Reviewability and Constitutionality of Military Pregnancy Discharge (Crawford v. Cushman)

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CONSTITUTIONAL LAW

REVIEWABILITY AND CONSTITUTIONALITY OF MILITARY PREGNANCY DISCHARGE

Crawford v. Cushman

Civilian courts traditionally have refused to review military administrative determinations. Originally, this reluctance to review was merely one specific instance of the immunity from judicial review then enjoyed by executive action. Upon the demise of the general proscription against reviewing executive actions, a more restricted nonreviewability doctrine, limited to military determinations, emerged. Based both on the idea that military law constitutes a separate system of jurisprudence and on an apprehension that

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2 Nonreviewability of executive actions was established at an early date. See, e.g., Decatur v. Paulding, 39 U.S. (14 Pet.) 497 (1840); Keim v. United States, 177 U.S. 290 (1900). Since military administrative determinations were considered executive actions, they were beyond the reach of judicial review. E.g., Sherman, supra note 1, at 490.

3 American School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902), has been viewed as the first inroad into the proscription against reviewing executive acts. See Lee, The Origins of Judicial Control of Federal Executive Actions, 36 Geo. L.J. 287 (1948). The McAnnulty Court reviewed the Postmaster General's interpretation of a statute concerning use of the mail for fraudulent purposes. The Court tried to minimize its departure from precedent by stressing that the relevant question involved the statutory powers of a government official. While conceding that judicial review of the Postmaster General's determination of fact was precluded under the nonreviewability doctrine, the Court emphasized that it is within the unique province of the judiciary to determine if the acts of an official are justified by law. Nonetheless, McAnnulty is an abrupt departure from the Court's earlier refusal to review executive action in Decatur v. Paulding, 39 U.S. (14 Pet.) 497 (1840). In that case, the Supreme Court refused to review the Secretary of the Navy's interpretation of a federal statute, notwithstanding the appellant's contention that the Secretary's actions exceeded his authority.

4 The concept that military law is a distinct system of jurisprudence was recognized in England at the time of the Norman Conquest. The Army and Judicial Review, supra note 1, at 414. See generally Barker, Military Law—A Separate System of Jurisprudence, 38 U. Cin. L. Rev. 223 (1967). This idea initially was applied by the Supreme Court to court-martial decisions in Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857). In Dynes, military courts were held not to be courts under article III of the Constitution, but rather executive agencies created pursuant to articles I and II. Therefore, although habeas corpus provides an avenue for collateral review of court-martial decisions, see, e.g., Burns v. Wilson, 346 U.S. 137 (1953); Ex parte Reed, 100 U.S. 13 (1879), they are not subject to appellate review by the federal
judicial "interference" with internal military affairs could have an adverse effect on the nation's security, this nonreviewability doctrine served as an almost absolute bar to judicial review.

In recent years, the federal courts, while still recognizing the importance of noninterference with military affairs, have manifested an unwillingness to apply a rule absolutely precluding review. The considerations underlying the nonreviewability doctrine, however, will often influence a court's disposition of the merits of a case. Utilizing a method of analysis designed to avoid undue defer-


This separate-system-of-jurisprudence rationale was extended to military administrative actions in Reaves v. Ainsworth, 219 U.S. 296 (1911). Reaves was a military officer who had been ordered discharged on the basis of an examination board's recommendation. Suing for reinstatement, he claimed, inter alia, that he had been denied due process. In rejecting this argument, the Court stated:

[What is due process of law must be determined by circumstances. To those in the military or naval service of the United States the military law is due process. The decision, therefore, of a military tribunal acting within the scope of its lawful powers cannot be reviewed or set aside by the courts.

Id. at 304 (citations omitted).]

A more recent application of the nonreviewability doctrine was made in Orloff v. Willoughby, 346 U.S. 83 (1953). Orloff, a physician who was inducted into the Army because of his profession and was then denied both a commission and the opportunity to practice medicine in the Army, sought discharge by writ of habeas corpus. The Court refused to review the propriety of Orloff's specific assignment to duty, and, while it did review the Army's interpretation of a relevant statute, denied relief on the merits.


Burns v. Wilson, 346 U.S. 137 (1953), represents an important step in the direction of a more flexible nonreviewability doctrine. See, e.g., The Army and Judicial Review, supra note 1, at 429-30. The Burns Court, by authorizing the federal courts to inquire into whether a court-martial tribunal had dealt "fully and fairly" with the allegations contained in the habeas corpus petition, 346 U.S. at 142, expanded the scope of civilian court review of court-martial convictions. A significant aspect of Burns is the Court's apparent repudiation of the separate-system-of-jurisprudence concept: "[T]he constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers—as well as civilians . . . ." Id. Shortly after Burns, in Harmon v. Bruckner, 355 U.S. 579 (1958) (per curiam), the Supreme Court allowed review of a military administrative decision. The Harmon Court permitted judicial review of a claim that the Secretary of the Army had exceeded his statutory authority in discharging the plaintiff from the Army under conditions other than "honorable." Significantly, the Court asserted that "judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers." Id. at 581-82. See generally Sherman, supra note 1; Note, Judicial Review and Military Discipline—Cortright v. Resor: The Case of the Boys in the Band, 72 Colum. L. Rev. 1048, 1058-59 (1972); Note, Dissenting Servicemen and the First Amendment, 58 Geo. L.J. 534, 549-554 (1970).

