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A VIRTUAL REALITY: PRESERVING THE RIGHT TO APPEAR
“IN PERSON” BEFORE AN ADMINISTRATIVE SEPARATION
BOARD

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ABSTRACT

Prior to the COVID-19 pandemic, courts and government agencies utilized video teleconference (“VTC”) technology to conduct trials and hearings in limited settings. However, as the pandemic progressed, a number of these adjudicative bodies began to rely more heavily on VTC, and at least one military service sanctioned the use of VTC to conduct administrative separation proceedings. The administrative separation process is routinely used as an employment action to separate military members from an armed service. Due to its speed and efficiency, military commanders often elect to use the administrative separation process over the more rigorous court-martial procedure to effect good order and discipline. While military commanders are empowered with significant discretion to adjudicate misconduct within their ranks, military members receive fewer procedural due process rights at an administrative separation board compared to the rights afforded at courts-martial. This article argues that conducting separation proceedings entirely over VTC would violate a service member’s due process rights when the member is subject to separation under other than honorable conditions. In particular, this article examines the origin and nature of military administrative separation proceedings, shedding light on Congress’ historical emphasis that the proceedings be conducted “in person.” This historical gloss, combined with the quasi-criminal nature and lifelong consequences of such proceedings, necessitates that service members be afforded the opportunity to be physically present when presenting their defense before an administrative separation board.

INTRODUCTION

Imagine you are an enlisted member serving in the military and have been accused of a crime. Assume that because the evidence against you is mostly circumstantial, the military cannot bring charges against you. Nevertheless, you have been ordered to appear before an administrative separation board composed of three officers from your unit.¹ You are told during your appearance before the board that the government will bring witnesses to testify against you and present what physical evidence they have, but the rules of evidence that typically govern in a trial do not apply—meaning less reliable evidence, like hearsay, may be admitted.² If the board believes that it is more

¹ An administrative separation board is typically composed of at least three commissioned officers, warrant officers, or non-commissioned or petty officers. See Major Latisha Irwin, *Justice in Enlisted Administrative Separations*, 225 MIL. L. REV. 35, 52 (2017).

² See *id.* at 53.

likely than not that you committed this crime,³ you will be separated⁴ with an “other than honorable” discharge,⁵ severely limiting your chances of future employment. There is one more catch: the entire separation board will be held over video teleconference (“VTC”). Despite the grave nature of this hearing, you will not have the opportunity to effectively examine physical evidence presented at the board, and you will not be in the same room as your assigned legal counsel. When you petition for an in-person hearing, you are told that your board will be conducted on VTC because it will be more “beneficial” to the government, although military regulations entitle you to an in-person hearing.

In the wake of COVID-19 and with an ever-increasing reliance on remote technology, the hypothetical situation described above has become a reality. The COVID-19 pandemic has spurred a historic use of remote technology in U.S. courts,⁶ and at least one military service has sanctioned the use of VTC at administrative separation boards.⁷ This article will examine the legal implications of using VTC technology in administrative separations. Section I of this article begins by describing how administrative separations have historically provided military commanders with a broad range of discretion to discharge service members with little oversight. Section II argues that due to Congress’ historical emphasis on conducting in-person hearings and the quasi-criminal nature of such proceedings, holding a separation board completely over VTC violates the service member’s due process rights. Finally, Section III contends that under the current scheme of Department of Defense (“DoD”) and Coast Guard policies, authorizing the use of VTC at separation boards would violate the Administrative Procedure Act.

³ The evidence supporting the allegation must only be established by a preponderance of the evidence. *Id.*

⁴ To separate from the military is to be discharged. Military discharges are either administrative or punitive in nature. This paper focuses on administrative discharges of service members stemming from administrative separation boards. The type of discharge a service member receives can affect their access to veteran benefits and their ability to be employed in the private or public sectors.

⁵ A military member may receive one of five types of service characterizations upon discharge: honorable, general (under honorable conditions), other than honorable, bad conduct, or dishonorable. *Forms of Military Discharges*, VETERANS AUTH., <https://va.org/forms-of-military-discharge/> (last visited Jan. 16, 2022). The latter two types of discharges may only be issued from a conviction at a court-martial, which is the military’s process for bringing criminal charges against a service member for a violation of the Uniform Code of Military Justice (“UCMJ”). *Id.* However, a member may receive an “other than honorable” discharge for a number of different reasons. *Id.*

⁶ See, e.g., Erika Rickard, *How Courts Embraced Technology, Met the Pandemic Challenge, and Revolutionized Their Operations*, PEW CHARITABLE TRUSTS (Dec. 1, 2021), <https://www.pewtrusts.org/en/research-and-analysis/reports/2021/12/how-courts-embraced-technology-met-the-pandemic-challenge-and-revolutionized-their-operations>.

⁷ See *infra* notes 63–64 and accompanying text. Additionally, the Army Review Boards Agency (“ARBA”) is authorized to use VTC capabilities to conduct hearings. *Army Discharge Review Board*, U.S. ARMY, <https://arba.army.pentagon.mil/adrb-app.html> (last visited Jan. 16, 2022).

I. HISTORICAL USE OF ADMINISTRATIVE SEPARATIONS

The U.S. military has used administrative separations to discharge service members since the nation's founding. Even among the earliest provisions authorizing the use of administrative discharges, the Second Continental Congress attached certain procedural protections. For example, the 1776 Articles of War required field officers to provide a written record of discharge to any enlisted member who was administratively separated, and a member's service could only be characterized as dishonorable through a court-martial hearing.⁸ It was not until the word "honorably" was included on administrative discharge forms in 1821 that the U.S. military began characterizing a member's service as part of an administrative separation.⁹ Such a characterization was included when a commanding officer "certified that the soldier served honestly and faithfully."¹⁰ Before then, no characterization of service was included on a service member's discharge paperwork.¹¹

Throughout the nineteenth and early twentieth centuries, the use of administrative discharges varied across the armed forces. In 1916, the Army characterized a soldier's service as either "honorable" or "without specification."¹² The "without specification" characterization became known as a "blue discharge" because it was issued on blue paper.¹³ The unique phrasing associated with a "blue discharge" was designed to avoid stigmatizing discharged service members who sought post-military service employment.¹⁴ However, the blue discharge was only issued when some part of the member's record precluded "honorable" service, and it was disproportionately issued to African Americans.¹⁵ Eventually, presenting a blue discharge to potential employers gave "the impression that there [was] something radically

⁸ See ARTICLES OF WAR OF 1776, § III, art. 2. However, officers could not be administratively discharged for reasons of misconduct. ARTICLES OF WAR OF 1776, § XIV, art. 13; see also Captain Richard J. Bednar, *Discharge and Dismissal as Punishment in the Armed Forces*, 16 MIL. L. REV. 1, 5 (1962).

⁹ See *Constitutional Rights of Military Personnel: Hearing Before the Subcomm. On Const. Rts. of the Comm. of the Judiciary*, 87th Cong. 8 (1962) (statement of Carlisle P. Runge, Assistant Sec'y of Def. for Manpower) [hereinafter *1962 Hearings*].

