST. art. II, § 2: "The President shall be Commander in Chief of the Army. . . ."

rectives.¹⁰ In 1909, and by subsequent re-enactment, the Congress expressly recognized and reinforced the post commander's inherent police power over military sites. Punishment consisting of a fine up to \$500, or imprisonment not exceeding six months, or both were authorized for anyone within the jurisdiction of the United States who either:

- a. Goes upon any military reservation or installation "for any purpose prohibited by law or lawful regulations;" or
- b. Re-enters such reservation or installation "after having been removed therefrom or ordered not to re-enter by any officer or person in command or charge thereof. . . ." ¹¹

Legislative sanction for the commander to control access to a post was also provided to include situations where security or protection of government property was the predominant interest.¹² For example, the Judge Advocate General of the Army has issued opinions supporting the inherent power of post commanders to order the removal of a soldier's wife for sufficient cause,¹³ and to exclude civilians regardless of the extent of jurisdiction reserved by the state.¹⁴ Other opinions empha-

10. The rationale supporting a presumption that, under appropriate circumstances, an official acts by authority of the President is succinctly recited in *Dunmar v. Ailes*, 348 F.2d 51, 55 (D.C. Cir. 1965).

11. Act of March 4, 1909, ch. 321, § 45, 35 Stat. 1097, as amended Act of March 28, 1940, 54 Stat. 80, re-enacted 18 U.S.C. 1382 (1964). Cases upholding convictions include: *United States v. Jelinski*, 411 F.2d 476 (5th Cir. 1969); *Weissman v. United States*, 387 F.2d 271 (10th Cir. 1967); *Holdridge v. United States*, 282 F.2d 302 (8th Cir. 1960); *United States v. Packard*, 236 F. Supp. 585 (N.D. Cal. 1964), *aff'd*, 339 F.2d 887 (9th Cir. 1964). Illustrative cases not upholding conviction include: *United States v. Bradley*, 418 F.2d 688 (4th Cir. 1969); *United States v. Ramirez Seijo*, 281 F. Supp. 708 (D. P.R. 1968); *United States v. Watson*, 80 F. Supp. 649 (E.D. Va. 1948).

12. Internal Security Act of 1950, § 21(a), 50 U.S.C. § 797(a) (1964) authorizes, in the case of conviction of willful violation of directives issued by the Secretary of Defense or designated commanders, a fine not to exceed \$5000 or imprisonment for not more than one year, or both.

13. *DIGEST OF OPINIONS*, *supra* note 7, at card 25177 (1912). An interesting recent example of the breadth of the commander's authority over his military personnel is *Hines v. Seaman*, 305 F. Supp. 564 (D. Mass. 1969). After warning a sergeant (permitted to live on post with his family) that if he did not control the behavior of a dependent son who had committed several thefts he might have to leave base housing, and upon evidence that the son had subsequently been arrested for molesting two girls on post, the post commander notified him that he must vacate the quarters. The court determined that the sergeant was a *licensee* and not a tenant, and therefore not entitled to judicial intervention to prevent eviction.

14. SPJGA 1946/3760, 5 BULL. JAG 181 (May 23, 1946).

sized that the authority of a commander to exclude civilians was a proprietary right not dependent upon legislative jurisdiction.¹⁵

For many years, Army regulations explicitly directed post commanders to use force, if necessary, to remove trespassers.¹⁶ Under current regulations enacted pursuant to statute,¹⁷ a post commander is responsible, *inter alia*, to accomplish his mission, to care for his personnel and property,¹⁸ to maintain law and order at the installation,¹⁹ and to establish appropriate rules governing the entry and exit of all persons.²⁰ In addition, he is charged with regulating post vehicular traffic,²¹ firearms,²² solicitors,²³ and other visitors, including those invited for social occasions or activities open to the public in general.²⁴

*Cafeteria Workers v. McElroy*²⁵

In 1961, the Supreme Court examined the scope of a commander's inherent authority over a military installation in the appeal of a Navy cafeteria worker who had been refused permission to enter the Navy premises. The worker had failed to meet the security requirements of the installation and subsequently had been denied a hearing to consider the effect of the exclusion upon her employment at the site. The Court responded to two basic questions: Was the commander authorized to

15. See, e.g., DEP'T OF THE ARMY PAMPHLET 27-164, para. 10.3 (1965). Much real property under government ownership is not subject to federal "legislative jurisdiction," which term refers to authority—normally exercised by a state—to legislate within such areas. *Id.* at para. 4-1.

