Hofstra Law Review

Volume 4 | Issue 3 Article 9

1976

Committee for GI Rights v. Callaway

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RECENT DEVELOPMENTS

COMMITTEE FOR GI RIGHTS v. CALLAWAY

CONSTITUTIONAL LAW—*Criminal Procedure—Fourth Amendment—Servicemen have no reasonable expectation of privacy in an Army barracks.* 518 F.2d 466 (D.C. Cir. 1975).

The problem of drug abuse in the military has recently been brought to public attention by the fact that an alarmingly large number of American soldiers became addicted to narcotics while serving in Vietnam.[1] In *Committee For GI Rights v. Callaway*,[2] the United States Court of Appeals for the District of Columbia Circuit held that mass searches of enlisted men pursuant to a drug abuse prevention program[3] adopted by the United States

1. An estimate made by the provost marshall's office in Saigon in 1971 indicated that "between 10 and 15 per cent of the American troops in Vietnam are on hard drugs . . . about 30,000 to 40,000 addicts in uniform." 117 CONG. REC. S8440 (daily ed. June 8, 1971) (remarks of Senator Hughes). Senator Harold Hughes of Iowa, discussing the threat to civilian society of drug abuse in the armed forces, stated:

> In America, where the cost of illegal heroin and other narcotics is high, the only way that most addicts can support their habit is by crime. In other words, as we release increasing thousands of addicted servicemen back into our society, we are inviting a horrifying addition to what is already the major source of crime in our cities.

Id.

2. 518 F.2d 466 (D.C. Cir. 1975), *rev'g* 370 F. Supp. 934 (D.D.C. 1974).

3. In recognition that "drug abuse is a profoundly serious national problem that is having a grave effect on the Armed Forces," (H.R. REP. No. 433, 92d Cong., 1st Sess. 28 (1971)), Congress included in its amendments to the Selective Service Act of 1967 (50 U.S.C. §§ 451 *et. seq.* (1971)), a provision directing the Secretary of Defense to "prescribe and implement procedures, utilizing all practical available methods, and provide necessary facilities to (1) identify, treat, and rehabilitate members of the Armed Forces who are drug or alcohol dependent persons . . . ." Act of Sept. 28, 1971, Pub. L. No. 92-129, § 501(a), 85 Stat. 361.

In response to this directive, the Army's European Command began to implement a drug abuse prevention campaign in late 1972. Initially, the details of the program were left to local commanders. See Brief for Appellees at 3, Committee For GI Rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1975) [hereinafter referred to as Brief for Appellees]. As a result of numerous departures from constitutionally permissible practices, including strip searches of whole companies of GIs (see Brief for Appellees at 5), plaintiffs-appellees, 18 enlisted men and the Committee For GI Rights, an "unofficial, unincorporated association of American Military personnel, formed . . . in order to protest the policies and practices which give rise to this lawsuit," (Committee For GI Rights v. Callaway, 518 F.2d 466, 468 n.4 (D.C. Cir. 1975)) brought this class action on behalf of approximately 145,000 soldiers between the ranks of E-1 (private) and E-5 (Specialist Fifth Class) stationed in Europe. They sought declaratory and injunctive relief from various aspects of the program claimed to be unconstitutional. Committee For GI Rights v. Callaway, 370 F. Supp. 934, 937 (D.D.C. 1974).

Army in Europe (USAREUR) did not violate the fourth amendment[4] although they were conducted without warrants and in the absence of probable cause.[5]

The drug abuse control program, as described in USAREUR Circular 600-85 [hereinafter referred to as the Circular], consists of three fairly distinct phases: identification, evaluation, and rehabilitation. Only "identified"[6] drug or alcohol abusers are sub-

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In an order denying the plaintiffs' motion for a preliminary injunction, the district judge "strongly suggested to the Army that the promulgation of a USAREUR-wide directive would clarify the facts and issues in the case." Brief for Appellees at 7. In response, the Secretary of the Army promulgated USAREUR Circular 600-85 (Sept. 10, 1973) which described in detail the procedures to be followed under the program and which discontinued some of the practices of which the plaintiffs-appellees had complained. Committee For GI Rights v. Callaway, 370 F. Supp. 934, 937 (D.D.C. 1974).

4. U.S. CONST. amend. IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

5. Committee For GI Rights v. Callaway, 518 F.2d 466, 477 (D.C. Cir. 1975). The court ruled on several additional matters. Noting that the plaintiffs "have been and continue to be subjected to drug inspections which may serve to identify them for purposes of mandatory drug processing and even criminal prosecutions," *id.* at 471-72, the court concluded that they satisfied the standing requirements of Baker v. Carr, 369 U.S. 186 (1962), and Flast v. Cohen, 392 U.S. 83 (1968). The court further determined that exhaustion of military remedies would "merely delay a decision by the federal courts [footnote omitted]" and was, therefore, not essential. Committee For GI Rights v. Callaway, 518 F.2d 466, 474 (D.C. Cir. 1975); *see* text accompanying notes 54-56 *infra*. It was also concluded that the jurisdictional amount required under 28 U.S.C. § 1331(a) (1971) was satisfied although the plaintiffs were seeking injunctive rather than monetary relief. Committee For GI Rights v. Callaway, 518 F.2d 466, 472-73 (D.C. Cir. 1975); *see* Gomez v. Wilson, 477 F.2d 411, 420 n.51 (D.C. Cir. 1973).

Plaintiffs also claimed that the imposition of nonmedical administrative sanctions without a prior hearing violated their rights under the due process clause of the fifth amendment. Concluding that the "individual GI cannot be said to suffer any 'grievous loss' which 'outweighs the governmental interest in summary adjudication,'" (Committee For GI Rights v. Callaway, 418 F.2d 466, 479 (D.C. Cir. 1975), *quoting* Goldberg v. Kelly, 397 U.S. 254, 263 (1970)), the *Callaway* court rejected the plaintiffs' argument and reversed the decision below. This conclusion reflects the court's complete deference to the Army's claim of necessity. *See* text accompanying notes 26-64 *infra*.