¹⁰ *Id.* (statement of Hon. Carlisle P. Runge, Assistant Sec'y of Def. for Manpower) (The word "honorably" was included on each discharge form, but the word was crossed out to designate service that was not honorable.).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* The Navy and Marine Corps, however, characterized a member's discharge as "honorable," "under honorable conditions," or "undesirable."

¹⁴ *Id.* at 9.

¹⁵ For example, in World War I, although African Americans composed just 6.5% of the Army, they received over 22% of all "blue" discharges. Melanie Burney, *WWII Vet Wants Army to Upgrade Discriminatory Discharge to 'Honorable,' Nearly 75 Years After Expelling Him*, PHILA. INQUIRER (May 3, 2019), <https://www.inquirer.com/news/pennsylvania/nelson-henry-army-blue-discharge-military-discharge-petition-20190503.html>.

wrong” with the veteran, simply because of the color of the paper they carried.¹⁶

Blue discharges were widely criticized, resulting in the ultimate end of the practice in 1947.¹⁷ Administrative separations, however, continued to be used as a means to quickly and quietly remove unwanted service members.¹⁸ Specifically, administrative separations were commonly used to discharge a service member when there was insufficient evidence for a conviction at court-martial.¹⁹ This rationale was ripe for abuse, given the wide latitude afforded to military commanders, as evidenced by the routine use of administrative separations to discharge service members under other than honorable conditions solely based on their *suspected* sexual orientation.²⁰ Service members were also separated when, in the eyes of a field officer, their conduct was deemed prejudicial to the good order and discipline of the unit.²¹ Thus, administrative separations have historically provided the military with a highly efficient means of separating members at the broad discretion of military commanders.

Perhaps the most significant landmark in the use of administrative separations was the enactment of the Uniform Code of Military Justice (“UCMJ”). Established in 1950, the UCMJ provided more significant and standardized due process protections across each of the armed services, implementing new measures such as a uniform prohibition against self-incrimination and creating a system of appellate review by civilian judges.²² Given this more rigorous system of procedural protections in military criminal procedures such as courts-martial, the military subsequently began to rely more heavily on administrative separations to discharge service members as a means to effect

¹⁶ 1962 Hearings, *supra* note 9 at 9.

¹⁷ Discriminatory “Blue Discharge” Finally Reversed After 75 Years in Case Brought by Legal Aid at Work and Golden Gate Law School’s Veterans Advocacy Clinic, LEGAL AID AT WORK (June 5, 2019), <https://legalaidatwork.org/blog/honorable-discharge-for-nelson-henry/>.

¹⁸ 1962 Hearings, *supra* note 9 at 10.

¹⁹ *Id.*

²⁰ After World War I, the Army implemented policies disqualifying men as gay based on their perceived physical attributes. See R.L. Evans, *U.S. Military Policies Concerning Homosexuals: Development, Implementation, and Outcomes*, 11 L. & SEXUALITY 113, 118 (2002). In 1962, the military continued to discharge those perceived to be gay. See, e.g., 1962 Hearings, *supra* note 9 at 10 (“The court-martial of a homosexual is difficult in that speedy trial and conviction are impossible. Meanwhile, the individual threatens the welfare of other service personnel . . . Prompt elimination of the homosexual is mandatory in the interests of the military services.”). See also *id.* at 260 (statement of Donald Rapson, Special Comm. on Military Justice of the N.Y. Bar Assoc.) (“Take the case of homosexuality where you have clear circumstantial evidence, but perhaps not enough to warrant a conviction, yet the military commanders feel reasonably sure that this man is homosexual. Should the military be forced to retain this man in the service? I would say ‘No.’”).

²¹ 1962 Hearings, *supra* note 9 at 10.

²² See generally Victor Hansen, *Military Justice Reform: An Overview*, 27 FED. SENTENCING REP. 88, 88–90 (2014).

good order and discipline while side-stepping these “new” due process protections.²³ In response to the increased use of administrative separations, Congress held a hearing in 1962 to investigate whether service members were being afforded adequate rights in separation proceedings.²⁴ Throughout the week-long hearing, one constant theme emerged: any member in receipt of an other than honorable discharge was severely stigmatized when seeking future employment, and the member needed to be afforded greater procedural protections.²⁵

Currently, administrative separations continue to be used in lieu of court-martial proceedings and in instances when a member’s conduct is generally deemed to be prejudicial to the good order and discipline of the unit.²⁶ In the past decade alone, the number of general, special, and summary court-martial cases has decreased by nearly 70%, and the use of non-judicial punishment has decreased by 40%.²⁷ Military experts have attributed this decline to an even greater reliance on administrative separations.²⁸ Noting the perceived unwillingness of military commanders to utilize the more onerous criminal procedures to enforce good order and discipline, then-Secretary of Defense James Mattis decreed to his military commanders in 2018 that “[a]dministrative actions should not be the default method to address illicit conduct simply because it is less burdensome than the military justice system.”²⁹ Therefore, it is critical now, more than ever, that service members are afforded adequate procedural protections during their separation proceedings, as these oft-misused administrative discharges can carry a lifelong stigma and radically affect

²³ 1962 Hearings, *supra* note 9 at 10; *United States v. Phipps*, 30 C.M.R. 14, 16 (1960) (Quinn, J., concurring) (“I am also aware of circumstances tending to indicate that the undesirable discharge has been used as a substitute for a court-martial, even in deprivation of an accused’s rights under the Uniform Code of Military Justice.”).

²⁴ 1962 Hearings, *supra* note 9 at 315.

²⁵ *Id.* at 214 (statement of Col. D. George Paston, Chairman, Comm. on Mil. Just.) (“we do find fault with any proposal to brand a man for life with the stigma of a discharge under other than honorable conditions, unless such person is given an opportunity, if he is available, to disprove the charges before a court of board”); *id.* at 5 (statement of Sen. Kenneth B. Keating) (“[Administrative separation] is a very real problem, for undeniably present-day personnel practices make it extremely difficult, if not impossible, for a serviceman to find suitable work if he has received anything other than an honorable discharge”); *id.* at 2 (statement of Sen. Sam J. Ervin, Chairman, Subcomm. on Const. Rts.) (“[o]n the basis of its studies, the subcommittee is aware that an undesirable discharge, in addition to its effect on veterans’ benefits, creates a stigma which often blocks employment and might have consequences far worse than those of confinement in a guardhouse or prison”).

²⁶ See Bryan Oliver, *Forgotten Heroes: The Unacceptable Results of Military Administrative Separations*, 2021 J. DISP. RESOL. 133, 139 (2021).

²⁷ Geoff Ziezulewicz, *UCMJ Crackdown: Why Mattis Thinks Commanders Have Gone Soft on Misconduct*, MIL. TIMES (Sept. 10, 2018), <https://www.militarytimes.com/news/your-military/2018/09/10/ucmj-crackdown-why-mattis-thinks-commanders-have-gone-soft-on-misconduct/>.

²⁸ *Id.*

²⁹ *Id.*

the ability of military personnel to fulfill future professional and personal aspirations.

II. MINIMUM DUE PROCESS & THE RIGHT TO "APPEAR IN PERSON"

This section argues that the practice of conducting an administrative separation using entirely virtual means violates a service member's due process rights when the member is subject to separation under other than honorable conditions. The section begins by describing the liberty and property interests implicated in administrative separation hearings. Then, the section argues that Congress' historical emphasis on the right of a member to appear in person suggests that such a right is constitutionally required for both officers and enlisted members. The section concludes by explaining why the right to "appear in person" necessarily excludes remote hearings, even when considering the more prevalent use of such technology in the civil context.