16. Army Regulations, para. 212 (1913) [hereinafter cited as AR].

17. E.g., 10 U.S.C. §§ 3061, 3012(g) (1964), authorize the President and Secretary of the Army, respectively, to prescribe regulations. Note also the constitutional grant of authority for the Congress "To make Rules for the Government and Regulation of the land and naval Forces . . ." U.S. CONSR. art. I, § 8.

18. AR 600-20, para. 10 (Jan. 31, 1967).

19. AR 210-10, para. 1-13 (Sept. 30, 1968).

20. 32 C.F.R. § 552.18 (1970); AR 210-10, para. 1-15 (rev. March 10, 1969). See also AR 633-1, para. 8c (Sept. 13, 1962) which expressly authorizes ejection of persons not subject to military law who commit a breach of regulations.

21. AR 210-10, para. 1-16 (Sept. 30, 1968).

22. *Id.*, para. 1-17.

23. AR 210-7 (Feb. 11, 1970).

24. AR 380-25 (May 17, 1965).

25. 367 U.S. 886 (1961). The installation involved was the Naval Gun Factory, Washington, D.C. The Court considered at some length the line of authority from the President and the Congress to the Navy Regulations, and their local implementation. The sweeping force of the Court's decision, however, and its reference to Army administrative determinations, and subsequent reliance on this decision by other courts in analogous cases preclude doubt of its general application to all of the armed services.

deny employees access to the installation in the manner chosen? If so, did such action deprive her of any constitutional rights?

On the first issue, the Navy's regulations governing the traditional responsibilities and duties of a commanding officer concerning the admittance of dealers, tradesmen, or their agents, in the Court's view, reflected "unquestioned authority which commanding officers of military installations have exercised throughout our history."²⁶ In considering whether summary denial of access to the site of her former employment violated the employee's rights under the due process clause of the Fifth Amendment, the Court was satisfied that a hearing at which she might refute the specific grounds for her exclusion from the site was not constitutionally required. In so deciding, the Court applied the traditional formula which requires consideration of the precise nature of the governmental function vis-à-vis the private interest affected. In this case, the governmental function to manage the internal operation of a federal military installation was determined to be paramount to the abridgment of a citizen's privilege to work at that installation.

CURRENT PROBLEMS AND THEIR DISPOSITION

Cafeteria Workers broadly outlines the fundamental authority of the commander to deny individuals access to his post. It may be useful, however, to fill in the basic framework with subsequent judicial views concerning special aspects of the over-all authority, particularly in the light of recent re-examination of the issues thought to have been settled in 1961. For example, mere entry upon a federal station has been stated to be not *malum in se* and becomes an offense under federal law only when a statute or lawful regulation prohibits entry without permission.²⁷ The exclusionary order may be justified, however, "in the interest of good order and military discipline," as in the *Cafeteria Workers* case. Reasonable requirements of orderly government dictate that persons who enter upon a military reservation surrender some of their constitu-

26. *Id.* at 892. The Court cited 3 OP. ATT'Y GEN. 268, 269 (1837) for the proposition that "citizens resident within the public limits . . . even though they own houses on the public grounds or occupy buildings belonging to the United States [are regarded] as tenants at will. . . ." 367 U.S. at 893 (emphasis added). Various Judge Advocate General views were also cited including JAGA 1925/680.44 (Oct. 6, 1925) which supports a post commander's discretion to "exclude private persons and property . . . or admit them under such restrictions as he may prescribe in the interest of good order and military discipline. . . ." 367 U.S. at 893.