6. The identification process recognizes four categories of drug abusers. Cir. 600-85, para. 7a states that a person may be classified as a "suspected" drug or alcohol abuser if there is credible information that he was under the influence of drugs or used alcohol excessively, or if at least two of the following indices apply: (1) he was in the company of individuals he knew to be using illegal drugs; (2) he has displayed "unexplained changes in job performance, behavior, or physical condition related to the use of . . . drugs"; (3) he frequents "known drug sales points" on a regular basis. Committee For GI Rights v. Callaway, 518 F.2d 466, 468 n.6 (D.C. Cir. 1975).

Cir. 600-85, para. 8a classifies as an "identified" drug or alcohol abuser any person whose activities furnish clear and convincing evidence of any of the following:

ject to the program. Identification is premised on either informants' reports or the discovery of actual possession of drugs.[7] The searches[8] at issue in *Callaway* were designed to assist the identification process. The Circular authorizes inspection of a soldier's belongings, his clothing, and his person including groin and anus.[9]

Upon identification as a possible drug user, the soldier enters the second phase of the program—evaluation—which is accomplished by mandatory drug processing.[10] Initially, he is confronted by his commanding officer who informs him of the basis of the identification, advises him of his rights, and provides him with the opportunity to present evidence that he is not a drug abuser. The case is then referred to a Community Drug and Alcohol Assistance Center (CDAAC) which evaluates the evidence. If the evidence is found to be adequate, the soldier is sent to a Medical Treatment Facility (MTF) for clinical testing. Counsel is provided at this stage if requested.[11]

Upon certification as a confirmed drug abuser, the GI enters the rehabilitation stage of the program; he may be admitted to a hospital or returned to the CDAAC for a 60-day rehabilitation program. Under this program the soldier may be required to submit to periodic medical testing, counseling, and treatment. After medical confirmation, the Commanding Officer may impose a

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(1) self-admitted current abuse; (2) illegal possession of controlled substances as defined in Army Regulation 600-50, or substances or drug paraphenalia prohibited by USAREUR Regulation 632-10; (3) illegal or improper use of drugs other than alcohol; (4) drunk driving; (5) public drunkenness; (6) disorderly conduct with alcohol or other drug involvement; and (7) drunk on duty.

Committee For GI Rights v. Callaway, *supra* at 469 n.7.

Cir. 600-85, para. 10a indicates that a person may be "medically confirmed" as a drug or alcohol abuser as a result of referral by the Community Drug and Alcohol Assistance Center, medical examination or treatment of drug-related diseases or injuries, or by other medical evidence (*e.g.*, needle marks). Committee For GI Rights v. Callaway, *supra* at 469 n.8.

7. Cir. 600-85, para. 8a, *quoted in* Committee For GI Rights v. Callaway, 370 F. Supp. 934, 938 (D.D.C. 1974).

8. The searches are authorized by annex I, para. 3a of the Circular. Committee For GI Rights v. Callaway, 518 F.2d 466, 474-75 (D.C. Cir. 1975).

9. Committee For GI Rights v. Callaway, 370 F. Supp. 934, 938 (D.D.C. 1974).

10. Committee For GI Rights v. Callaway, 518 F.2d 466, 469 (D.C. Cir. 1975). Individuals identified as "medically confirmed" drug abusers are immediately placed in a rehabilitation program which eliminates the "evaluation" phase. *Id.* at 469 n.9.

11. *Id.* The court noted that, subject to a few exceptions, no disciplinary or rehabilitative measures are sanctioned prior to MTF certification. *Id.* at 469 n.11.

variety of nonmedical administrative sanctions.[12]

Following the 60-day rehabilitation period, the Commanding Officer and the CDAAC decide whether the objectives of the program have been realized. If the program is deemed successful, the soldier is permitted to return to normal duties subject to a 300-day follow-up program of testing and observation. If it is determined that the goals of the rehabilitation program were not achieved, however, the soldier is processed for an administrative discharge which may be under less than honorable conditions. Evidence developed during a soldier's participation in the program is admissible at a court-martial.[13] Furthermore, the Circular sanctions distribution of such information to other governmental agencies[14] and to prospective civilian employers.[15]

On cross-motions for summary judgment, the district court, in a memorandum opinion dated January 14, 1974,[16] and an order entered February 8, 1974, granted the plaintiffs-appellees partial relief by issuing a mandatory injunction requiring cancellation of the Circular and prior related orders and instructions.[17] The court found that the Circular authorizes inspections without warrants and in the absence of probable cause. It held that such searches

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12. *Id.* at 469. The court stated that the sanctions are rehabilitative rather than punitive. *Id.*

13. Cir. 600-85, annex I provides that the discharge will be either an honorable or a general discharge provided that evidence of drug abuse falls within the general exemption policy outlined in Cir. 600-85, annex I:

> [A] soldier who requests rehabilitation help, is mandatorily referred, or otherwise obtains help for a drug problem is exempt from disciplinary action under the UCMJ [Uniform Code of Military Justice] and from discharge under less than honorable conditions for prior use or incidental possession of drugs for his personal use occurring before he asked for or otherwise received help . . . .

Committee For GI Rights v. Callaway, 518 F.2d 466, 470 n.13 (D.C. Cir. 1975). Paragraph 2(c) of annex I further provides:

> The exemption policy also applies to soldiers identified as drug abusers by involuntary urinalysis and clinical evaluation by a physician. Evidence obtained directly or indirectly as a result of urinalysis administered for the purpose of identifying drug users, evidence attributable to the volunteering for treatment, or any admission made by the service member after mandatory referral may not be used, in whole or in part, to support a disciplinary action under the UCMJ or an undesirable discharge.