A. Liberty and Property Interests

The Fifth Amendment of the U.S. Constitution provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."³⁰ The Due Process Clause of the Fifth Amendment applies to both members of the military and civilians.³¹ A due process violation occurs when the government deprives a person of life, liberty, or property without providing adequate procedural protections.³²

The right to "liberty" attaches when a service member faces an "other than honorable discharge." "Liberty" may include adverse effects to a person's reputation when it limits their ability to earn a living. Specifically, one's liberty interest may be impinged when there is some public disclosure of stigmatization to prospective employers.³³ It is well established that a service member who receives anything less than an honorable discharge from the military faces a stigma.³⁴ As one federal court explained,

³⁰ U.S. CONST. amend. V.

³¹ *Weiss v. United States*, 510 U.S. 163, 177 (1994).

³² Erwin Chemerinsky, *Procedural Due Process Claims*, 16 *TOURO L. REV.* 871, 871 (2000) (describing what qualifies as government deprivation).

³³ *See Owen v. City of Independence*, 445 U.S. 622, 661 (1980); *Bd. of Regents v. Roth*, 408 U.S. 564, 573–74 (1972).

³⁴ *See, e.g., Anderson v. United States*, 111 Fed. Cl. 572, 588–89 (2013), *aff'd* Fed. Cir. 13-5117 (2014).

[T]here can be no doubt that a military discharge on other than honorable grounds is punitive in nature, since it stigmatizes the service member's reputation, impedes his ability to gain employment, and is in his life, if not the law, prima facie evidence against the service member's character, patriotism, or loyalty.³⁵

However, courts have generally held that a member who receives a "general discharge under honorable conditions" is not stigmatized, and such members are generally not entitled to an administrative board.³⁶ Simply put, the worse the potential discharge characterization, the more procedural due process rights attach to these separations.

The right not to be deprived of property without due process of law typically does not apply to administrative separations.³⁷ Courts have widely recognized service members "generally serve at the pleasure of the President and may be terminated with or without cause."³⁸ Therefore, it is generally accepted that there is no property interest in continued military service.³⁹ However, if the military fails to follow its own procedures during the separation process, some courts have held that the discharged member has a limited property interest in continued employment.⁴⁰ Nevertheless, whether through liberty or property interests, the Fifth Amendment's Due Process Clause unequivocally attaches to military members facing administrative separation under other than honorable conditions.

B. What Process is Due: The Right to Appear in Person

The more difficult question—and the focus of this article—is the scope of procedures required in an administrative separation hearing, and specifically, whether a service member is entitled to an in-person hearing. When determining what process is due in the civilian context, courts apply the balancing

³⁵ *Stapp v. Resor*, 314 F. Supp. 475, 478 (S.D.N.Y. 1970).

³⁶ At least four circuits have adopted this position. *See Wilburn v. Dalton*, 832 F. Supp. 943, 948 (E.D. Pa. 1993); *see also Ostler v. United States*, 41 Fed. Appx. 424, 426 (Fed. Cir. 2002) (Mayer, J., concurring) (arguing that general discharge stigmatizes a member for future employment); *Holley v. United States*, 124 F.3d 1462, 1470–71 (Fed. Cir. 1997); *May v. Gray*, 708 F. Supp. 716, 723 (E.D.N.C. 1988). Generally, members who are discharged based on a refusal to receive the COVID-19 vaccination would only be subject to a general discharge under honorable conditions. *See, e.g., U.S. MARINES, MARADMINS 612/21, SUPPLEMENTAL GUIDANCE (2) TO MANDATORY COVID-19 VACCINATION OF MARINE CORPS ACTIVE AND RESERVE COMPONENTS (2021); see also Diana Stancy Correll, Navy Unveils Discharge Plans for Sailors who Refuse COVID-19 Vaccine, NAVY TIMES (October 14, 2021), <https://www.navytimes.com/news/your-navy/2021/10/14/navy-unveils-discharge-plans-for-sailors-who-refuse-covid-19-vaccine/>.*

³⁷ *See Karr v. Castle*, 768 F. Supp. 1087, 1095–97; 1101 (D. Del. 1991).

³⁸ *See, e.g., id.* at 1099.

³⁹ *See, e.g., Guerra v. Scruggs*, 942 F.2d 270, 278 (4th Cir. 1991); *Stone v. Trump*, 400 F. Supp. 3d 317, 357 (D. Md. 2019); *Tatum v. United States*, No. RDB-06-2307, 2007 WL 2316275, at *15 (D. Md. Aug. 7, 2007); *Gay Veteran's Assn. v. Sec. of Def.*, 668 F. Supp. 11, 14 (D.D.C. 1987); H.R. REP. NO. 90-868 at 10 (1967).

⁴⁰ *Perez v. United States*, 850 F. Supp. 1354, 1362 (N.D. Ill. 1994); *May v. Gray*, 708 F. Supp. 716, 720 (E.D.N.C. 1988).

test established in *Mathews v. Eldridge*.⁴¹ Specifically, courts weigh three factors: (1) the individual's interest affected by the government action; (2) the likelihood that any additional procedures will reduce the risk of an erroneous deprivation of that interest; and (3) the government's interest in administrative efficiency.⁴² However, in the military context, the Supreme Court has held that courts "must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces, U.S. Const., Art. I, § 8."⁴³ In explaining that the *Mathews v. Eldridge* balancing test is not expressly applicable in the context of military discipline, the Court reasoned that:

[T]he tests and limitations of due process may differ because of the military context. The difference arises from the fact that the Constitution contemplates that Congress has "plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline." Judicial deference thus is "at its apogee" when reviewing congressional decision making in this area. Our deference extends to rules relating to the rights of servicemembers: "Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military . . . we have adhered to this principle of deference in a variety of contexts where, as here, the constitutional rights of servicemen were implicated."⁴⁴

Thus, when deciding what process is due in matters of military discipline, courts will generally defer to the procedures set in place by Congress.⁴⁵ In the context of administrative separations, courts have applied this standard in ruling that the minimal procedural protections put in place by Congress are adequate. For example, courts have held that failing to provide subpoena power at separation hearings—even when a witness possesses exculpatory testimony—is constitutional.⁴⁶ Although separation proceedings generally lack certain basic procedural protections, conducting a separation hearing completely over virtual means violates due process because Congress has historically emphasized the importance of allowing members to appear "in person" before administrative boards.

i. Officers' Right to Appear in Person

First, Congress has expressly mandated by statute that *officers* subject to separation be provided an opportunity to "appear in person" before a

⁴¹ *Weiss v. United States*, 510 U.S. 163, 177 (1994).

⁴² *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

⁴³ 510 U.S. at 176–77.

⁴⁴ *Id.* at 177.