27. *United States v. Bishop*, 261 F. Supp. 969, 971 (N.D. Cal. 1966), a prosecution for violation of a post regulation prohibiting entry without prior permission.

tional rights so that military discipline and security may remain inviolate.²⁸ Regarding a post commander's acknowledged responsibility for maintaining order on a post, the courts have ruled that he may bar re-entry of persons to forestall actions of a disruptive nature. This action is to be based upon his reasonable belief that such a consequence may follow their entry upon the premises.²⁹ Under the *Cafeteria Workers* rationale, prohibition of re-entry would not be subject to prior notice or hearing.³⁰ Once having been barred for any legitimate reason within the scope of the post commander's police power, an individual's motive for re-entry becomes immaterial.³¹

As the threat of anti-war demonstrations increased, the Judge Advocate General of the Army suggested that post commanders issue regulations prohibiting activities such as on-post "picketing, demonstrations, sit-ins, protest marches, political speeches, and similar activities," except as approved in specific instances upon prior submission of a request therefor.³² Mindful that anti-war manifestations might also take the form of distribution of printed materials, the Judge Advocate General issued guidance for commanders to control distribution of pamphlets, handbills, and flyers.³³

28. *United States v. Miller*, 261 F. Supp. 442, 449 (D. Del. 1966), permitting admission of evidence obtained on a military reservation in connection with arrest thereon for possession of a stolen car in violation of the Dyer Act.

29. *Weissman v. United States*, 387 F.2d 271 (10th Cir. 1967), affirming conviction under 18 U.S.C. § 1382 (1964), and thus sustaining as "rational" and "reasonable" the post commander's order barring two persons from re-entering Fort Sill because of a prior "unseemly demonstration" at a court-martial.

30. For a recent application of this rationale see *United States v. Jelinski*, 411 F.2d 476 (5th Cir. 1969).

31. *Holdridge v. United States*, 282 F.2d 302 (8th Cir. 1960), affirming the conviction of an individual for re-entry motivated by religious beliefs about the immorality of war.

32. 67-13 Judge Advocate Legal Service 9 (June 14, 1967) [hereinafter cited as JALS]; see also, Letter, Dep't of the Army, JAGL-X, *October 15 Peace Demonstrations* (Oct. 7, 1969), issued in response to impending "peace" demonstrations, in which the Judge Advocate General of the Army stated:

It is our view that, providing he treats all similarly situated persons equally, a post commander has an absolute right to exclude civilians from his installation and that he may place restrictions upon their entrance and activities on his post. In particular, a post commander may exclude activities which he deems detrimental to morale and good order and discipline on his installation. We believe it is reasonable for him to exclude persons who admittedly wish to convince others, and particularly his soldiers, to resist the established military policy of the United States. . . .

33. JAGA, 1 November 1968, 68-26 JALS 13. Subsequent opinions suggested the addition of newspapers, magazines, other printed material, and circulation of petitions

Early in 1969, the Department of the Army announced a policy governing on-post distribution of publications.³⁴ Installation commanders were to be guided by the principle that troops are as entitled to free access to publications, even if in poor taste or unfairly critical of government policies or officials, as are other citizens. This policy, however, was subject to certain conditions under which a post commander might prohibit distribution of publications which were disseminated through other than regularly established and approved outlets, such as military libraries and exchanges, unless prior approval was given. The Judge Advocate General warned that such prohibitions could be justified only by the application of reasonable standards. Standards such as "good taste" and "best interests of the command" were regarded to be of doubtful validity and likely to invite legal challenge. Defensible standards, on the other hand, which would support prohibition of distribution of publications on post include a reasonable belief that the publication:

- a. Would prevent or materially interfere with the military mission;
- b. Was obscene or pornographic; or
- c. Was one whose distribution would be unlawful (*e.g.*, activities detrimental to the armed forces, as proscribed by specific statutes); or would otherwise constitute a clear danger to military loyalty, discipline, or the morale of the military personnel at the installation.³⁵

In May of 1969, the Department of the Army established additional guidelines in a letter entitled "Guidance on Dissent,"³⁶ the essence of which was incorporated in a subsequent Department of Defense release.³⁷ Concerning on-post demonstrations and similar activities, the directive substantially employed the language previously suggested by the Judge Advocate General of the Army in connection with the distribution of publications:

for signatures. JAGA 1969/3715 (April 2, 1969), 69-9 JALS 15, and JAGA 1969/4942 (Jan. 8, 1970), 70-1 JALS 27.