Committee For GI Rights v. Callaway, *supra* at 470 n.13. The exemption policy does not apply to use or possession of drugs which were previously known to military officials or to sale of drugs or other offenses which may be motivated by drug abuse. *Id.*

14. Committee For GI Rights v. Callaway, 518 F.2d 466, 470 (D.C. Cir. 1975).

15. Committee For GI Rights v. Callaway, 370 F. Supp. 934, 938 (D.D.C. 1974).

16. The opinion of the district court is reported at 370 F. Supp. 934, (D.D.C. 1974).

17. *Id.* at 941.

are not justified by military necessity[18] and that the use of information obtained in the course of such inspections for the purpose of imposing punitive sanctions[19] violates the plaintiffs' fourth amendment rights.[20]

In reversing the decision below, the court of appeals noted that cases[21] decided subsequent to entry of the district court's judgment established the principle that distinctions between the military and civilian environments warrant the application of different constitutional standards.[22] The court stated:[23]

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18. *Id.* at 940. For a complete discussion of the issue of military necessity see Imwinkelried & Zillman, *Constitutional Rights and Military Necessity: Reflections on the Society Apart*, 51 NOTRE DAME LAW. 396, 419-21 (1976). Judge Gerhard Gesell, in rejecting the Army's claim of military necessity, observed:

> [The Army] urges that the USAREUR drug abuse program is required to prevent serious impairment of morale and discipline and that, accordingly, under the well-established doctrine . . . [that] the constitutional rights of soldiers affected by the program must be judicially determined to be inapplicable under these circumstances. The Army has the burden of establishing military necessity, however, and it has failed to do so.
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> . . . One does not automatically forfeit the protections of the Constitution when he enters military service. The constitutional rights of a G.I., including his privacy, may not be infringed except to the extent that the military can demonstrate by concrete proof an urgent necessity to act unconstitutionally in order to preserve a significant aspect of discipline or morale.

Id.

19. *Id. See also* note 13 *supra* and accompanying text.

20. Committee For GI Rights v. Callaway, 370 F. Supp. 934, 941 (D.D.C. 1974). The court noted:

> The difficulty with the circular . . . is that it attempts to deal with the drug abuse problem not only as a health problem, as Congress intended, but also as a disciplinary problem.

Id. Recognizing the rehabilitative value of the inspections, the court allowed the searches to continue provided that evidence obtained thereby was not used to support punitive sanctions against participants in the program. *Id.* at 941-42. The court of appeals criticized this resolution of the case and noted that it "presents both practical and legal problems. If the inspections are legal, any evidence of crime obtained therefrom may be used in subsequent criminal action. [Citations omitted.]" Committee For GI Rights v. Callaway, 518 F.2d 466, 475 (D.D. Cir. 1975). Although the distinction made by the district court is tenuous, it does produce a result consistent with congressional intent. The legislative history of the enabling statute (Act of Sept. 28, 1971, Pub. L. No. 92-129, § 501(a), 85 Stat. 361) reveals that punitive measures were excluded in order "to provide an atmosphere in which a drug abusing soldier can feel free to come forth and get medical and psychological help to overcome his drug use." 117 CONG. REC. S8441 (daily ed. June 8, 1971) (remarks of Senator Hughes). To the extent that the Circular sanctions imposition of administrative and disciplinary sanctions, it undermines this purpose.

21. The court cited, *inter alia*, Schlesinger v. Councilman, 420 U.S. 738 (1975); Secretary of the Navy v. Avrech, 418 U.S. 676 (1974); Parker v. Levy, 417 U.S. 733 (1974); Carlson v. Schlesinger, 511 F.2d 1327 (D.C. Cir. 1975). Committee For GI Rights v. Callaway, 518 F.2d 466, 474 (D.C. Cir. 1975).

22. Committee For GI Rights v. Callaway, 518 F.2d 466, 474 (D.C. Cir. 1975).

23. *Id., quoting* Parker v. Levy, 417 U.S. 733, 758 (1974).

> "[T]he different character of the military community and of the military mission . . . may render permissible within the military that which would be constitutionally impermissible outside of it." [Citation omitted.] We rely on that standard in . . . holding Circular 600-85 constitutional.

The court indicated that the cumulative impact of several factors required the conclusion that the procedures authorized by the Circular were reasonable in the military context.[24] It referred to evidence that increased levels of drug abuse have had a detrimental effect on military preparedness and efficiency and noted that a soldier living on a military installation could not reasonably entertain the same expectation of privacy as his civilian counterpart. Reference was also made to the fact that the program was primarily rehabilitative and only secondarily punitive. The court emphasized that unannounced inspections are the most effective method of identifying drug users and that military authorities have attempted to safeguard the personal dignity and privacy of those individuals subjected to inspections whenever possible.[25]

In *Parker v. Levy*,[26] the Supreme Court held that articles 133 and 134 of the Uniform Code of Military Justice[27] were not unconstitutionally vague.[28] The majority recognized the historic differences between military and civilian life,[29] but did not indicate to what extent these differences justify the application of different constitutional standards.[30] The *Callaway* court relied heavily upon *Parker* to support its conclusion that the searches authorized by the Circular are not unconstitutional.

The district court in *Callaway* characterized an inspection under the Circular as[31]

> a mass search [which] would be illegal in a civilian context if conducted in the absence of particularized probable cause.

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24. Committee For GI Rights v. Callaway, 518 F.2d 466, 476-77 (D.C. Cir. 1975).

25. The *Callaway* court noted that Cir. 600-85, annex I, para. 3c requires that those conducting the search must "[t]reat each individual and his possessions with dignity and avoid undue harassment." Committee For GI Rights v. Callaway, 518 F.2d 466, 475 n.21 (D.C. Cir. 1975).

26. 417 U.S. 733 (1974).