⁴⁵ *Id.*

⁴⁶ *Milas v. United States*, 42 Fed. Cl. 704, 716 *aff'd*, 217 F.3d 854 (Fed. Cir. 1999). Courts have also held that the rules of evidence need not apply at separation hearings. *See Doe v. United States*, 132 F.3d 1430, 1434 (Fed. Cir. 1997).

separation board, which for officers is referred to as a Board of Inquiry (“BOI”).⁴⁷ The history leading to this statutory protection illuminates the fact that Congress considers the right to an in-person hearing a fundamental procedural protection. Prior to World War I, officers in the Army were entitled to appear in person before a Board of Inquiry when being separated for unsatisfactory conduct.⁴⁸ However, at the beginning of World War II, Congress determined that entitling members to in-person hearings was “cumbersome” and “entirely inapplicable to the conditions of an emergency.”⁴⁹ As a result, Congress removed the right of officers to appear in person.⁵⁰ Though this policy change was a seemingly logical and good faith rationale during a time of war, it resulted in a large number of officers being unjustly separated.⁵¹ In response, following World War II, Congress reinstated the statutory right of officers in the Army to appear in person before a board, denouncing the more summary procedure as a mistake and referring to it as “ineffective” and “clumsy.”⁵² The statutory right of officers to appear in person has since been extended to all services, including the Coast Guard,⁵³ and an officer’s right to appear in person remains in force today.⁵⁴ Therefore, it is clear that Congress deems the right to appear in person to be a fundamental protection in separation proceedings, even during times of emergency.

ii. Enlisted Members’ Right to Appear in Person

Although it would be an apparent due process violation for a military service to revoke an officer’s right to appear in person, the ability of a military department to revoke this right for enlisted personnel is not as clear. In contrast to the statutory protection afforded to officers, Congress has delegated authority to each military department to discharge enlisted members as prescribed by department regulations.⁵⁵ However, even before such authority was delegated, the DoD and Coast Guard had established uniform regulations

⁴⁷ 10 U.S.C. § 3785; 14 U.S.C. § 2162.

⁴⁸ National Defense Act of 1920, Pub. L. 66-242, § 24b, 41 Stat. 759, 773 (1920).

⁴⁹ S. REP. NO. 77-556 at 3 (1941).

⁵⁰ *Id.*

⁵¹ S. REP. NO. 80-1543 at 3–4 (1948). More than five hundred officers claimed that they were wrongly separated. *Hearings Before the Subcomm. on H.R. 2744 to Provide for the Selection for Elimination and Retirement of Officers of the Regular Army*, 80th Cong. 3340, 3541 (1947).

⁵² H.R. REP. NO. 80-816 at 6 (1947).

⁵³ The statutes were made applicable to all branches, except the Coast Guard, as part of the Defense Officer Personnel Management Act of 1980. Congress made these protections mandatory for the Coast Guard in 1963, expressly citing the reasoning of the original enactment of the comparable DoD statute. An Act to Amend the Provisions of title 14, Pub. L. No. 88-130, § 321, 77 Stat. 174, 187–88 (1963).

⁵⁴ 10 U.S.C. § 3785; 14 U.S.C. § 2162.

⁵⁵ 10 U.S.C. § 1169. Initially, the Army and Air Force possessed statutory authority to discharge enlisted members while the Coast Guard, Navy and Marines relied on inherent executive powers. Bednar, *supra* note 11, at 12, n.67. In 1968, Congress enacted 10 U.S.C. § 1169, which extended the substance of the Army and Air Force statutes to all the armed services. This statute remains in force today.

governing administrative separations—including the right of enlisted members to be present before a separation board.⁵⁶ This uniform policy was initially implemented by the DoD in 1959 in response to the widespread use of administrative separations after the UCMJ was enacted.⁵⁷ Though this set of regulations has been revised over the years, it still affords enlisted members the right to appear in person today.⁵⁸

As a component of the Department of Homeland Security (“DHS”), the Coast Guard regulates enlisted separations through its own set of regulations which largely mirror the DoD regulations.⁵⁹ Although the Commandant of the Coast Guard has provided enlisted members with the “right to be present” at separation hearings, the agency’s Personnel Service Center (“CG PSC”) recently issued a separate policy that allows the member, witnesses, or “other participants” at a separation board to “appear through the use of video teleconference” when it would be “beneficial to the proceedings.”⁶⁰ CG PSC has further interpreted this policy to allow military commanders to hold an entire separation board over VTC.⁶¹

On its face, the Coast Guard regulation appears to be a valid exercise of executive authority. However, in *Weaver v. United States*, the court held that the statutory protection afforded to officers in separation proceedings established the minimum standard of due process that is likewise applicable to enlisted personnel, holding that “[t]he government fulfills its due process obligation by providing petitioners at administrative discharge hearings with . . . an opportunity to appear in person.”⁶²

Although *Weaver* did not assert any reasoning for extending the right to appear in person to enlisted members, such reasoning can be inferred from Congress’ historical expectation of the minimum protections that must be

⁵⁶ Oliver, *supra* note 26 at 139.

⁵⁷ *Id.*

⁵⁸ U.S. DEP’T OF DEF. INSTR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS 3.a.(12) (2014).

⁵⁹ See generally U.S. COAST GUARD, MILITARY SEPARATIONS (2018); U.S. COAST GUARD, ADMINISTRATIVE INVESTIGATIONS MANUAL (2007); ENLISTED PERSONNEL ADMINISTRATIVE BOARDS MANUAL 5-2 (2014).

⁶⁰ U.S. DEP’T OF DEF. INSTR., *supra* note 58; U.S. COAST GUARD, ENLISTED PERSONNEL ADMINISTRATIVE BOARDS MANUAL 5-2 (2014), [https://www.dcms.uscg.mil/Portals/10/CG-1/psc/psd/docs/EPAB%20\(Final%20Revised%20August%202017\).pdf?ver=2018-03-30-101707-787](https://www.dcms.uscg.mil/Portals/10/CG-1/psc/psd/docs/EPAB%20(Final%20Revised%20August%202017).pdf?ver=2018-03-30-101707-787) [hereinafter ENLISTED ADMINISTRATIVE BOARDS MANUAL]. See *infra* Section III for a discussion of the legal effect of these conflicting provisions.

⁶¹ U.S. COAST GUARD, COVID-19: ADMINISTRATIVE DISCHARGE BOARDS CONTINUITY OF OPERATIONS 4 (2020), <https://content.govdelivery.com/accounts/USDHSCG/bulletins/28b595d>.