34. Dep't of the Army message 894727 (Jan. 24, 1969) published in AR 210-10, para. 5-5 (March 10, 1969).

35. JAGA 1969/3715 (April 2, 1969), 69-9 JALS 15.

36. The Adjutant General, Dep't of the Army letter, *Guidance on Dissent* (May 28, 1969).

37. Dep't of Defense Directive 1325.6, *Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces*, (Sept. 12, 1969).

The Commander of a military installation shall prohibit any demonstraton or activity on the installation which could result in interference with or prevention of orderly accomplishment of the mission of the installation, or present a clear danger to loyalty, discipline, or morale of the troops.

The directive cited 18 U.S.C. § 1382 to emphasize that it is a crime for any person to enter a military reservation for any purpose prohibited by law or lawful regulations, or to enter or re-enter any installation after having been barred by order of the commander. By way of illustrating the effect of such a directive prohibiting on-post demonstrations or distribution of publications, an analogous situation arose involving the application of a General Services Administration rule prohibiting unseemly or disorderly conduct on GSA property. As judicially interpreted on review, this rule did not deny fair warning to defendants whose behavior allegedly interfered with the official business of an armed forces examining and entrance station.³⁸

The recent case of *Kiiskila v. Nichols*³⁹ bears a striking resemblance to *Cafeteria Workers*. The commanding officer at Fort Sheridan issued an order forbidding an employee's re-entry which resulted in the termination of her employment. The order was based on the commander's belief that the worker intended to distribute anti-war literature on the base.⁴⁰ A substantial supply of literature had been found in her car on post after she had, on the same day, distributed such material in the vicinity of another military installation. The officer reasoned that her continued presence would be prejudicial to good order and discipline and adversely affect the accomplishment of the commander's mission. The plaintiff sought an injunction to bar the commander from interfering with her employment on post. The rule of *Cafeteria Workers*, however, defeated the argument that her First Amendment right of free speech had been violated. A summary judgment for the government was affirmed by the Seventh Circuit Court of Appeals which relied on the commander's responsibility to protect his command against the threat of anti-military expressions which would interfere with his military mission.

38. *United States v. Akeson*, 290 F. Supp. 212 (D. Col. 1968). Similar regulations were also deemed not to be unconstitutionally vague or overly broad in *United States v. Sroka*, 307 F. Supp. 400 (E.D. Wis. 1969) (denying a motion to dismiss information charging unwarranted loitering and assembly in a federal building).

39. — F.2d — (7th Cir. 1970), 38 U.S.L.W. 2450 (7th Cir. Feb. 4, 1970).

40. Post regulations barred demonstrations and similar activities.

Occasionally ambiguities in regulations, or omissions therefrom may cause serious problems in the event of litigation. By way of illustration, a post commander issued the standard prohibition against picketing, demonstrations, sit-ins, protest marches, political speeches and similar activities.⁴¹ He then applied the "similar activities" portion to university students who distributed anti-war and free-speech pamphlets on post. The district court perceived no difficulty in including the questioned act under the regulation and upheld, without extended comment, a conviction under 18 U.S.C. § 1382.⁴² The circuit court reversed in *United States v. Bradley*⁴³ on the ground that the specified activities in the applicable regulation pertained to expressions overtly displayed and proclaimed—demonstrative activities, such as parading, singing and display of placards⁴⁴—and not to pure dissemination of information, unaccompanied by fanfare. The reversal was based upon a failure of the government to show that "disruption, confusion or inconvenience" accompanied the students' activities.⁴⁵

In *Dash v. Commanding General*,⁴⁶ the court considered a number of issues raised, not by civilians, but by ten soldiers, in a petition filed on behalf of all post enlisted personnel. The petitioners sought a ruling on their constitutional rights of free speech insofar as they were allegedly abridged by:

- a. A regulation of the post commander restricting on-post distribution of published materials;⁴⁷ and
- b. Refusal of the post commander to grant the plaintiffs' petition for an open meeting on base for free discussion of the Viet Nam war and other related matters.

41. See note 32, *supra*.

42. The conviction was for being present on a military post in violation of a lawful regulation.

43. 418 F.2d 688 (4th Cir. 1969).