It is submitted that although review is no longer completely precluded, the doctrine of nonreviewability often leads to a substantial bias on the merits in favor of the military. This
ence towards the military, the Second Circuit, in *Crawford v. Cushman*,\(^8\) not only reviewed a fifth amendment due process and equal protection challenge\(^9\) to a Marine Corps regulation that mandated discharge of pregnant members of the Corps,\(^10\) but also concluded that the regulation was unconstitutional on both grounds.

Stephanie Crawford, a member of the United States Marine Corps, learned in May 1970 that she was pregnant. At the time, Crawford was assigned to an office in an administrative capacity. When the Marine Corps discovered that she was pregnant, she was discharged "for the convenience of the government."\(^11\) Since the Marine regulation then in force provided that a woman member must be discharged upon certification that she was pregnant,\(^12\) neither Crawford's personal nor medical condition or history was evaluated with respect to her capacity to continue to serve.\(^13\) Seeking a declaratory judgment and reinstatement, as well as back pay and allowances, Crawford brought suit in federal district court. She contended that the Marine regulation which required her discharge

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\(^9\) Although there is no equal protection clause in the fifth amendment, it has been construed to prohibit discrimination by the federal government that is "so unjustifiable as to be violative of due process." *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *accord*, *Schlesinger v. Ballard*, 419 U.S. 498, 500 (1975). Equal protection claims arising under the fifth amendment are judged by the same general criteria as those arising under the equal protection clause of the fourteenth amendment. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 637 n.2 (1975); *Johnson v. Robison*, 415 U.S. 361, 364 n.4 (1974).

\(^10\) Marine Corps Order P1900.16 ¶ 6012 provided in pertinent part:

\(\text{(c) Women members. Commanders shall discharge for the convenience of the Government, or, in the case of overseas commands, will transfer to the continental limits of the United States for discharge:}\)

\(\text{(3) A woman member, whether married or unmarried, upon certification by a medical officer that she is pregnant, shall be discharged by her commander, for the convenience of the Government, or in the case of overseas commands, will be transferred to the continental United States for discharge. The character of the discharge certificate issued in these cases will be as warranted by the woman member's service record, regardless of her marital status.}\)


The Marine Corps recently abandoned the mandatory discharge policy, and now permits pregnant women who are otherwise qualified to remain on active duty. *See MCO 500.12 (1975), quoted in Crawford v. Cushman*, 531 F.2d 1114, 1117 n.1 (2d Cir. 1976).


\(^12\) *See note 10 supra.*

\(^13\) 531 F.2d at 1116.
violated the constitutional guarantees of due process and equal protection. Recognizing the Corps' need to insure the readiness and mobility of its personnel, the district court upheld the regulation as being rationally related to these objectives. 14

A divided Second Circuit panel reversed. 15 Judge Oakes, writing for the majority, 16 reasoned that the question of reviewability should be treated as a separate threshold issue. Noting that federal courts have reviewed military determinations, including discharges, when constitutional issues or various other significant questions were presented, 17 Judge Oakes concluded that the constitutional challenges in Crawford should be reviewed on their merits. 18 In support of this conclusion, the majority noted that the Supreme Court has recently undertaken extensive review of military matters on at least two separate occasions. 19

Turning to the merits, the Second Circuit first examined the mandatory discharge provision of the Marine Corps regulation on equal protection grounds. Viewing the regulation as categorizing military personnel on the basis of sex, Judge Oakes observed that sex has not yet been declared a suspect classification. Rather than applying the traditional rational basis standard, 20 however, the

14 378 F. Supp. at 725-26. The district court reasoned that pregnancy results in a reduced level of physical capacity which adversely affects the readiness and mobility of the Corps. Id. Additionally, the court found that the needs of a pregnant woman and of a woman with a dependent child could not be reconciled with the structured life of the military. Id. at 725. For these two reasons, it was concluded that the regulation was rationally based. Id. at 726.

15 531 F.2d at 1116.

16 The majority consisted of Judges Oakes and Feinberg. Judge Moore authored a dissenting opinion.

17 Id. at 1120.

18 Id. at 1120-21.

19 Id. at 1120. The two recent cases in which the Supreme Court has reviewed military affairs are Schlesinger v. Ballard, 419 U.S. 498 (1975), and Parker v. Levy, 417 U.S. 733 (1974). In Schlesinger, the Court reviewed a challenge to a statute which required that a male Navy officer be discharged if he failed twice within nine years to be promoted to the grade of lieutenant commander. Lieutenant Ballard argued that the statute amounted to a denial of equal protection because women were exempt from its operation. 419 U.S. at 499-500. After an extensive review on the merits, the Court upheld the statute on the ground that men and women officers are not similarly situated. Id. at 508. Levy, on the other hand, concerned, inter alia, a void for vagueness challenge to various sections of the Uniform Code of Military Justice. Following a review on the merits, the Court upheld article 133, 10 U.S.C. § 933 (1970) (conduct unbecoming an officer), and article 134, id. § 934 (neglect to the prejudice of good military order and discipline), since previous constructions had limited the scope of the sections and identified the conduct proscribed. 417 U.S. at 754.