⁶² *Weaver v. United States*, 46 Fed. Cl. 69, 79–80 (2000). In *Weaver*, an enlisted member brought multiple due process challenges to his administrative separation hearing. *Id.* In dicta, the court went on to reason that the member’s constitutional right to confrontation was not violated when two witnesses testified by telephone and were subject to cross examination by defense counsel. *Id.* The right to confrontation applicable in *Weaver* was the Fifth Amendment right applicable in administrative hearings, rather than the Sixth Amendment right applicable in criminal contexts. *Id.*

afforded to service members. When determining whether a particular military procedural protection that is not expressly provided by Congress is constitutionally required, courts must examine “whether the factors militating in favor [of that protection] are so extraordinarily weighty as to overcome the balance struck by Congress.”⁶³ In *Weiss v. United States*, the Supreme Court used this test to consider whether the lack of a fixed term of office for military judges violated the Fifth Amendment’s Due Process Clause.⁶⁴ In applying the test, the Court examined the historical role played by judges in the military justice system, along with the procedural safeguards already in place to ensure a judge’s impartiality.⁶⁵ The Court found there was no due process violation because the military conducted court-martials for over 200 years without tenured judges.⁶⁶ Further, Congress had not expressed concern over this lack of protection and had instead created other procedural measures, such as judicial review by civilian judges, to ensure the fairness of military court-martials.⁶⁷

Unlike the historical backdrop in *Weiss*, the historical backdrop of administrative separations militates strongly in favor of overcoming any lack of statutory protections offered by Congress to enlisted members. Specifically, unlike the lack of tenured military judges throughout history, the right to appear in person before a separation board has been consistently afforded to service members since the end of World War II.⁶⁸ As described above, after the UCMJ was enacted, the military heavily relied on administrative separations in order to avoid being required to comply with the more rigorous protections of the military justice system.⁶⁹ In response to this practice, and with the discriminatory practice of issuing “blue discharges” still looming, Congress held a series of hearings to review the constitutional rights of military personnel.⁷⁰ Throughout the hearings, representatives from the various military branches continuously reassured Congress that the military branches provided adequate procedural protections for enlisted members by providing them with the right to be present at separation proceedings.⁷¹ Congress was further assured that the protections afforded to enlisted members

⁶³ *Weiss v. United States*, 510 U.S. 163, 177–78 (1994); *see also* *Milas v. United States*, 42 Fed. Cl. 704, 717 (1999) (applying the test in *Weiss* to determine what protections are due at an enlisted member’s administrative separation board).

⁶⁴ 510 U.S. at 165.

⁶⁵ *Id.* at 178–79.

⁶⁶ *Id.* at 179.

⁶⁷ *Id.* at 179–81.

⁶⁸ *See* H.R. REP. NO. 816, at 6 (1947).

⁶⁹ *See* Oliver, *supra* note 26 and accompanying text.

⁷⁰ *See* 1962 Hearings, *supra* note 9 at 5. (“The subcommittees believe that, to the extent that the armed services use administrative action to circumvent protections provided by the Uniform Code, the intent of Congress is thwarted and the constitutional rights of service personnel are jeopardized.”).

⁷¹ *See id.* at 12, 51, 64–65, 215.

“substantially parallels” the protections already afforded officers by statute.⁷² These hearings, along with threatened legislation by Congress, led to the DoD revising its separation regulations in 1965 to provide even greater procedural protections.⁷³ These baseline protections still form the basis of the regulations governing enlisted separations today.⁷⁴ Further, unlike the separate procedural protections in *Weiss*, there are no procedural protections in place that would protect enlisted members at separation hearings.⁷⁵ That is, without the procedural measures put in place by each military service, there would essentially be no procedural protections afforded to enlisted members.

Therefore, Congress’ failure to prescribe a right to appear in person for enlisted members in no way indicates that Congress has foreclosed the existence of such a right; Congress instead assumed such a right would continue to be present in department regulations.⁷⁶ The legislative history described above makes clear that Congress only delegated to the military the authority to regulate the manner of administrative separations on the condition that the military maintain certain minimum procedural rights for enlisted members, including the right to appear in person.⁷⁷ Congress’ condemnation of the historical abuse of administrative separations to circumvent the procedural safeguards of the UCMJ further supports the contention that adequate safeguards should be present in separation hearings.⁷⁸ A significant alteration from these minimum standards, including removing the right of members to appear in person, severely compromises Congress’ expectations of the minimum process due to enlisted members facing an other than honorable discharge.

⁷² See *id.* at 66.

⁷³ Robinson O. Everett, *Military Administrative Discharges—The Pendulum Swings*, 41 DUKE L. J. 42, 60–61 (1966); *Bills to Improve the Administration of Justice in the Armed Services: Hearings Before the Subcomm. on Const. Rights of the Comm. on the Judiciary*, 89th Cong. 5–6 (1966).

⁷⁴ See generally U.S. DEP’T OF DEF. INSTR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS (2014).

⁷⁵ Robert D. Powers Jr., *Administrative Due Process in Military Proceedings*, 20 WASH. & LEE L. REV. 2, 2 (1963).

⁷⁶ Interestingly, during this period where Congress expanded the rights of military personnel, the Supreme Court deferred to the legislature when determining what process was due, even in the civilian context. See, e.g., *Arnett v. Kennedy*, 416 U.S. 134, 160 (1974). It was not until years later that determining what process was due in the civilian context was held to be a constitutional question to be answered by the judiciary. See *Vitek v. Jones*, 445 U.S. 480, 491 (1980); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985). Thus, at the time, Congress was presumably aware of this deference to the legislature, further indicating that it believed its views should be taken as establishing minimum due process protections. As discussed above, the Supreme Court continues to give deference to Congress’ determination of what process is due in the military context. See, e.g., *Weiss v. United States*, 510 U.S. 163, 177–81 (1994).

⁷⁷ See U.S. DEP’T OF DEF. INSTR., *supra* note 74 at 42.

⁷⁸ See, e.g., Everett, *supra* note 73 at 1; S. COMM. ON CONST. RTS., 88TH CONG., REP. ON CONST. RTS. OF MIL. PERS. iv–v (Comm. Print 1963).

iii. Scope of the Right to “Appear in Person”

Since minimum due process requires that both officers and enlisted members have the right to appear in person when subject to separation under other than honorable conditions, the next step of this analysis is to determine whether a remote hearing can satisfy the “in-person” requirement. Prior to the COVID-19 pandemic, trials and hearings were conducted remotely in very limited settings. However, the pandemic has slowly produced a more robust body of case law testing the limits of when remote hearings may be conducted without violating minimum due process protections, even when liberty and property interests are at stake. This section argues that because Congress considered the right to appear in person to be a fundamental procedural protection prior to the existence of VTC technology, physical presence is required. Even without such Congressional acquiescence, administrative separation proceedings are quasi-criminal in nature and therefore cannot be accurately compared to other civil matters where remote hearings have been upheld as constitutional.

a) VTC Technology at Criminal & Quasi-Criminal Proceedings

First, although the vast majority of cases outside the criminal context have held that trials and hearings conducted remotely do not violate due process, military separation hearings create a unique situation that necessitates a different conclusion. When a statute provides the right to be present, courts have held that absent an explicit provision authorizing remote hearings, physical presence is required. For example, a statute enacted in 1976 granted prisoners the right to “appear” before the Parole Commission.⁷⁹ In *Terrell v. United States*, the Sixth Circuit held that the statute’s use of the word “appear” mandated physical presence.⁸⁰ Specifically, the court rejected the government’s arguments that the word “appear” meant to “be visible,” and that the statute could be interpreted to encompass subsequent technological advances.⁸¹ Rather, because Congress could not have foreseen the use of VTC technology for parole proceedings when it enacted the statute, the court held that the statute “unambiguously” prohibited the agency from compelling the use of VTC.⁸² The court noted that Congress had the opportunity to update the statute if it had meant to account for technological advances, but failed to do so.⁸³

⁷⁹ *Terrell v. United States*, 564 F.3d 442, 444 (6th Cir. 2009).

⁸⁰ *Id.* at 452.

⁸¹ *Id.* at 451–53.