44. The court did not undertake to distinguish between a quiet display of placards and an equally quiet distribution of leaflets. *Id.*

45. The court expressly declined to comment on the constitutionality of the post regulation, and also did not preclude conviction, in a proper case, where proof connected distribution with a "mass demonstration." *Id.* at 689. Prior to the decision, but subsequent to the incident involved, the post filled the void in its regulation by issuing the customary bar against distribution of publications. See note 33, *supra*.

46. 307 F. Supp. 849 (D. S.C. 1969).

47. The regulation incorporated the customary military prohibition against distribution of publications, including pamphlets, handbills and flyers (except through regularly established outlets) without prior approval.

Some threshold considerations are of interest. Although each plaintiff had been released by the Army or transferred to another base, the court denied the government's contention of mootness. The court's theory was that the issues were continuing, since they involved restraints on all personnel at the base. The court refused to permit its power to be destroyed by the military through release or transfer of personnel. The defendant also urged application of the exhaustion of remedies doctrine, but the court found that further administrative action by the plaintiffs would be ineffective under the circumstances. The court noted that the right of free speech is not absolute; the issue always involves a balance between competing private and public interests in the particular circumstances.⁴⁸ This is especially true in the military community,⁴⁹ where the need for discipline, with the attendant impairment of certain individual rights, is significant.⁵⁰ In reviewing military decisions, the courts must accommodate the demand of individual rights and the social order in a context which is far removed from those encountered in ordinary civilian litigation, and they must interpret a legal tradition which is radically different from that which is common in civil courts.⁵¹ Concerning the regulation controlling distribution of literature, the court stated that the constitutionality of the provision must be determined by the regulation as construed and defined in the Judge Advocate General's instructions controlling its application.⁵² In this case the court found no constitutional impediment in the regulation per se, but cautioned that whether a commander has properly exercised his power in a particular situation is an issue that must be resolved on a case by case basis. The court relied, in part, on recognition by the Supreme Court in *Cafeteria Workers* of the commander's authority to enforce good order and military discipline.

48. The court cited *Callison v. United States*, 413 F.2d 133 (9th Cir. 1969), in which that court indicated that an inductee was not free to incite and solicit others present at the induction station to join with him in an expression of opposition to the very process in which they were involved. *Cf. Meehan v. Macy*, 392 F.2d 822 (D.C. Cir. 1968), in which the court discussed limits of propriety for acceptable behavior of civilian employees of the government in an action challenging the validity of a discharge for printing and distributing an intemperate, contemptuous, and defamatory lampoon of a high government official.

49. *See Orloff v. Willoughby*, 345 U.S. 83, 94 (1953), and *In re Grimley*, 137 U.S. 147 (1890).

50. *See Raderman v. Kaine*, 411 F.2d 1102, 1104 (2d Cir. 1969), *cert. denied*, 396 U.S. 976 (1969), in which the court held that what constitutes neat and soldierly appearance for a reservist under Army regulations was for the military to decide.

51. *See Noyd v. Bond*, 395 U.S. 683, 694 (1969).

52. *See* note 35, *supra*.

The court dealt with the issue of public meetings on post in similar terms. Though the plaintiffs asserted that the purpose of the particular meeting desired was to peacefully discuss the justification for the Viet Nam engagement, the court believed that it was indisputable that such a meeting, held on post and directed particularly to servicemen being trained to participate in that war, would breed discontent and weaken loyalty. The court also distinguished the college campus from a military training base, pointing out that authority allegedly sustaining First Amendment rights of students is not applicable to the determination of the rights of servicemen on base.⁵³ Accordingly it granted the government's motion for summary judgment.⁵⁴

The government's motion to dismiss was summarily granted in two other recent cases. The first case⁵⁵ arose at Fort Knox when the plaintiff went on the post to distribute leaflets advertising an off-post "Teach-in, Speak-out" at which servicemen would be given a chance to express their views "about the Army, as it really is, and about Army racism." While distributing the leaflets, plaintiff was arrested by the Military Police, was finger-printed, photographed, held in custody for about two hours, and was then presented with a letter ordering him to leave the premises and not to re-enter without permission, under penalty of prosecution. Plaintiff complained that his treatment abridged his constitutional rights. He requested an injunction prohibiting enforcement of the order denying access to the post and interference with distribution of leaflets. The court sustained the government's motion to dismiss for lack of jurisdiction. A similar ruling was given in a case arising at Fort