27. 10 U.S.C. §§ 933-34 (1975).

28. Parker v. Levy, 417 U.S. 733, 752-57 (1974).

29. *Id.* at 743.

30. *Id.* at 758. The opinion acknowledged generalized needs for obedience and discipline but did not discuss particular circumstances under which a different standard would be appropriately applied. *Id.*

31. Committee For GI Rights v. Callaway, 370 F. Supp. 934, 939 (D.D.C. 1974).

> [Citation omitted.] Moreover, the subsequent use for disciplinary purposes of facts developed during such a search or during participation in a rehabilitative program ordered by reason of an illegal search would be equally improper.

Certainly, the extent to which the court of appeals in *Callaway* went in stressing its reliance on this "other standard"[32] supports the view that in the absence of such a standard the case would have been decided differently.

The principle that differences between military and civilian life permit distinctions in the adjudication of constitutional issues will not justify diminution of a soldier's rights in every case. Rather, as several decisions in the District of Columbia Circuit[33] recognize:[34]

> "To strike the proper balance between legitimate military needs and individual liberties [courts] must inquire whether 'conditions peculiar to military life' dictate affording different treatment to activity arising in a military context."

Kauffman v. Secretary of the Air Force[35] is illustrative. The *Kauffman* court held that the scope of collateral review of military judgments by civilian courts encompasses constitutional considerations. The court rejected the contention that restrictions on the review of military judgments were justified by the unique character of military life.[36] Limitations on review were found to be without rational relation to the military circumstances which may warrant qualification of constitutional requirements.[37] Thus, the rule that different constitutional standards apply to situations involving the military is qualified to the extent that further

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32. *See* Committee For GI Rights v. Callaway, 518 F.2d 466, 474 (D.C. Cir. 1975).

33. *See* Carlson v. Schlesinger, 511 F.2d 1327 (D.C. Cir. 1975); Kaufman v. Secretary of the Air Force, 415 F.2d 991 (D.C. Cir.), *cert. denied*, 396 U.S. 1013 (1970).

34. Carlson v. Schlesinger, 511 F.2d 1327, 1331 (D.C. Cir. 1975), *quoting* Kauffman v. Secretary of the Air Force, 415 F.2d 991, 997 (D.C. Cir.), *cert. denied*, 396 U.S. 1013 (1970).

35. 415 F.2d 991 (D.C. Cir.), *cert. denied*, 396 U.S. 1013 (1970).

36. *Id.* at 997.

37. *Id.*; *see* Carlson v. Schlesinger, 511 F.2d 1327, 1333 (D.C. Cir. 1975) where the court stated:

> Because judges are ill-equipped to second guess command decisions made under the difficult circumstances of maintaining morale and discipline . . . we should not upset such determinations unless the military's infringement upon first amendment rights is *manifestly unrelated to legitimate military interests.*

Id. (emphasis added). *See also* Anderson v. Laird, 466 F.2d 283, 295 (D.C. Cir. 1972); Stolte v. Laird, 353 F. Supp. 1392, 1402-03 (D.D.C. 1972).

inquiry must be made to determine whether the alleged military necessity is sufficiently compelling to warrant restriction of personal freedoms[38] and whether the proposed restriction is rationally related to the military concern at issue.[39]

Citing *Schlesinger v. Councilman*,[40] the *Callaway* court declared that "[t]he increased incidence of drug abuse in the Armed Forces poses a substantial threat to the readiness and efficiency of our military forces." [Footnote omitted.][41] A careful examination of the statistics submitted by the Army,[42] however, indicates that the 3,100 members of the USAREUR identified by military law enforcement agencies as drug abusers in 1970[43] represent only 1.55 percent of the approximately 200,000 personnel comprising the European Command. Of 1,374 randomly selected personnel surveyed in 1973, only 2 percent admitted to the daily use of drugs other than marijuana; only 10 percent admitted to

38. In a recent decision, Middendorf v. Henry, 44 U.S.L.W. 4401 (U.S. March 24, 1976), the Supreme Court has apparently added a further requirement. The Court held that neither the sixth amendment nor the due process clause of the fifth amendment requires that servicemen be represented by counsel in summary court-martial proceedings under Article 15 of the Uniform Code of Military Justice, 10 U.S.C. § 815 (1975). In deciding the due process issue, the Court relied upon the conclusions of two judges of the United States Court of Military Appeals in United States v. Alderman, 22 U.S.C.M.A. 298, 46 C.M.R. 298 (1973) (see notes 54-64 *infra* and accompanying text), and determined that the denial of counsel is predicated upon a legitimate claim of military necessity. Middendorf v. Henry, 44 U.S.L.W. 4401, 4407 (U.S. March 24, 1976). This determination did not, however, mark the end of the Court's inquiry; the Court found it necessary to consider "whether the factors militating in favor of counsel at summary courts-martial are so extraordinarily weighty as to overcome the balance struck by Congress [footnote omitted]." *Id.* Noting that the "presence of counsel will turn a brief, informal hearing . . . into an attenuated proceeding . . . ." *Id.*, the Court concluded that the inconvenience and expense which would be engendered are not justified in light of the "relative insignificance of the offenses being tried." *Id.* It is at least arguable that the interests compromised by the regulations at issue in *Callaway* are of such magnitude that the test set out by the *Middendorf* Court requires subordination of the military interest. *See* notes 71-73 *infra* and accompanying text.

39. Kauffman v. Secretary of the Air Force, 415 F.2d 991, 997 (D.C. Cir. 1970).

40. 420 U.S. 738 (1975) (holding that a soldier claiming that military tribunal did not have jurisdiction to try charges pertaining to sale of drugs must exhaust military remedies).