⁸² *Id.* at 454–55.

⁸³ *Id.* at 454; *cf.* *United States v. Lawrence*, 248 F.3d 300, 302–03 (4th Cir. 2001) (concluding that the plain text of Rule 43 of the Federal Rules of Criminal Procedure, which requires a defendant “to ‘be present’ at every stage of the trial,” “mandates that a defendant be physically present at sentencing except when the rule specifically provides otherwise.”).

Although the statute at issue in *Terrell* was enacted in the criminal context, the parole proceedings at issue were not unlike administrative separation proceedings: matters of guilt or innocence were not at issue, prisoners were afforded a limited right to counsel, and there were limited procedural protections governing witness testimony.⁸⁴ Also, just as the statute in *Terrell* was enacted prior to the use of VTC technology, the right to appear in person was established as a minimum procedural protection shortly after the UCMJ was enacted in the mid-twentieth century.⁸⁵ At the time, Congress could not have envisioned the use of remote technology at administrative boards, and it has since had opportunity to sanction the use of such technology, as noted in the 2011 Administrative Conference of the United States, discussed in Section III, below.

Even absent express statutory prohibition, conducting an administrative board entirely through VTC is likely to violate a member's due process rights. Administrative separations are more quasi-criminal, rather than civil, in nature, as they are often convened to determine if a basis exists to separate an enlisted member because of the commission of a serious offense or a pattern of misconduct. The board members at an administrative separation proceeding effectively fill the role of a fact-finding jury.

The use of VTC to conduct criminal trials is generally considered to be a violation of the defendant's Sixth Amendment right to confrontation, with some exceptions made for arraignments, initial appearances, and other hearings.⁸⁶ Because "virtual reality is rarely a substitute for actual presence . . . even in the age of advancing technology," defendants' Sixth Amendment rights are violated when the fact-finder is not given the opportunity to judge the credibility of witnesses in person.⁸⁷ Indeed, the fact that the *prosecution* will generally oppose a sentencing hearing being conducted remotely, even when requested by the defendant, is evidence that the demeanor of witnesses as observable in person can materially alter the outcome of any proceeding.⁸⁸ These fundamental principles have been held applicable in the civil context when determining whether a due process violation occurred in remote

⁸⁴ *Terrell v. U.S.*, 564 F.3d 442, 451 (6th Cir. 2009).

⁸⁵ See U.S. DEP'T OF DEF. INSTR., *supra* note 74 and accompanying text.

⁸⁶ See, e.g., Alicia L. Bannon & Douglas Keith, *Remote Court: Principles for Virtual Proceedings During the Covid-19 Pandemic and Beyond*, 115 NW. U.L. REV. 1875, 1881–83 (2021).

⁸⁷ See *United States v. Lawrence*, 248 F.3d 300, 304 (4th Cir. 2001) (discussing the use of VTC in sentencing proceedings); see also *Edwards v. Logan*, 38 F.Supp.2d 463, 467 (W.D.Va. 1999) ("Video conferencing . . . is not the same as actual presence, and it is to be expected that the ability to observe demeanor, central to the fact-finding process, may be lessened in a particular case by video conferencing. This may be particularly detrimental where it is a party to the case who is participating by video conferencing, since personal impression may be a crucial factor in persuasion").

⁸⁸ Courts will rarely grant a defendants' request to conduct a sentencing hearing remotely. See, e.g., 248 F.3d at 304 (4th Cir. 2001).

hearings.⁸⁹ No court has yet held that remote testimony is the constitutional equivalent of in-person testimony in any context.⁹⁰

As described above, administrative separations are often used in lieu of seeking prosecution at a court-martial. It is not unusual for the central issue in an administrative board to revolve around drug use, sexual assault, or other forms of felonious misconduct. Consequently, an administrative board will often engage in exhaustive fact-finding missions and will rely heavily on witness testimony and other evidence to establish material facts. The grave stakes and complex nature of administrative boards have led the military to recognize that a member has a right to counsel.⁹¹ Because of the gravity of these proceedings, in-person appearance becomes a crucial factor in judging the credibility of witnesses, responding to the demeanor of the fact-finder and presiding official, and maintaining meaningful access to counsel.⁹² Thus, conducting these proceedings over entirely remote means severely undermines the fundamental fairness of the hearing.

b) Administrative Proceedings

In the civil context, courts have generally denied the contention that compelling a party to participate in a remote hearing categorically violates their due process rights.⁹³ However, the civil cases that have precipitated these rulings cannot be fairly compared to military separation hearings. To demonstrate these differences, this section will briefly examine two predominant practice areas where courts have upheld the use of compelled remote hearings: immigration and labor proceedings.

First, immigration courts have used VTC in removal proceedings since the early 1990s.⁹⁴ Because deportation involves a loss of liberty, noncitizens are entitled to due process prior to being deported.⁹⁵ However, administrative separations pose several key distinctions from the immigration context. Importantly, unlike administrative separations, the use of VTC in removal

⁸⁹ See, e.g., *Rusu v. INS*, 296 F.3d 316, 323 (4th Cir. 2002).

⁹⁰ Fredric I. Lederer, *The Evolving Technology-Augmented Courtroom Before, During, and After the Pandemic*, 23 VAND. J. ENT. & TECH. L. 301, 320 (2021).

⁹¹ See Irwin, *supra* note 1 at 53.

⁹² *Vilchez v. Holder*, 682 F.3d 1195, 1199 (9th Cir. 2012); *Rusu v. INS*, 296 F.3d 316, 322–24 (4th Cir. 2002); JEREMY GRABOYES, ADMIN. CONF. OF THE U.S., LEGAL CONSIDERATIONS FOR REMOTE HEARINGS IN AGENCY ADJUDICATIONS 13 (2020), https://www.acus.gov/sites/default/files/documents/Legal%20Considerations%20for%20Remote%20Hearings%20in%20Agency%20Adjudications_1.pdf.

⁹³ *Terrell v. United States*, 564 F.3d 442, 454 (6th Cir. 2009); GRABOYES, *supra* note 92 at 11.

⁹⁴ 8 U.S.C. § 1229a(b)(2)(A)(iii); 8 C.F.R. § 1003.25(c) (“An Immigration Judge may conduct hearings through video conference to the same extent as he or she may conduct hearings in person.”).