53. As to the plaintiffs' assertion concerning college campus rights, the law is not altogether as claimed, *see, e.g., Norton v. East Tenn. State Discipline Committee*, 419 F.2d 195 (6th Cir. 1969), *cert. denied*, 399 U.S. 906 (1970), affirming a district court's denial of relief for alleged deprivation of constitutional rights, and upholding the claim of institutional administrators that they have inherent authority to discipline students whose actions (including distribution of inflammatory leaflets) threaten to disrupt school activities.

54. Although *Dash* may be thought to conflict with *Bradley*, the cases are easily distinguishable. The latter denied the commander's power to bar distribution of publications on post only because it was found that he sought to exercise power pursuant to a regulation generally dealing with disruptive demonstrative acts, which the court believed did not reach peaceful dissemination of leaflets. For a recent consideration of constitutional limitation on free expression by public employees in another context, *see Murphy v. Facendia*, 307 F. Supp. 353 (D. Colo. 1969) (denying relief to VISTA employees who used government facilities to discuss and draft an anti-war resolution which, in the view of the court, detracted time and effort from their primary work, "promoted dissension between volunteers and their superiors, and generally interfered with the regular operation of VISTA").

55. *Goldsmith v. Sutherland*, — F. Supp. — (W.D. Ky. 1969).

Dix.⁵⁶ In this instance, plaintiffs⁵⁷ complained that they were denied permission to hold a protest march and rally on post, in the vicinity of the stockade, and to distribute literature. Prominent among their claims was the contention that the post was open to the public, since several public highways ran through it. An application for an order to show cause and the issuance of a temporary restraining order was denied by the court and it dismissed the complaint for lack of jurisdiction.

A PERSPECTIVE

These cases represent the present status of the law and should be placed in proper perspective, although it is patent that subsequent events may affect the prevailing view. It is quite probable that *Bradley* would not have been heard by a court when the early Attorneys General were advising the Secretary of War that there was no doubt that the commander of a post might, at his discretion, order from it any person whose presence was, in his judgment, injurious to the interests of the military; indeed that a few words of instruction to the officers concerned would be sufficient to clear military areas of trespassers. By 1969, however, the Secretary of Defense was willing to impose limitations upon the discretionary authority of installation commanders to prohibit distribution of publications, through other than official outlets, and demonstrations. Only when such activities would result in clear danger to the loyalty, discipline, or morale of his troops, or materially interfere with the accomplishment of a military mission might the commander exercise his authority.⁵⁸

Bradley makes clear, at least in the view of the fourth circuit, that a commander may not repress distribution of publications by use of a local regulation designed to control disruptive behavior such as demonstrations and protest marches.⁵⁹ Under the rationale of *Dash*, however,

56. *The Committee to Free the Fort Dix 38 v. Collins*, — F. Supp. — (D. N.J. 1969), *appeal dismissed*, 429 F.2d 807 (3d Cir. 1970). In still another case originally involving commanders of Army, Navy, and Marine Corps units, the court considered whether the commanders were constitutionally authorized to bar certain ministers from military installations in Hawaii. The court declined to review what it considered to be highly important military administrative decisions, and dismissed the complaints. *Bridges v. Davis*, 311 F. Supp. 935 (D. Hawaii 1969).

57. The plaintiffs were civilians assertedly unhappy with the administration and treatment of 38 military prisoners at the stockade.

58. According to the Judge Advocate General of the Army, distribution of publications can also be barred if the activity violates specific federal statutes, or if the material circulated is pornographic. See JAGA 1969/3715 (April 2, 1969), 69-9 JALS 15.