20 The traditional lower tier of equal protection is applied when the legislative classification does not infringe on a fundamental right and cannot be said to be suspect. See Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065 (1969). For examples of fundamental rights, see, e.g., Dunn v. Blumstein, 405 U.S. 330 (1972) (right to vote); Shapiro v.
court utilized a more vigorous lower tier standard apparently applicable in sex discrimination cases.\textsuperscript{21} Under this test, a classification must bear a substantial relationship to its purpose in order to withstand challenge.\textsuperscript{22} Endeavoring to identify the exact equal protection issue before the court, the majority stressed that the question was not whether it is rational to mandate the discharge of women who were temporarily disabled due to pregnancy, while exempting from similar treatment nondisabled persons; rather, in the court's opinion, the relevant issue was whether it is rational to mandate discharge of pregnant women while not requiring discharge of other temporarily disabled persons.\textsuperscript{23} Finding that the principal justification for the mandatory discharge regulation was the Corps' need to maintain readiness and mobility, Judge Oakes reasoned that the distinction drawn between personnel temporarily disabled due to pregnancy and personnel temporarily disabled from other causes was not rationally related to that objective: "Why the Marine Corps should choose, by means of the mandatory discharge of pregnant Marines, to insure its goals of mobility and readiness, but

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  \item[\textsuperscript{21}] Although classifications based on sex have not been declared suspect by a majority of the Court, the standard utilized when such classifications are challenged is more stringent than the traditional rational basis test. Craig v. Boren, 97 S. Ct. 451 (1976). Rather than merely requiring that sex classifications be rational, the Court has required that they have a "fair and substantial" relationship to the legislative purpose. \textit{Id.; accord,} Stanton v. Stanton, 421 U.S. 7, 13-15 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636, 651-53 (1975); Reed v. Reed, 404 U.S. 71, 76 (1971). \textit{See also Gunther, The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1 (1972) [hereinafter cited as Gunther].}
  
  In discussing the equal protection issue, the \textit{Crawford} court looked to its earlier decision in Green v. Waterford Bd. of Educ., 473 F.2d 629 (2d Cir. 1973), for guidance. \textit{Green} involved a civil rights action brought under 42 U.S.C. § 1983 (1970) by a teacher who had been forced to take pregnancy leave. In reversing the district court's grant of summary judgment in favor of the defendant, the Second Circuit reasoned that to require a physically capable woman to take a payless leave was discriminatory treatment not justified by a legitimate state interest. 473 F.2d at 636. Of particular note in \textit{Green} is the fact that the Second Circuit expressly applied the more vigorous equal protection standard in a case that was viewed as involving sex-based discrimination. \textit{Id. at} 633-34.
  
  \textsuperscript{22} \textit{See note 21 supra.}
  
  \textsuperscript{23} 531 F.2d at 1122.
\end{itemize}
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not to do so regarding other disabilities equally destructive of its goals is subject to no rational explanation."

In addition to invalidating the regulation on equal protection grounds, the Crawford majority held the regulation violative of the due process clause. The court reasoned that the Marine regulation imposed an irrebuttable presumption that debility results from pregnancy, a presumption not necessarily true in fact. Accordingly, the Second Circuit found the regulation to be overly restrictive of the constitutionally protected right to choose whether to procreate. In order to avoid the obstruction of this freedom, Judge Oakes concluded, due process requires that before a woman is discharged an individual determination be made as to whether her pregnancy will interfere with the Corps' need for readiness and mobility.

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24 Id. at 1123. Another justification advanced by the Marine Corps was the administrative convenience in knowing where Corps members are at a given time and their ability to respond in an emergency. This was also rejected by the Crawford court on the ground that Marines suffering from other disabilities equally destructive of this goal were not subject to mandatory discharge. Id.

25 Id. at 1124-25.

26 Judge Oakes stated that the regulation “penalizes the decision to bear a child by those Marines whose mobility and readiness would not be reduced, either during most months preceding birth or during their careers after birth.” Id.

27 See id. Having found the regulation to be violative of both equal protection and due process, the court issued instructions to guide the district court's determination of the relief to be afforded on remand. In fashioning these instructions, Judge Oakes noted that even if Crawford had obtained an injunction prohibiting the Marines from discharging her under the regulation, the Marines would only have been required to make an individual determination of Crawford's capacity to continue to serve. It was impossible, the judge continued, to determine at such a late date whether the Marines would have been justified in discharging Crawford after an individual determination had been made. Hence, the court held that Crawford was not entitled to reinstatement. Instead, Judge Oakes instructed the district court to award Crawford the pay and benefits which she had lost, calculated according to “ordinary principles of damage law.” Id. at 1127.