⁹⁵ See, e.g., *Chew v. Colding*, 344 U.S. 590, 600 (1953); *Sung v. McGrath*, 339 U.S. 33, 52–53 (1950); *Hirsh v. INS*, 308 F.2d 562, 566–67 (9th Cir. 1962); *Snajder v. INS*, 29 F.3d 1203, 1207 (7th Cir. 1994).

hearings has been expressly authorized by Congress.⁹⁶ As the Supreme Court has noted, “[t]he exclusion of aliens and the reservation of the power to deport have no permissible counterpart in the Federal Government’s power to regulate the conduct of its own citizenry.”⁹⁷ Thus, the fact that Congress passed a statute permitting the use of VTC in the immigration context does not necessarily authorize the use of VTC in other contexts. Indeed, Congress’ specific authorization of VTC in the immigration context, and its silence on the use of VTC in other contexts, signals Congressional disfavor of VTC in military separations under the negative-implication canon of statutory interpretation, *expressio unius est exclusio alterius*.⁹⁸ When assessing the validity of these remote hearings, courts have applied the balancing test from *Mathews v. Eldridge*, noting the government’s strong compelling interest in administrative efficiency when controlling immigration, which “might well be unacceptable in other proceedings.”⁹⁹ The government’s strong interest in addressing the historical backlog of immigration hearings cannot be compared to military separations, where the discharges occur much less frequently, and there is no reported shortage of resources to conduct such hearings. Finally, even though the use of VTC in immigration removal proceedings has not been categorically barred as unconstitutional, courts have held that noncitizens’ rights may still be violated in such settings.¹⁰⁰ However, most claims have simply failed to prove that a due process violation resulted in actual prejudice, which is necessary to enjoin their removal.¹⁰¹

Second, VTC is used, and even encouraged, in certain federal agencies that have high volume caseloads, such as the Social Security Administration’s Office of Disability Adjudication and Review.¹⁰² However, a military administrative separation is not akin to a typical government benefit hearing. A service member is not merely displaced from military service when they are separated under less than honorable conditions; they are barred from many types of employment and marked by a lifelong stigma.¹⁰³ Courts have

⁹⁶ 8 U.S.C. § 1229a(b)(2)(A)(iii).

⁹⁷ *Mathews v. Diaz*, 426 U.S. 67, 80 (1976).

⁹⁸ *United States v. Vonn*, 535 U.S. 55, 65 (2002) (the canon *expressio unius est exclusio alterius* has force only when the items expressed are members of an “associated group or series,” justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence).

⁹⁹ *Rusu v. INS*, 296 F.3d 316, 323 (4th Cir. 2002) (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)).

¹⁰⁰ See *Reyez v. AG U.S.* 767 F. App’x 358, 362 (3d Cir. 2019); *Vilchez v. Holder*, 682 F.3d 1195, 1199 (9th Cir. 2012); *Rusu v. INS*, 296 F.3d 316, 323 (4th Cir. 2002).

¹⁰¹ See 296 F.3d at 323; 682 F.3d at 1199.

¹⁰² Adoption of Recommendations, 76 Fed. Reg. 48789, 48795–96 (Aug. 9, 2011).

¹⁰³ See *Stapp v. Resor*, 314 F. Supp. 475, 478 (S.D.N.Y. 1970) (“[T]here can be no doubt that a military discharge on other than honorable grounds is punitive in nature, since it stigmatizes the service member’s reputation, impedes his ability to gain employment, and is in his life, if not the law, prima facie evidence against the service member’s character, patriotism, or loyalty.”).

recognized the reality of seeking employment when stigmatized by a less than honorable discharge, noting that “employers routinely ask discharged service personnel for documentation verifying their service and discharge. The truth of the matter is that military separation codes are known, understood, and available to the part of society that counts—i.e., employers.”¹⁰⁴ Additionally, the cases where courts have upheld the use of video or telephonic hearings in other administrative contexts typically do not rely heavily—or at all—on witness testimony, and they rarely involve the serious criminal matters seen in the military separation context.¹⁰⁵ Accordingly, the widespread acceptance of remote hearings in the civil context should not be applicable to military separations.¹⁰⁶

Even in the context of a typical government employment termination or benefit hearing, the Administrative Conference of the United States, established by Congress to study the efficiency, adequacy, and fairness of the administrative procedures used by federal agencies, has cautioned against the use of VTC.¹⁰⁷ Specifically, in 2011, the Administrative Conference considered the use of VTC at administrative hearings within the federal government and advised limiting its use only to federal agencies that have high-volume caseloads.¹⁰⁸ Even so, the Conference recommended the use of VTC on a “voluntary basis and [to] allow a party to have an in-person hearing or proceedings if the party chooses to do so.”¹⁰⁹ The recommendation considered agencies like the Department of Justice’s Executive Office for Immigration Review, discussed *supra*, where procedural due process requirements are statutorily less stringent than those that apply at military administrative separation proceedings.¹¹⁰ The federal government, writ large, should strive for consistency and fairness in administrative procedures. Hence, this

¹⁰⁴ *May v. Gray*, 708 F. Supp. 716, 722 (E.D.N.C. 1988).

¹⁰⁵ *See, e.g.*, *William Beaumont Hosp.*, 370 N.L.R.B. No. 9 (N.L.R.B. Aug. 13, 2020) (fair labor practice dispute); *Morrison Healthcare*, 369 N.L.R.B. No. 76, 1, 2 (N.L.R.B. May 11, 2020) (“[W]here a hearing does not include witness testimony, the Regional Director may proceed with a telephonic pre-election hearing.”).

¹⁰⁶ Numerous state courts have also held that compelled use of remote technology in child custody disputes does not violate parents’ due process rights, although parents’ interests in maintaining custody of their children are great. *E.g.*, *TJH*, 485 P.3d 408, 415–16 (Wyo. 2021); *E.C.*, 2021 IL App (1st) 21097-U. However, in upholding the use of compelled virtual hearings in custody disputes, courts have considered not just the parents’ interests in having an in-person hearing, but also the child’s interest in receiving a timely custody determination. *J.S.*, 167 N.E.3d 712 (Ind. App. 2021); *in re TJH*, 485 P.3d 408 (Wyo. 2021); *ex rel. E.C.*, 2021 IL App (1st) 210197-U. Thus, the existence of this third-party interest in the family law context distinguishes the use of remote technology from the context of administrative separations in the military.

¹⁰⁷ *Adoption of Recommendations*, 76 Fed. Reg. 48789, 48796 (Aug. 9, 2011).

¹⁰⁸ *See id.* (highlighting the Social Security Administration’s Office of Disability Adjudication and Review as an agency with a high-volume caseload, having conducted a total of 120,624 Video hearings in 2010. The Coast Guard in contrast, held approximately 33 administrative separation hearings in 2020).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 48795.

recommendation, when considered along with the intent of Congress and military commanders, weighs strongly in favor of, at minimum, the armed services adhering to in-person hearings when service members are being involuntarily separated.

iv. Special Considerations for the COVID-19 Pandemic

It is also important to address the use of remote technology in response to the dangerous environment posed by the COVID-19 pandemic. Courts have indicated an unwillingness to second-guess an executive agency's determination that holding remote proceedings is necessary to promote public health and to promptly resolve open matters during a pandemic.¹¹¹ Further, pursuant to the Coronavirus Aid, Relief, and Economic Security ("CARES") Act, the Judicial Conference, an administrative policy-making body for the federal courts, approved the use of VTC for certain criminal and civil proceedings throughout the duration of the COVID-19 national emergency.¹¹²

There is no dispute that holding administrative boards remotely is a logical way to reduce the risk of infection to military members while adjudicating a member's case in a timely manner. However, Congress relied on very similar reasoning when it suspended in-person separation hearings amidst the nation's state of emergency in World War II. As history has shown, this more summary procedure resulted in hundreds of officers being unjustly separated, and Congress shortly thereafter condemned the practice as a grave error.¹¹³

Today, in-person separation boards can and have been implemented during the COVID-19 pandemic in a safe manner. An administrative separation board can be conducted with less than ten people in a room and thus can easily satisfy social distancing requirements. Accordingly, service members should have the ultimate right to waive an in-person hearing if, after consulting with counsel and considering their own medical condition, they believe it is in their best interest to have a virtual hearing. Otherwise, the fact that in-person administrative separation hearings have occurred in all the armed services throughout the COVID-19 pandemic is evidence that there is no compelling government interest in mandating the use of VTC technology at

¹¹¹ *E.g.*, Nat'l Immigration Project of the Nat'l Lawyers Guild v. Exec. Office of Immigration Review, 456 F. Supp. 3d 16, at *40–41 (D.D.C. 2020); Doe v. Transylvania Univ., 2020 U.S. Dist. LEXIS 63965, at *37 (E.D. Ky. 2020); MPLX Ozark Pipe Line LLC, 171 F.E.R.C. P 63018, at *66140 (F.E.R.C.) (May 4, 2020).