41. Committee For GI Rights v. Callaway, 518 F.2d 466, 476 (D.C. Cir. 1975). The *Callaway* court neglected to indicate that the Supreme Court in *Councilman* did not purport to make a finding of fact on the issue of the extent of drug abuse in the military; the *Councilman* Court's observations were made solely to support the conclusion that "the expertise of the military courts is singularly relevant, and their judgments indispensable to inform any eventual review . . . ." Schlesinger v. Councilman, 420 U.S. 738, 760 (1975); *see* text accompanying notes 54-56 *supra*.

42. *See* Brief for Appellants at 4-7.

43. *Id.* at 4.

the regular use of marijuana.[44] Similarly, mass urinalysis testing conducted on a monthly basis during 1972 and 1973 revealed that only 4 to 6 percent of those tested used amphetamines, barbituates, or opiates.[45]

The district court[46] found the statistics inadequate to justify the measures under consideration and observed:[47]

> It is certainly clear that drug use in the Command has not reached anything comparable to the epidemic proportions detected in Viet-nam and is not particularly different from drug use encountered among civilians in major United States cities. [Citation omitted.]

This conclusion is supported by the *Staff of Senate Subcommittee on Alcohol and Narcotics, Report on Drug Abuse in the Military*[48] which drew the following conclusion from its exhaustive investigations into the problem:[49]

> We did not find that the use of drugs has a significant direct impact upon the military mission of the Armed Services. . . . [W]e saw no evidence that any mission or operation had been jeopardized by drug use. Virtually every commander to whom the Subcommittee staff put the question stated unequivocally

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44. *Id.* at 5.

45. *Id.*

46. Committee For GI Rights v. Callaway, 370 F. Supp. 934, 940 (D.D.C. 1974).

47. *Id.* Thus, the district court found that the first requirement of the general rule—a showing of legitimate military necessity—was not satisfied. Judge Gesell explained:

> Surveys of drug abuse since 1970 reveal a fairly stable level of daily drug use: ten to fifteen per cent for cannabis and one to two and one-half per cent for other drugs. There are no reliable statistics with respect to addiction, and the Army's claim of increasing drug use is subject to serious question because of changes in testing procedures.

Id. See also STAFF OF SENATE SUBCOMM. ON ALCOHOLISM AND NARCOTICS, 92d Cong., 1st Sess., REPORT ON DRUG ABUSE IN THE MILITARY, 117 CONG. REC. S8441, S8442 (daily ed. June 8, 1971) [hereinafter referred to as SUBCOMMITTEE STAFF REPORT]. This report would appear to lend support to Judge Gesell's finding that the military's claim of necessity is unsupported by reliable evidence:

> There is a paucity of hard data on which to base an authoritative finding of the extent of drug use in the military. The few studies which exist have been made exclusively among Army populations and are severely limited both in numbers and in scope.

Id.

48. 92d Cong., 1st Sess., 117 CONG. REC. S8441 (daily ed. June 8, 1971).

49. *Id.* at S8445. The Defense Department Comments on Report of the Subcommittee noted: "It is not considered a fair assumption that drug abuse among military personnel is more prevalent than among the civilian population." 117 CONG. REC. S8450-51 (daily ed. June 9, 1971).

and categorically that drug use has not adversely affected military effectiveness or the military mission of his unit.

While these facts might warrant enforcement of the most stringent drug control program in a combat zone, they nevertheless fail to support the result reached in *Callaway*. The suit challenged the validity of searches of soldiers stationed in Europe. Units assigned to the European Command are required only to maintain combat-readiness—a duty discharged primarily by preparedness for routine administrative inspections.[50] In light of the actual military setting, the limitations on individual freedoms which result from the implementation of the drug control program do not appear to bear a rational relation to "the military circumstances which may qualify constitutional requirements."[51]

An analysis of the drug abuse situation in West Germany reveals a further deficiency in the approach taken by the Circular. The Subcommittee found that the most widespread form of drug abuse was the smoking of hashish, while heroin and cocaine use appeared to be virtually nonexistent.[52] It does not seem reasona-

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50. SUBCOMMITTEE STAFF REPORT, *supra* note 47, at S8443-44. Specifically, the Subcommittee found the following:

> A jeep driver in Germany, for example, told us that his only consistent job during the three months in advance of a unit-wide vehicle inspection was to "maintain" his own vehicle. A platoon leader said the only time the morale of his troops seemed to lift was when they were preparing to go on a tough training exercise, which was infrequently. There was widespread griping about the many "make work" jobs that troops were being given to do.

Id.

51. Kauffman v. Secretary of the Air Force, 415 F.2d 991, 997 (D.C. Cir. 1970).

52. In describing the drug abuse problem in the European Command, the Subcommittee Staff noted:

> In Germany, there is a plentiful supply of hashish, amphetamines, and barbituates, and U.S. troops and their dependents have easy and inexpensive access to them. Hashish is by far the drug of choice, and is in widespread use . . . . "Uppers" and "Downers"—amphetamine preparations, Librium, Valium and Darvon—may be purchased inexpensively over the counter, without prescription, in any German drug store.
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> . . . We had very little indication of heroin or cocaine use. Both the law enforcement personnel and the medical personnel had had very little contact with these drugs.

SUBCOMMITTEE STAFF REPORT, *supra* note 47, at S8443.

53. Brief for Appellants at 5 n.4.

Similarly, in light of the Subcommittee's finding that there is little evidence of heroin or cocaine abuse, it must be concluded that the preponderance of drug use within the four to six percent group of "other drug" users would involve amphetamines and barbituates which "may be purchased inexpensively over the counter, without prescription, in any German drug store." SUBCOMMITTEE STAFF REPORT, *supra* note 47, at S8443. Thus, perhaps the most rational approach the Army might pursue in attempting to control the drug

ble to establish a program which consists largely of urinalysis and other clinical testing procedures which, as the Army admitted, "do not detect use of cannabis products (hashish or marijuana) . . . ."[53]

Rejecting the Army's claim that the complaint should have been dismissed for failure to exhaust available administrative remedies,[54] the *Callaway* court noted that "[t]he issues involved are purely legal, requiring no exercise of military discretion or expertise."[55] This reasoning is questionable since the resolution of a claim of military necessity must be sensitive to "conditions peculiar to military life."[56] The result is significant in light of the fact that military courts have been less willing than the *Callaway* court to defer to the argument.