Judge Moore, in his dissent, argued that the relief authorized by the majority was “nothing less than the monetary equivalent of appellant's reinstatement” and that “no court has ever gone so far . . . .” Id. at 1129 (Moore, J., dissenting). The dissent is quite erroneous, however, in asserting that “no court has ever gone so far.” The Court of Claims has frequently held that an enlisted service member who has been wrongfully discharged is entitled to pay and benefits for the unexpired term of enlistment, minus any money earned during that time as a civilian. See, e.g., Conn v. United States, 376 F.2d 878 (Ct. Cl. 1967); Middleton v. United States, 175 Ct. Cl. 786, 796 (1966); Clackum v. United States, 161 Ct. Cl. 34 (1963); Murray v. United States, 154 Ct. Cl. 185 (1961). The formula used by the Court of Claims is apparently what the Crawford court intended when it instructed the district court to calculate damages according to “ordinary principles of damage law.” The propriety of the Second Circuit's use of this formula is further demonstrated by the fact that the Supreme Court has approved the award of backpay to compensate former service members for wrongful discharge. See United States v. Brown, 206 U.S. 240 (1907); United States v. Perkins, 116 U.S. 483 (1886).
Judge Moore dissented, objecting strenuously to the majority’s consideration of the case on the merits. Relying on *Orloff v. Willoughby*, a case in which the Supreme Court refused to review the propriety of an inducted physician’s duty assignment, the dissent argued that the nonreviewability doctrine dictated that the case not be entertained on its merits. The dissent further posited that the constitutional principles of due process and equal protection do not necessarily apply to members of the military.

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28 345 U.S. 83 (1953).
29 Id. at 1127-28 (Moore, J., dissenting).
30 Id. at 1128. The dissent also argued that the plaintiff had failed to exhaust her administrative remedies. According to Judge Moore, there exist two administrative tribunals to which the plaintiff could have appealed. The first of these bodies, the Navy Discharge Review Board (the Board), referred to as the “Marines Discharge Review Board” by the dissent, was established pursuant to 10 U.S.C. § 1553 (1970) to review the discharges of former members of the Navy and Marines. *See* 32 C.F.R. §§ 724.10 - .110 (1976). The dissent declared that the Board was “empowered to recommend . . . eliminat[ing] the discharge and restor[ing] the party to his or her prior duty and rank.” 531 F.2d at 1130. This Board, however, apparently had power only to review discharges “to determine whether, under reasonable standards of naval law and discipline . . . the type and nature of the discharge or dismissal should be changed, corrected, or modified . . . .” 22 Fed. Reg. 3436 (1957) (current version at 32 C.F.R. §§ 724.31-.32 (1976)) (emphasis added). While the Board did have the power to recommend that a former member be permitted to reenlist, it does not seem that it had the authority to recommend reinstatement; in fact, the Board was and is specifically denied the power to revoke a discharge or reinstate a former service member. *See* 22 Fed. Reg. 3436 (1957) (current version at 32 C.F.R. § 724.33 (1976)). Nor is the Board empowered to compensate a former member for wrongful discharge by awarding back pay. Lunding, *Judicial Review of Military Administrative Discharges*, 83 Yale L.J. 33, 41 (1973). Clearly, the Board could not have afforded Crawford the remedies she sought, i.e., reinstatement, a declaration that her discharge was unconstitutional, and back pay and allowances. Thus, it was unnecessary for Crawford to bring her case before the Board, since only those administrative remedies which could lead to adequate relief need be pursued prior to seeking judicial review. *See*, e.g., 3 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 20.04, at 74-76 (1958); L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 426 (1965); Lunding, *Judicial Review of Military Administrative Discharges*, 83 Yale L.J. 33, 71 (1973); Sherman, *supra* note 1, at 498.

The second tribunal discussed by the dissent, the Board for Correction of Naval Records (BCNR), was established pursuant to 10 U.S.C. § 1552 (1970), and is authorized to correct errors or injustices in the records of Naval or Marine Corps personnel. *See* 32 C.F.R. §§ 723.1 -.11 (1976). Notwithstanding the seemingly broad nature of the BCNR’s powers, resolution of the constitutional question presented in *Crawford* is apparently beyond the competency of that administrative tribunal, and resort to it prior to seeking judicial review is thus unnecessary. *Cf.* Weinberger v. Salfi, 422 U.S. 749, 764-66 (1975) (question of the constitutionality of a statute beyond the competency of the Secretary of Health, Education, and Welfare); 3 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 20.04, at 74 (1958); Sherman, *supra* note 1, at 524 & nn.196 & 197. Moreover, a recent line of cases indicates that failure to appeal to the various Boards for Correction of Military Records (BCMR), of which the BCNR is one, does not preclude judicial review. Underlying these cases is the notion that resort to a BCMR prior to seeking judicial review would not promote the purposes behind the exhaustion doctrine. *See* United States *ex rel.* Brooks v. Clifford, 412 F.2d 1137 (4th Cir. 1969) (denial of petition for rehearing); Cole v. Laird, 468 F.2d 829, 831 (5th Cir. 1972); Patterson v. Stancliff, 330 F.
Clearly, as was emphasized by Judge Moore, a major obstacle to the granting of review has been the traditional doctrine of nonreviewability. Orloff contained broad language which has been interpreted by some authorities as a reaffirmation of the absolute non-reviewability doctrine. More recently, however, Orloff has been viewed as barring review only of questions concerning particular assignments to duty and other such day-to-day military activities.

