

Rights of Military Members
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“(The Supreme Court of the United States) has long recognized that the military is, by necessity, a specialized society separate from civilian society...(t)he rights of men in the armed forces must performe be conditioned to meet certain overriding demands of discipline and duty.”

Parker v. Levy, 1974

I. Introduction

A. Sources of Rights

1. The sources of rights for service members include:
 - a. U.S. Constitution
 - b. Uniform Code of Military Justice
 - c. Manual for Courts-Martial
 - d. Statutes
 - e. Regulations
 - f. Executive orders
2. Rights of service members may be abridged to a degree because of the unique nature of military service.

B. Categories of Rights

Rights of service members may be divided into three categories:

1. Equal Protection under the law;
2. Due Process of law;
3. Freedom of Expression

II. Equal Protection under the Law

A. Fundamental Right

1. Equal protection under the law regardless of race, religion, culture, national origin, gender or political affiliation, is a recognized fundamental human right for all people, including military personnel.
2. “Equal opportunity shall be afforded to all on the basis of individual effort, performance, conduct, diligence, potential, capabilities and talents without discrimination as to race, color, religion, creed, sex or national origin. Naval personnel shall demonstrate a strong personal commitment to stand on these principles and carry them out”

U.S. Navy Regulation

3. “The United States Army will provide equal opportunity and treatment for soldiers, civilian employees, and their families without regard to race, color, religion, gender, or national origin...”

U.S. Army Regulation

B. Benefits of Equal Protection

1. High morale
2. Confidence in the fairness of decisions
3. Selection of most capable personnel for promotion, additional training and leadership
4. Public respect and support for the military

III. Due Process of Law

- A. Due process describes the steps the government must go through before they take action concerning an individual citizen. Examples of due process precautions for servicemembers are:
 1. Advance notification of adverse government action so that the member may make a reply;
 2. Opportunity to inspect government documents and files, or interview witnesses;
 3. Opportunity for service members to have input into government decisions affecting them;
 4. Assistance from a legal professional.
- B. Within the U.S. legal system, the amount of due process protection to which a person is entitled depends upon how serious the harm posed to the person.
- C. In the U.S. Military Justice system, there are three basic level due process:
 1. Administrative
 2. Non-judicial
 3. Judicial or court-martial
- D. Administrative Due Process
 1. There are many decisions made by the military which require the application of administrative due process, including:
 - a. promotions
 - b. awards
 - c. granting of benefits
 2. As relating to military justice issues, administrative due process is applied to decisions regarding administrative separations or discharges.
 3. Most separations from the military are voluntary and require a very low level of due process.
 4. Involuntary separations require a higher degree of due process depending upon the reason and characterization of separation and seniority of the member.

5. The following due process rights are guaranteed an enlisted member with greater than six years of service if he is being separated for misconduct:
 - a. notification that includes a detailed description of the reason for the proposed separation, and makes a member aware of his rights prior to separation;
 - b. assistance from a military attorney or the right to hire a civilian attorney;
 - c. a hearing before three officers at which the member may present evidence and call witnesses;
 - d. the right to inspect government files and documents pertaining to the proposed discharge;
 - e. sufficient time to prepare for the hearing;
 - f. the right to appeal the decision to a civilian discharge review board after separation.

E. Non-Judicial Due Process

Under the Uniform Code of Military Justice (UCMJ), commanders have the authority to administer punishment for minor offenses. The punishments are limited based upon the seniority of the acting officer. The punishment shall not exceed sixty days restriction or forfeiture of half the service member's pay for two months.

1. Non-judicial punishment (NJP) does not require a formal court hearing with normal judicial due process protection;
2. Non-judicial due process does guarantee the rights of notice, appearance and response.
3. NJP applies to both officers and enlisted members;
4. The member has the right to refuse NJP and request a court-martial, unless the member is attached to a ship.
5. There is a right to appeal the decision to the next higher commander.

F. Courts-martial (or Judicial) Due Process

1. Charges must be attested to by someone familiar with the facts that support the charges;
2. Charges must be referred to a courts-martial panel by a commanding officer with designated authority;
3. Pre-trial investigation hearing must be conducted before a neutral magistrate where punishment is to exceed six months confinement;
4. The accused member must be formally notified of the charges;
5. The accused is entitled to free legal representation by an assigned military lawyer, he may request a particular military lawyer, or he may hire a civilian attorney;
6. Government must bring the case to trial within 120 days from the date of formal charges, or 90 days from the date the accused is placed in pre-trial confinement.