In *United States v. Ruiz*,[57] the United States Court of Military Appeals considered issues raised by the implementation of a drug rehabilitation program in Vietnam. This program was strikingly similar to that considered in *Callaway*; both were theoretically directed toward treatment rather than punishment,[58] but each provided for administrative discharges under less than honorable conditions.[59] In reversing the conviction of a soldier who refused to submit to a mandatory urinalysis, the *Ruiz* court, per Chief Judge Duncan, observed:[60]

> We recognize again the generally beneficent purpose behind the Army's drug rehabilitation program. Even had the Govern-

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abuse problem would be to attempt to enlist the support of local authorities in an effort to shut off the supply. Instead, the primary law enforcement emphasis has been on infiltrating the "drug culture" through extensive use of undercover agents in order to arrest large groups of users. *Id.* at S8446.

The irrationality of the USAREUR drug program's emphasis on barracks searches is further highlighted by the Subcommittee's observation that the use of drugs and alcohol "is more likely to occur on off-duty hours . . . . It is also likely to occur away from the military post." *Id.* at S8443.

54. *See* note 5 *supra*.

55. 518 F.2d 466, 474 (D.C. Cir. 1975).

56. Carlson v. Schlesinger, 511 F.2d 1327, 1331 (D.C. Cir. 1975), *quoting* Kauffman v. Secretary of the Air Force, 415 F.2d 991, 997 (D.C. Cir. 1970). In Middendorf v. Henry, 44 U.S.L.W. 4401 (U.S. Mar. 24, 1976) (discussed in note 38 *supra*), the Supreme Court observed: "Dealing with areas of law peculiar to the military branches, the Court of Military Appeals' judgments are normally entitled to great deference." *Id.* at 4407. *See* Schlesinger v. Councilman, 420 U.S. 738 (1975); note 41 *supra*. *See also* text accompanying notes 33-39 *supra*.

57. 23 U.S.C.M.A. 181, 48 C.M.R. 797 (1974).

58. *Id.* at 182, 48 C.M.R. at 798.

59. *Id.* at 183, 48 C.M.R. at 799.

60. *Id.* at 182, 48 C.M.R. at 798.

> ment relied on military necessity as justification for the program, it cannot be operated inconsistent [*sic*] with the [privilege against self-incrimination embodied in Article 31(a) of the Uniform Code of Military Justice[61]].

Ruiz represents a recognition by the highest military tribunal of the superiority of individual rights over claims of military necessity.[62] It is significant that a claim of military necessity would have been far more convincing in *Ruiz* than in *Callaway* since *Ruiz* involved a combat situation in Vietnam[63] where heroin addiction was a serious problem.[64]

The *Callaway* court explained that although searches and administrative inspections may not ordinarily be conducted without a warrant or the consent of the person being examined, the absence of these safeguards does not render them unreasonable per se. Reference was made to *Camara v. Municipal Court*[65] where the Supreme Court noted:[66]

> In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.

Relying on *Camara*, the *Callaway* court concluded that the administrative burden of obtaining warrants on a mass basis would discourage military officials from conducting drug inspections. It was also suggested that a warrant requirement might diminish the effectiveness of the searches by affording advance warning to the intended subjects.

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61. 10 U.S.C. § 831(a) (1975). This section provides:

> No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

62. The *Callaway* court distinguished *Ruiz* on the ground that it "was concerned only with the accused's Fifth Amendment right against self-incrimination." Committee For GI Rights v. Callaway, 518 F.2d 466, 475-76 n.22 (D.C. Cir. 1975). This distinction is questionable in light of the Supreme Court's observation that "[t]he values protected by the Fourth Amendment . . . substantially overlap those the Fifth Amendment helps to protect." Schmerber v. California, 384 U.S. 757, 767 (1966) (dictum).

63. United States v. Ruiz, 23 U.S.C.M.A. 181, 48 C.M.R. 797 (1974). Compare with text accompanying note 50 *supra*.

64. *See* note 1 *supra*.

65. 387 U.S. 523 (1967).

66. *Id.* at 533.

In *Camara*, the Supreme Court considered two issues—whether municipal building inspections may be conducted without a warrant, and whether warrants issued in the absence of specific allegations of violations would be constitutionally sufficient.[67] The Court held that warrantless inspections violated the fourth amendment.[68] In passing on the validity of administrative area inspections in general, the Court found that the historical acceptance of such inspections by courts and the public, the considerable public interest in preventing dangerous conditions from arising, and the essentially nonpersonal and noncriminal character of such inspections militated convincingly in favor of a finding of reasonableness.[69] Since a valid public interest justified the relatively limited invasion of privacy which municipal inspections involved, the Court concluded that there was probable cause to issue a warrant without specific knowledge that a code violation existed in a particular building.[70]

A comparison of the inspections considered in *Camara* with those conducted under the Circular reveals that the two are easily distinguishable.[71] There has been no prior judicial acceptance of the type of mass searches conducted by the Army. On the contrary, the Supreme Court has consistently held that searches unaccompanied by warrants are permissible only in narrowly circumscribed situations.[72] The Court has specifically noted that warrantless searches involving intrusions into the human body may never be justified absent an emergency which threatens the destruction of evidence:[73]

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67. *Id.* at 534.

68. *Id.* at 528-34.

69. *Id.* at 537.

70. *Id.* at 538-39.