Supp. 110 (D. Vt. 1971). Thus, although the Crawford majority did not discuss the question, it is submitted that the plaintiff's failure to utilize these administrative remedies was not a bar to review on the merits.

The language used by the Orloff Court is, in part:

But judges are not given the task of running the Army. . . . The military constitutes a specialized community governed by a separate discipline from that of the civilian. 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.

345 U.S. at 93-94. This language is certainly susceptible to a broad reading, and courts have so construed it. See, e.g., Arneither v. Chafee, 435 F.2d 691, 692 (9th Cir. 1970); Marshall v. Wyman, 132 F. Supp. 169, 173 (N.D. Cal. 1955); Sherman, Legal Inadequacies and Doctrinal Restraints in Controlling the Military, 49 IND. L.J. 539, 574 (1974); Sherman, supra note 1, at 527; Comment, Army Drug Treatment Programs and the Doctrine of Military Necessity: Committee for G.I. Rights v. Callaway and United States v. Ruiz, 10 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 215, 236 n.108 (1975); Note, Pregnancy Discharges in the Military: The Air Force Experience, 86 HARV. L. REV. 568, 577 (1973) [hereinafter cited as Pregnancy Discharges]. In Chavez v. Fergusson, 266 F. Supp. 879 (N.D. Cal. 1967), for example, the court relied on the Orloff language and accordingly found that it lacked jurisdiction to determine whether the plaintiff should be granted an in-service conscientious objector discharge. Id. at 880-81.

Although some courts have read Orloff broadly, see note 31 supra, others have read it narrowly, characterizing its sweeping language as mere dictum. See, e.g., McDonald v. McLucas, 371 F. Supp. 831, 835 (S.D.N.Y. 1974). Under this narrow reading of Orloff, which appears to be gaining wide acceptance, the courts apply the nonreviewability doctrine only to matters uniquely military in nature, such as standards of discipline or the propriety of particular duty assignments. See, e.g., Denton v. Secretary of Air Force, 483 F.2d 21 (9th Cir. 1973), cert. denied, 414 U.S. 1146 (1974) (reviewed discharge proceedings); Hagopian v. Knowlton, 470 F.2d 201, 204 (2d Cir. 1972) (reviewed cadet's dismissal from West Point); Anderson v. Laird, 466 F.2d 283, 294-95 (D.C. Cir.), cert. denied, 409 U.S. 1076 (1972) (reviewed compulsory chapel attendance policies at military academies); Mindes v. Seaman, 453 F.2d 197, 199 (5th Cir. 1971) (reviewed separation from active duty); Sherman, Legal Inadequacies and Doctrinal Restraints in Controlling the Military, 49 INDIANAPOLIS L.J. 539, 575-80 (1974); Sherman, supra note 1, at 493; The Army and Judicial Review, supra note 1, at 425-29; Comment, Army Drug Treatment Programs and the Doctrine of Military Necessity: Committee for G.I. Rights v. Callaway and United States v. Ruiz, 10 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 215, 236 n.108 (1975); Pregnancy Discharges, supra note 31, at 577.

See, e.g., Campbell v. Beaugher, 519 F.2d 1307 (9th Cir. 1975), cert. denied, 96 S. Ct. 855 (1976) (Marine hair length regulation reviewed); Committee for G.I. Rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1975) (constitutional challenge to local commander's authorization of warrantless searches reviewed); Allgood v. Kenan, 470 F.2d 1071 (9th Cir. 1972) (courts will review military affairs to insure that constitutional rights are protected); Antonuk v. United States, 445 F.2d 592 (6th Cir. 1971) (reviewed allegation that military failed to follow
The fact that many federal courts, including the Second Circuit and the Supreme Court, have reviewed military determinations subsequent to Orloff bolsters this narrow construction. In addition, the Crawford court’s position is supported by the now generally accepted principle that federal courts should review alleged encroachments upon the constitutional rights of military personnel.

Its own regulations); Schatten v. United States, 419 F.2d 187 (6th Cir. 1969) (reviewed allegation that military failed to follow its own regulations); Ashe v. McNamara, 355 F.2d 277 (1st Cir. 1965) (reviewed Board for Correction of Military Record’s refusal to change a dishonorable discharge to a discharge under honorable conditions); Murray v. United States, 154 Ct. Cl. 185 (1961) (propriety of military discharge reviewed). See generally Peck, The Justices and the Generals: The Supreme Court and Judicial Review of Military Activities, 70 Mil. L. Rev. 1, 44 (1975); Sherman, Legal Inadequacies and Doctrinal Restraints in Controlling the Military, 49 Ind. L.J. 539 (1974).