7. Pre-trial confinement must be justified by evidence that the member is a danger to himself or others or is likely to flee the jurisdiction.
8. Decision to impose pre-trial confinement is automatically reviewed by a neutral military magistrate.
 - a. all officers have the authority to place enlisted members in confinement prior to final disposition of an offense;
 - b. continuation of pretrial confinement requires a decision by a commander with court-martial authority;
 - c. commander's decision is then reviewed by a neutral and detached officer who then holds a hearing to determine whether pre-trial confinement should continue.

G. Searches

According to military rules of evidence, a police search for evidence must be based on probable cause and be properly authorized, otherwise it will be properly excluded at a later court-martial.

1. In military jurisdictions, commanders may authorize searches so long as they remain neutral and detached;
2. Search authorization is required only for areas considered private.
3. Military-specific exceptions to search authorization requirement:
 - a. inspections: military readiness requires frequent inspections of military personnel and equipment. If evidence of a crime is uncovered during a military inspection, it may be considered for use in prosecution;
 - b. entry and exit of military bases or ships outside the U.S.: as a consequence to the interest in protecting U.S. territory, courts have generally allowed searches of persons or vehicles entering or exiting a U.S. controlled, or shared, base.
 - c. Searches by foreign police: evidence obtained through searches conducted by foreign police can be used against U.S. military personnel, even though there was no probable cause or prior authorization by a U.S. official.

H. Statements of the Accused

Statements made by an accused involuntarily shall not be considered at trial.

IV. Freedom of Expression

Most societies with a republic as a form of government guarantee the right to free expression for their citizens. The right of free expression includes the right to express opinions orally, in writing, and at group meetings. Freedom of expression may differ, however, for military personnel.

A. Balancing Test

1. Support for right to freedom of expression
 - a. open discussions about important issues are healthy for any democracy. Free debate and free exchange of ideas bring about many good ideas that may be helpful for society.

- b. free expression ensures that the leaders of government become aware of the desires of the people, so that they may be responsive to the will of the people.
 - c. citizens will be more likely to obey the decisions of the government leaders if they believe the government is listening to them.
 2. The proper balancing of a service member's right to express himself and the need for operational readiness will depend largely upon the calm and prudent judgment of the responsible commander.
 3. In applying a balancing test, punishment after unlawful speech has taken place is preferred over prior restraint of expression.
- B. Freedom of Speech

Service members, like other citizens, have a right to express themselves. However, the right to engage in free speech does not provide an absolute immunity from subsequent punishment if the speech violates a criminal law. In the military, such criminal laws include:

 1. Disrespectful speech toward superiors;
 2. Use of words or gestures that might provoke a fight;
 3. Disclosure of classified information;
 4. Discussing official matters outside of the military without proper authorization.
- C. Freedom of the Press

Private possession of written material, other than classified matter, by Servicemembers does not generally have a negative effect on military discipline or effectiveness. The public display or distribution of written material should be prohibited, however, if the servicemember's interest in expression is outweighed by command interest in maintaining morale, good order, and discipline. Examples of prohibited material include hate literature and forms of pornography.
- D. Right to Peaceful Assembly
 1. Demonstrations.
 - a. a commanding officer may prohibit on-base demonstrations if a legitimate finding is made that such demonstrations may present a clear and present danger to good order, discipline, and morale;
 - b. the commanding officer may prohibit servicemembers from attending off-base demonstrations under circumstances that would provide for a material interference with the military mission;
 - c. servicemembers should not be in uniform while attending demonstrations or public group meetings because it will appear to civilians that the military is giving its official support to a particular group.
- E. Servicemembers' Unions
 1. Military forces must always be ready to perform their mission. The mission may be dangerous at times therefore U.S. servicemembers cannot join a military labor organization where their allegiance might be divided.

2. Servicemembers are not permitted to strike for higher wages. They could ask their leaders to negotiate for higher wages with the elected officials.

F. Grievances

1. Servicemembers are permitted to present complaints or grievances to their superiors through formal procedures that require responses from superiors.
2. Servicemembers are also given the right to communicate directly with elected civilian officials who represent the Servicemembers.

G. Political Activities

1. Servicemembers may vote for the political candidate of their choice;
2. However, the servicemember is prohibited from becoming a candidate for an elected office or participating directly in an election campaign for a particular candidate.

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