71. The district court found that the "health and welfare" inspections conducted by the Army's European Command were not even analogous to traditional military preparedness inspections. Committee For GI Rights v. Callaway, 370 F. Supp. 934, 939 (D.D.C. 1974). The court of appeals did not attempt to contest the validity of this finding. *See* Committee For GI Rights v. Callaway, 518 F.2d 466, 475 (D.C. Cir. 1975). For examples of traditional military inspections see United States v. Kazmierczak, 16 U.S.C.M.A. 594, 37 C.M.R. 214, 221 (1967); United States v. Lange, 15 U.S.C.M.A. 486, 35 C.M.R. 458 (1965) (administrative "shakedown" of a soldier's personal effects to determine readiness not "unreasonable search and seizure").

72. Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (consent of suspect); Chimel v. California, 395 U.S. 752 (1969) (searches incident to lawful arrest); Harris v. United States, 390 U.S. 234 (1968) (plain view); Warden v. Hayden, 387 U.S. 294 (1967) (hot pursuit); Schmerber v. California, 384 U.S. 757 (1966) (exigent circumstances).

73. Schmerber v. California, 384 U.S. 757, 770 (1966) (dictum).

> The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.

While neither the search in *Camara* nor that in *Callaway* can be said to have been primarily aimed at the discovery of criminal evidence, punitive actions could have been taken in connection with both.[74] It is clear, however, that the penalties for municipal code violations do not begin to approach the severity of those which may be imposed by a military court-martial.

Perhaps the most serious difficulty raised by the *Callaway* court's reliance on *Camara* concerns the issue of probable cause. *Camara* stands for the proposition that where a particular type of inspection is demanded by the public interest, the necessity for a warrant depends partially on whether the purpose behind the search would be defeated by the burden of obtaining a warrant.[75] Implicit in the concept that such a search is justified by the public interest is the notion that probable cause to issue the warrant exists by virtue of that interest.[76] Thus, before the question of balancing the interest for searching against the burden of obtaining a warrant is reached, the threshold requirement of probable cause must be satisfied. Considering both the Senate Subcommittee's findings that the most serious drug problem in

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74. In reference to the municipal inspections, the *Camara* court stated:
> Like most regulatory laws, fire, health, and housing codes are enforced by criminal processes. In some cities, discovery of a violation by the inspector leads to a criminal complaint [footnote omitted]. Even in cities where discovery of a violation produces only an administrative compliance order [footnote omitted], refusal to comply is a criminal offense, and the fact of compliance is verified by a second inspection, again without a warrant [footnote omitted]. Finally, as this case demonstrates, refusal to permit an inspection is itself a crime, punishable by fine or even by jail sentence.

Camara v. Municipal Court, 387 U.S. 523, 531 (1967). For a discussion of the punitive aspects of the USAREUR drug control program see note 13 *supra* and accompanying text.

75. Camara v. Municipal Court, 387 U.S. 523, 533 (1967).

76. *Id.* at 538-39. The *Camara* Court stated:
> The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest. But reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant. [Citation omitted.]

Id. at 539.

West Germany involved the smoking of cannabis[77] and a marked shift in public attitudes toward such activities,[78] a conclusion that the probable cause requirement is supplied by the public interest in preventing such activity, as in *Camara*, is clearly untenable. One must, therefore, question the validity of the *Callaway* court's conclusion that the probable cause requirements set forth in *Camara* were satisfied.

The *Callaway* court stated that a soldier's restricted "expectation of privacy" in the military was one of five factors to be considered in assessing the reasonableness of the Army's drug inspections.[79] The court apparently concluded that a soldier's expectation of privacy is substantial enough to trigger the application of the fourth amendment, but not substantial enough to merit the protection usually afforded by the amendment.

Before the issue of fourth amendment reasonableness is reached, inquiry must be made to determine whether the subject of the search has exhibited a subjective expectation of privacy which society has deemed to be reasonable.[80] If the circumstances

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77. *See* text accompanying note 52 *supra*.

78. The changing public attitude toward the smoking of cannabis is evidenced by the fact that an increasing number of state legislatures are enacting statutes decriminalizing the possession of marijuana for personal use. *See generally*, Soler, *Of Cannabis and the Courts; A Critical Examination of Constitutional Challenges to Statutory Marijuana Prohibitions*, 6 CONN. L. REV. 601 (1974). As of October 1, 1973, 30 states had enacted statutory provisions for conditional discharge for first offense possession of marijuana. *Id.* at 616-20. Since 1973, six states have passed liberalized statutes under which the possessor of small amounts of marijuana is no longer subject to arrest, prison sentence, or a permanent criminal record. National Organization for the Reform of Marijuana Laws, A Compilation of State Citation Laws for Minor Marijuana Offenses 1 (Aug. 15, 1975).

Three of the six states, Alaska, Maine, and Oregon, have eliminated criminal penalties entirely, substituting citation-enforced civil fines. *See* S. 350 (approved May 15, 1975, effective Sept. 1, 1975), *amending* ALASKA STAT. § 17.10.010 *et. seq.* (1972) (Reform of Marijuana Laws, *supra* at 3) ($100 fine for possession of any amount in private or up to one ounce in public); ME. REV. STAT. ANN. tit. 17-A, ch. 45 *et. seq.* (1975) ($200 fine for possession of up to one and one-half ounces); ORE. REV. STAT. § 167.207(3) (1974) ($100 for possession of up to one ounce).

In California, Colorado, and Ohio, possession of specified small amounts of marijuana is treated as a minor criminal offense, punishable by a fine with no permanent criminal record attaching to the possessor. *See* CAL. HEALTH & SAFETY CODE § 11357 *et. seq.* (West 1975); *and* CAL. PENAL CODE § 853.6 (West Supp. 1975) ($100 fine for possession of up to one ounce, misdemeanor, no permanent criminal record); H. 1027 (effective July 1, 1975), *amending* COLO. REV. STAT. § 12-22-401 *et. seq.* (1974) (Reform of Marijuana Laws, *supra* at 4) ($100 fine for possession of up to one ounce, class 2 petty offense, no criminal record); H. 300, OHIO REV. CODE ANN. § 3719.01 *et. seq.* (1971) (reform of Marijuana Laws, *supra* at 6) ($100 fine for possession of up to 100 grams or approximately 3½ ounces, minor misdemeanor, no criminal record).