The Second Circuit has actively contributed to the liberalization of the nonreviewability doctrine. It was one of the first circuits to conclude that civilian courts could review the military’s denial of an in-service conscientious objector discharge request. See Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968). Other circuits soon followed the lead of the Second Circuit. See United States ex rel. Healy v. Beatty, 424 F.2d 299 (5th Cir. 1970); Packard v. Rollins, 422 F.2d 525 (8th Cir. 1970); United States ex rel. Brooks v. Clifford, 409 F.2d 700 (4th Cir. 1969). Ultimately, the Second Circuit’s position on this issue was approved by the Supreme Court. See Parisi v. Davidson, 405 U.S. 34, 39 (1972).


Perhaps the case most supportive of the proposition that members of the military are entitled to the protection of the equal protection clause is Frontiero v. Richardson, 411 U.S. 677 (1973). In Frontiero, the Supreme Court struck down as violative of equal protection several statutes which required a servicewoman to prove dependency in fact to entitle her spouse to receive certain military benefits, while automatically entitling the spouse of a serviceman to the same benefits. It has been suggested that since the Court was willing to strike down the statutes at issue in Frontiero, it is quite likely that all challenged military regulations which are found to deny equal protection will similarly be held to be unconstitutional by the Court. Peck, The Justices and the Generals: The Supreme Court and Judicial Review of Military Activities, 70 Mil. L. Rev. 1, 44 (1975).
If assailable at all, the majority's decision to review on the merits can only be criticized on the ground that apparently no consideration was given to whether judicial review of the military activities challenged in Crawford "would . . . seriously impede the military in the performance of vital duties . . . ." Tempering this criticism, however, is the fact that the government did not argue that the Marine Corps' regulation or actions were not reviewable, and thus made no claim or showing that review would have any adverse effect on the Corps.

By treating the question of reviewability as a separate threshold issue, the Second Circuit has taken an approach which differs significantly from the approaches utilized by some federal courts. For example, in Cook v. Arentzen, the District Court for the Eastern District of Virginia was faced with the issue of whether a Navy regulation mandating the discharge of pregnant women officers was constitutional. Rather than engaging in a separate threshold analysis of the question of reviewability, it appears that the Cook court combined the question of reviewability with the merits of Lieutenant Commander Cook's equal protection challenge. Similarly, in Gutierrez v. Laird, the District Court for the District of Columbia did not consider separately whether it should review the military determination in question. In considering Lieutenant Gutierrez' equal protection and due process challenges to an Air Force mandatory discharge regulation, Judge Smith expressly stated that his analysis on the merits was "tempered" by the nonreviewability doctrine.

37 Mindes v. Seaman, 453 F.2d 197, 201 (5th Cir. 1971). The fear that interference with the military might adversely affect the nation's security, see note 5 and accompanying text supra, would seem to mandate a case-by-case determination of reviewability, including an assessment of the possible effects of review. See id. at 199, 201-02; Allgood v. Kenan, 470 F.2d 1071, 1073-74 (9th Cir. 1972); United States ex rel. Schonbrun v. Commanding Officer, 403 F.2d 371 (2d Cir. 1968).
38 531 F.2d at 1120.
40 In sustaining the constitutionality of the Navy's mandatory discharge regulation, the Cook court noted that "[j]udges are not given the task of running the Army." Id. at 11, quoting Orloff v. Willoughby, 345 U.S. 83, 93 (1953).
42 Id. at 290. The Ninth Circuit, in Struck v. Secretary of Defense, 460 F.2d 1372 (9th Cir. 1971), vacated and remanded for consideration of mootness, 409 U.S. 1071 (1972), also failed to separately consider the reviewability of Captain Struck's equal protection challenge to an Air Force pregnancy discharge regulation. That the court combined the reviewability issue and the equal protection question is evidenced by its discussion of the merits; "Captain Struck is asking us to displace the military authorities . . . and to say to the Air Force . . . 'You must not . . . separate this woman from her military service. And you must not discriminate against her . . . .''' 460 F.2d at 1376.
Although the approach taken by the Cook and Gutierrez courts appears viable, it is submitted that it may lead to inequitable results. Combining the question of reviewability with the substantive analysis results in the plaintiff's claims being weighed not only against the justifications for the specific military action or determination in question, but also against the general considerations which discourage review of military determinations. Consequently, the substantive analysis is subtly biased in the military's favor and extreme deference is afforded the military on the merits. The approach utilized by the Crawford court, a technique which has also been used by other circuits, is preferable because it allows the court to analyze the merits of the case without unduly deferring to either party. Yet, if the military would be adversely affected by judicial review in any particular instance, this factor should be considered in making the threshold determination whether to grant review. In addition, any legitimate special need the military might have may be advanced as justification on the merits. By adopting this approach, the Second Circuit appears to have struck a balance between the unique requirements of the military and the constitutional rights of members of the Armed Forces.