59. The commander's authority to bar publications in accordance with regulations and application of appropriate standards has not been denied in any reported case.

a commander may legitimately forbid an open meeting or distribution of materials, when either may reasonably be expected to generate criticism of, and resistance to government policy, or otherwise impede the accomplishment of the post mission. A military reservation frequently constitutes an enclave, isolated from the surrounding civilian community, without major thoroughfares by which non-military traffic may pass. Such conditions permit a commander considerable latitude in restricting entry to the post. When, however, major traffic arteries traverse a reservation,⁶⁰ he may not bar traffic through his post. This limitation upon his authority exists for the purpose of accommodating bona fide travelers. Finally, with due regard for the established authority of a post commander over those within his military control, he represents but one echelon in the hierarchy of the national defense establishment. If the traditional exhaustion of remedies doctrine is significant in determining the maturity of a case for judicial review,⁶¹ it would seem to be particularly appropriate to require a complainant to follow the normal administrative avenues of redress when challenging the power of a post commander before burdening the judicial process.

Where are we with respect to the commander's authority to protect his post from dissident acts? Is his post a fort in the traditional sense, where military interests exclude any incompatible intrusion at the discretion of the commander? Or is it, as suggested by some advocates, no more than a government park, freely available for popular use as a meeting place, even for the purpose of airing righteous indignation or criticism of the government?⁶² With deference to distinguishing factors

60. See, e.g., *United States v. Watson*, 80 F. Supp. 649 (E.D. Va. 1948). The reservation road provided the only public access between an abutting town and the major highway. In any event, when government property is open to the public in general, reasonable, non-discriminatory regulation is appropriate to prevent interference with designated and intended governmental use. *United States v. Cassagnol*, 420 F.2d 868 (4th Cir. 1970) (arising out of antiwar demonstration at the Pentagon in Arlington County, Virginia); *Massachusetts Welfare Rights Organization v. Ott*, 421 F.2d 525 (1st Cir. 1969) (suit attacking constitutionality of a state regulation suspending welfare services affected by demonstrations and disturbances). Mr. Justice Black noted the distinction between governmental facilities and public streets in his dissenting opinion in *Brown v. Louisiana*, 383 U.S. 131, 157 (1966); see Note, *Regulation of Demonstrations*, 80 HARV. L. REV. 1773, 1776-77 (1967).

61. See Sherman, *Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement*, 55 VA. L. REV. 483, 539 (1969).

62. See *A Quaker Action Group v. Hickel*, 429 F.2d 185 (D.C. Cir. 1970), under which potential demonstrators were free to use National Park Services facilities in Washington, D.C. adjacent to the White House, subject to compliance with reasonable notice requirements; *Atlanta Viet Nam Moratorium Committee v. Maddox*, — F. Supp. — (N.D. Ga. 1969), in which the court ruled, by way of declaratory judgment, that the plaintiffs,

in the particular situation of any military installation, appropriate precedents, including contemporary judicial attitudes, indicate that neither extreme will govern. We are dealing with neither a military bastion nor an unsupervised public area. It is evident that it is still the post commander's prime responsibility to safeguard the security of the United States' personnel and property. Yet, he must undertake to balance that responsibility with rights of personal expression and freedom, consistent with good order and discipline and the national security. It is, most assuredly, a delicate balance which must be determined, not on arbitrary grounds, but upon reasonable standards consistent with his official mission.⁶³

as in the case of other citizens, had equal access to the use of the State Capitol grounds for peaceful assembly and non-violent expression of views. Note generally that parks are a particular kind of community area that, under the Anglo-American tradition, are available, at least to some extent and on a reasonable basis, for groups of citizens concerned with expression of ideas. *Women Strike for Peace v. Hickel*, 420 F.2d 597, 600 (D.C. Cir. 1969) (involving the right of a peace organization to construct an anti-war display in a national park). *Cf.*, *Koehl v. Resor*, 296 F. Supp. 558 (E.D. Va. 1969), *aff'd*, 417 F.2d 1338 (4th Cir. 1969), *cert. denied*, 90 S.Ct. 1262 (1970) (upholding the refusal by the Secretary of the Army under the Secretary's regulations to permit the American Nazi Party to use a national cemetery as a base for symbolic dissemination of its political philosophy by wearing Party uniforms and displaying Party banners and bags while conducting a member's funeral).

63. The role of the command staff judge advocate in the military decision process is significant. He must be prepared to furnish his commander with the necessary legal counsel to support determinations which may be challenged in the courts.