79. Committee For GI Rights v. Callaway, 518 F.2d 466, 477 (D.C. Cir. 1975).

80. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

surrounding a search belie the view that the subject intended or expected to preserve the privacy of his acts (as in "plain view" cases[81]), or if societal values preclude honoring an expectation actually held (as in cases involving prison searches),[82] the absence of the traditional indices of reasonableness—probable cause and the issuance of a warrant—is of no constitutional significance.[83]

The *Callaway* court's novel expectation of privacy analysis provided an excuse to avoid the more probing evaluation envisioned by the Supreme Court when it first announced the test in *Katz v. United States*.[84] In his concurring opinion in *Katz*, Justice Harlan explained:[85]

> [T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one society is prepared to recognize as "reasonable."

Since *Callaway* was a suit for declaratory and injunctive relief, it must be assumed that the court concluded that the second prong of the test was not satisfied. In this respect, it is significant that the act which authorized implementation of the Circular[86] also established a ceiling on the number of persons who could be drafted into the armed services.[87] This limitation envisioned the establishment of an all-volunteer army.[88] In a message to Congress, former President Nixon discussed the purposes underlying the changes in the draft laws:[89]

> [W]ith an end to the draft we will demonstrate to the world the responsiveness of our system of government—and we will also demonstrate our continuing commitment to the principle of en-

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81. *See, e.g.*, Harris v. United States, 390 U.S. 234 (1968).

82. *See, e.g.*, United States v. Hitchcock, 467 F.2d 1107 (9th Cir. 1972), *cert. denied*, 410 U.S. 916 (1973).

83. *See* United States v. Dionisio, 410 U.S. 1 (1973) (holding *inter alia* that exemplars sought by a grand jury are not protected by the fourth amendment because the subject had no expectation of privacy). In discussing Katz v. United States, 389 U.S. 347 (1967), the *Dionisio* Court noted that "the Fourth Amendment provides *no* protection for what 'a person knowingly exposes to the public, even in his own home or office . . . .'" United States v. Dionisio, 410 U.S. 1, 14 (1973) (emphasis added), *quoting* Katz v. United States, 389 U.S. 347, 351 (1967).

84. 389 U.S. 347 (1967).

85. *Id.* at 361.

86. Act of Sept. 28, 1971, Pub. L. No. 92-129, § 501(a), 85 Stat. 361.

87. *Id.* at § 101(9)(e), 85 Stat. 349.

88. *Id.* at § 101(29)(h), 85 Stat. 352.

89. 2 U.S. Code Cong. & Ad. News 1470, 1473 (1971).

suring for the individual the greatest possible measure of freedom.

Although it might be argued that expectations of privacy ought to be limited in a military setting, any consideration of the issue should be sensitive to changing conditions in the military. The analysis of the *Callaway* court is notably deficient in this respect.

The *Callaway* court suggested two additional bases for its findings of reasonableness. It stated that unannounced drug inspections are the most effective way of identifying drug abusers[90] and that the Army has attempted to protect the privacy of soldiers who are subjected to inspection "insofar as practical."[91] In *Camara v. Municipal Court*,[92] the Supreme Court rejected precisely the same arguments when advanced in support of the legality of a warrantless municipal code enforcement inspection. The Court indicated that to dispense with the warrant requirement on the strength of supposed protections contained in the enforcement scheme placed the individual at the mercy of the municipal authorities. The Court also observed that "broad statutory safeguards are no substitute for individualized review . . . ."[93] Significantly, the warrantless inspection which the Court found to be unreasonable in *Camara* was far less hostile and intrusive than those involved in *Callaway*.

The *Callaway* decision marks an unprecedented approval of wholesale infringements upon individual liberties traditionally protected by the fourth amendment. The court's conclusion rests solely on the fact that the searches occurred in a military context. The *Callaway* court failed to recognize that those decisions which speak of a "different constitutional standard" do not advocate a blanket policy which absolutely shields military authorities from constitutional scrutiny under any and all circumstances. Rather, as a careful reading of the cases indicates, a showing of legitimate military necessity must be made where limitations upon fundamental rights are involved. Similarly, it must be demonstrated that the deprivation of rights necessarily attendant upon a program such as that implemented by the Army bears a reasonable relationship to the military circumstances as they do, in fact, exist.

90. Committee For GI Rights v. Callaway, 518 F.2d 466, 477 (D.C. Cir. 1975).
91. *Id.*
92. 387 U.S. 523 (1967).
93. *Id.* at 533.

In order to safeguard fundamental personal freedoms, American courts have traditionally stood between the individual citizen and the exercise of governmental authority. When public discourse becomes enclosed within a circle of self-validating concepts like "military necessity," however, the fairness of methods used to attain specific objectives becomes immaterial; offical action is legitimized by the overriding social goal. Addressing itself to this point in *United States v. Robel*,[94] the Supreme Court stated:[95]

> [T]his concept of "national defense" cannot be deemed an end in itself, justifying any exercise of . . . power designed to promote such a goal. Implicit in the term "national defense" is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution. . . . It would indeed be ironic if, in the name of national defense, we would sanction the subversion of . . . those liberties . . . which makes the defense of the nation worthwhile.

In *Callaway*, the District of Columbia Circuit has taken a disquieting step backward from the fulfillment of the historic function of the judiciary.

Mark M. Horowitz

94. 389 U.S. 258 (1967) (dicta).
95. *Id.* at 264.