Having resolved the threshold reviewability issue, the court was faced with Crawford's challenge to the constitutionality of the regulation. In determining that the regulation violates the guarantee of equal protection, Judge Oakes assumed that the Marine regulation created a sex-based classification. Consequently, the regulation was examined under the heightened standard of review seemingly applicable when sex-based discrimination is involved. Although the regulation in question appears to classify on the basis of sex, the court's reasoning fails to take cognizance of the Supreme Court's decision in Geduldig v. Aiello. In Geduldig, the Court held that a California disability insurance program which excluded pregnancy from the list of covered disabilities did not establish a sex-based

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43 See Pregnancy Discharges, supra note 31, at 578-79.
45 See Pregnancy Discharges, supra note 31, at 570-80.
47 531 F.2d at 1121-22.
48 See note 21 supra.
This would seem to indicate that a mandatory pregnancy discharge regulation does not engender a sex-based classification. Therefore, under the *Geduldig* reasoning, instead of applying the more vigorous equal protection standard applied in sex discrimination cases, the *Crawford* court should have utilized the less demanding traditional rational basis standard. Had the Second Circuit analyzed the regulation under this standard, it is doubtful that the panel could have concluded that the regulation was violative of the equal protection clause.

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50 *Id.* at 496-97 & n.20.
51 The *Geduldig* court reasoned:
The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. . . . The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. *Id.* at 496-97 n.20. The Court has recently reaffirmed that this language “leaves no doubt that our reason for rejecting . . . [the] equal protection claim [in *Geduldig*] . . . was that the exclusion of pregnancy . . . was not in itself discrimination based on sex.” General Elec. Co. v. Gilbert, 97 S. Ct. 401, 407 (1976).

The conclusion that pregnancy classifications are not sex-related has been attacked on a number of grounds. First, it has been pointed out that the *Geduldig* Court’s identification of the relevant classes created by the challenged statute is fallacious: “While it is true that not all women are pregnant at any one time, all women, as a class, are susceptible to pregnancy (and bear in the United States an average of two children apiece).” Comment, *Geduldig v. Aiello: Pregnancy Classifications and the Definition of Sex Discrimination*, 75 COLUM. L. REV. 441, 448 (1975). Viewed thusly, it is difficult to avoid the conclusion that the statute classifies on the basis of sex. *See id.* Moreover, on a very practical level, “[i]nsofar as pregnancy classification and stereotypes about pregnancy help perpetuate [the economic and social inferiority of women], they are part and parcel of the problem we label sex discrimination.” *Id.* at 461. Finally, it would appear that the *Geduldig* logic is readily applicable to numerous other classifications, even those traditionally considered to be racially based. For example, the *Geduldig* rationale could easily be used to find that an insurance program which excludes sickle cell anemia from its coverage does not classify on the basis of race. *See id.*

Professors Lockhart, Kamisar, and Choper have propounded the following possible extension of the *Geduldig* logic:

Consider the following description of a law that forbids blacks from becoming lawyers: “The law divides all persons into two groups—blacks who wish to become lawyers and all persons who do not wish to become lawyers. While the first group is exclusively black, the second includes members of both races.”

W. LOCKHART, Y. KAMISAR, & J. CHOPER, *The American Constitution* 952 (4th ed. 1975). The foregoing examples demonstrate that *Geduldig* does not state a rule generally applicable in equal protection cases; the logic of that case must be confined in order to prevent abrogation of the entire classification concept. Thus, it might be possible to argue successfully that the *Geduldig* holding should be restricted to the disability insurance situation. Cf. *Dandridge v. Williams*, 397 U.S. 471, 484-86 (1970) (economic and social regulation is subjected to a more relaxed standard of review than legislation affecting Bill of Rights freedoms).

52 *See* 417 U.S. at 496-97 & n.20.
53 The Ninth Circuit in Struck v. Secretary of Defense, 460 F.2d 1372 (9th Cir. 1971), *vacated and remanded* for consideration of mootness, 409 U.S. 1071 (1972), sustained an Air
It is submitted, however, that the Crawford result is supportable under an equal protection analysis different from that employed by the Second Circuit. Since the Marine regulation appears to penalize the exercise of the right to procreate, a right which has been denominated fundamental by the Supreme Court, the regulation should be subject to strict scrutiny. Under this analysis, the regulation cannot be upheld unless it is shown to be necessary to the attainment of a compelling state interest. Once strict scrutiny is invoked, underinclusive and overinclusive classifications are afforded little tolerance. Moreover, if the governmental objective can be achieved by means that have a less drastic impact on the exercise of the fundamental right involved, the classification usually will not be upheld.

The pregnancy discharge regulation at issue in Crawford was clearly underinclusive. It mandated that a woman be discharged immediately upon discovery of her pregnancy, while other disabled personnel were individually evaluated before a decision whether to

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Footnotes:

1. The right to procreate has been recognized as a part of the right to privacy. See Roe v. Wade, 410 U.S. 113, 152 (1973). Apparently, this right was first recognized in Skinner v. Oklahoma, 316 U.S. 535 (1942). There, Justice Douglas, writing for the Court, declared that it is "one of the basic civil rights of man" and that statutes which infringe on the right to procreate must be subject to "strict scrutiny." Id. at 541. More recently, the Court seems to have reaffirmed the principle that the right to procreate is fundamental and that encroachment on that right triggers strict judicial scrutiny. See San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973) (dictum); Roe v. Wade, 410 U.S. 113, 152 (1973); Robinson v. Rand, 340 F. Supp. 37, 38 (D. Colo. 1972).

5. A finding that a challenged regulation penalizes, interferes with, or infringes upon the exercise of a fundamental right is necessary to apply strict scrutiny. See Memorial Hosp. v. Maricopa County, 415 U.S. 260 (1974); San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 37-39 (1973). In Crawford, the abrupt termination of a woman's chosen career solely because she chose to bear a child appears to penalize the exercise of the right to decide whether to procreate.

discharge them was made. Exacerbating this underinclusiveness is the fact that pregnant women, who may generally suffer less debility than other temporarily disabled persons, may be the class of disabled personnel who are least likely to impair readiness and mobility. Indeed, the tenuous nature of the connection between mobility and readiness and the mandatory discharge of pregnant women is demonstrated by the fact that the Corps has abandoned the mandatory discharge policy and currently allows pregnant women to remain on active duty. Finally, the objective of readiness and mobility appears readily attainable by individual consideration of each pregnant woman's capacity to continue to serve. It is this less drastic procedure which is utilized when other, perhaps more serious disabilities are involved. Indeed, no justification for exempting pregnant women from this procedure, other than mobility and readiness, was adduced by the government.

More cogent than its equal protection analysis is the Crawford court's conclusion that the regulation denies due process of law. The finding that the regulation violates due process seems to be dictated by Cleveland Board of Education v. LaFleur, wherein the Supreme Court held that two boards of education mandatory pregnancy leave rules similar to the Marine Corps regulation challenged in Crawford created the irrebuttable presumption that disability results from pregnancy. The LaFleur Court reasoned that not all women would be disabled at the point at which they were required to take leave, and concluded that an individual determination of each teacher's capabilities and disability must be made before the teacher may be required to take pregnancy leave. This reasoning seems especially

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59 See 32 C.F.R. § 730.5 (1976). It may also be argued that the regulation challenged in Crawford is markedly overinclusive because it mandated the discharge of those pregnant women whose condition did not impede the readiness and mobility of the Marine Corps. See Crawford v. Cushman, 531 F.2d 1114, 1123 (2d Cir. 1976).

60 It has been asserted that "[t]he period of genuine disability preceding childbirth is normally brief, and delivery is followed by a rapid and complete recovery." Pregnancy Discharges, supra note 31, at 590 (footnotes omitted). In Crawford, the district court concluded that there was no medical reason why Crawford could not have performed her assigned duties up until the seventh month of pregnancy. Moreover, Crawford returned to a civilian job six weeks after the birth of her child. 378 F. Supp. at 720.

61 See MCO 500.12 (1975), quoted in Crawford v. Cushman, 531 F.2d 1114, 1116-17, n.1 (2d Cir. 1976).


63 Id. at 644-48.

64 Id. at 647 & n.14.

65 It should be noted that irrebuttable presumption analysis is not beyond criticism. See, e.g., Weinberger v. Salfi, 422 U.S. 749, 772-73 (1975) (extension of irrebuttable presumption
applicable to the *Crawford* situation, where, without any evaluation of Crawford's physical capacity to continue to serve, disability was presumed from the moment of conception. Thus, the *Crawford* court's conclusion that the regulation amounted to an irrebuttable presumption and thereby denied due process appears to be correct.\(^6\)

Notwithstanding the *Crawford* court's questionable equal protection reasoning, its conclusions appear to be sound. The decision demonstrates that absent either a threshold showing that judicial review would have an adverse affect on the military, or a showing on the merits that there is a legitimate need to interfere with individual rights, the Second Circuit will afford military personnel the same constitutional protections enjoyed by their civilian counterparts.

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analysis could result in the destruction of many legislative judgments); Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 Harv. L. Rev. 1534 (1974); Note, *The Conclusive Presumption Doctrine: Equal Process or Due Protection?*, 72 Mich. L. Rev. 800 (1974). One student commentator has argued that this analysis seems to be a combination of due process and equal protection. Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 Harv. L. Rev. 1534, 1544-49 (1974). The Court's concern with the accuracy of the classification in an irrebuttable presumption analysis is similar to the concerns of equal protection analysis. See id. at 1547. On the other hand, the concern with individual determinations as opposed to automatic inclusion in a class resembles due process analysis. See id. at 1548.

Supporting the Second Circuit's due process holding is the Supreme Court's recent reaffirmance of *LaFleur* in Turner v. Department of Employment Security, 423 U.S. 44 (1975) (per curiam). There, the plaintiff challenged a Utah statute which denied unemployment benefits to all pregnant women for the period extending from 12 weeks before the estimated date of birth of the child until 6 weeks after birth. The Court, in a short per curiam opinion, held that "unemployment compensation boards no less than school boards must achieve legitimate state ends through more individualized means when basic human liberties are at stake." Id. at 251.