¹¹² CARES Act, Pub. L. No. 116-136 (2020); *Judiciary Authorizes Video/Audio Access During COVID-19 Pandemic*, U.S. CTS. (Mar. 31, 2020), <https://www.uscourts.gov/news/2020/03/31/judiciary-authorizes-videoaudio-access-during-covid-19-pandemic>.

¹¹³ *See* S. Rep. No. 556, at 2 (1941); H.R. Rep. No. 816, at 6 (1947); S. Rep. No. 1543, at 3 (1948); *Subcommittee Hearings on H.R. 2744 to Provide for the Selection for Elimination and Retirement of Officers of the Regular Army, for the Equalization of Retirement Benefits for Members of the Army of the United States*, 80th Cong. 3340, 3541 (1947).

administrative separation hearings.

III. ADMINISTRATIVE PROCEDURE ACT AS A REMEDY

In addition to any due process violations, Section III examines how service policies may run afoul of the Administrative Procedure Act (“APA”) when they contemplate using VTC at separation proceedings in violation of superseding military policies.¹¹⁴ Specifically, DoD regulations provide enlisted members in each military department with the “right to be present at the [separation] hearing.”¹¹⁵ Similarly, the Coast Guard, which is one of the six armed forces but is not considered a military department,¹¹⁶ has provided all of its members with the right to be present at involuntary separation proceedings. As a case study, this paper will examine how, without changing its superseding regulations, a recent Coast Guard policy authorizing VTC in enlisted administrative separation proceedings violates the APA. Although the authors are not aware of any other service policy that has yet to authorize VTC at separation proceedings, an analysis of the Coast Guard’s policy is relevant to assessing potential future policy changes that may be implemented by another military branch.

A. Relevant Coast Guard Policies

The Coast Guard’s policies concerning administrative separations are promulgated in several different service instructions. First, the Coast Guard Administrative Investigations Manual (“AIM”) is a Commandant Instruction that details the specific rights and procedural processes that members must be afforded during various types of administrative hearings, including separation proceedings.¹¹⁷ Specifically, the AIM protects a service member’s right “[t]o be present” at separation proceedings.¹¹⁸ Similarly, the Coast Guard Manual for Military Separations (“MMS”) is another Commandant Instruction that establishes the Coast Guard’s policy and procedures for

¹¹⁴ This part focuses on *enlisted* separation boards. However, the arguments in this section would also be generally applicable to a military services’ attempt to conduct involuntary separation proceedings for *officers* due to the statutory right for officers to appear “in person” before a separation board of inquiry. See Defense Officer Personnel Management Act of 1980, Pub. L. No. 96-513, 94 Stat. 2835.

¹¹⁵ U.S. DEP’T OF DEF., INSTR. 1332.14.

¹¹⁶ 10 U.S.C. § 101(a)(4).

¹¹⁷ U.S. COAST GUARD, ADMINISTRATIVE INVESTIGATIONS MANUAL 1 (2007), https://media.defense.gov/2017/Mar/24/2001721520/-1/-1/0/CIM_5830_1A.PDF [hereinafter ADMINISTRATIVE INVESTIGATIONS MANUAL].

¹¹⁸ *Id.* at 10-1, 10-2. According to the AIM, an administrative separation board is a formal administrative investigation in which a Party is designated and afforded a hearing. The AIM emphasizes that a formal investigation and hearing is necessary where there is “a substantial risk of injustice to the individual or individuals if they were not afforded the rights of a Party during the investigation.” In the context of a formal investigation, the AIM also states that “‘due process’ means giving persons all the procedural protections necessary.” *Id.* at 3-6.

separations.¹¹⁹ Like the AIM, the MMS does not contemplate the use of VTC at separation proceedings, but instead states that all members subject to an other than honorable discharge have “the right to present the case to an administrative discharge board” according to the procedures outlined in the AIM.¹²⁰

A third relevant instruction for administrative separation boards is the Enlisted Personnel Administrative Boards (“EPAB”) Manual.¹²¹ The EPAB is a subordinate instruction issued pursuant to the AIM and MMS, promulgated by the Commander of the Coast Guard’s Personnel Service Center, who is a subordinate of the Commandant.¹²² The EPAB explicitly protects an enlisted service member’s right “[t]o *be present* during board proceedings.”¹²³ However, the EPAB interprets this right to also permit the service member, witnesses, and other participants to “appear through the use of [VTC]” when the board president determines the use of such technology “to be beneficial to the proceedings.”¹²⁴ During the COVID-19 pandemic, the Coast Guard interpreted this policy as allowing separation boards to be conducted entirely over VTC.¹²⁵

B. APA Concerns

i. Justiciability

Service members involuntarily separated using VTC, contrary to procedural protections, can seek redress from the government through the APA. The APA entitles any person who has been legally wronged by a federal agency to obtain judicial review, thereby waiving sovereign immunity of the United States.¹²⁶ The APA requires federal agencies, including the armed services, to follow their own published procedures.¹²⁷ Although great deference is given to military decision-making, courts do not abdicate their duty to

¹¹⁹ U.S. COAST GUARD, MILITARY SEPARATIONS 1 (2018), https://media.defense.gov/2019/Dec/09/2002222065/-1/-1/0/CIM_1000_4.PDF.

¹²⁰ *Id.* at 1-117.

¹²¹ ENLISTED ADMINISTRATIVE BOARDS MANUAL, *supra* note 60.

¹²² *See id.*

¹²³ *Id.* at 1-6.

¹²⁴ *Id.* at 5-2.

¹²⁵ *See* U.S. COAST GUARD, *supra* note 61.

¹²⁶ 5 U.S.C. § 702 (2021); *Martinez v. United States*, 26 Cl. Ct. 1471, 1476 (1992).

¹²⁷ *Crane v. Sec’y of the Army*, 92 F. Supp. 2d. 155, 164 (W.D.N.Y. 2000) (citing *Smith v. Resor*, 406 F.2d 141, 145 (2d Cir.1969)); *see also* *Montilla v. I.N.S.*, 926 F.2d 162, 167 (2d Cir. 1991) (holding that “where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures” (quoting *Morton v. Ruiz*, 415 U.S. 199, 235, 39 L. Ed. 2d 270, 94 S. Ct. 1055 (1974))).

review military actions that violate their own regulations.¹²⁸ When the military chooses to introduce its own procedural limits, a federal court may review any violations of such limits even if the underlying decision is nonjusticiable.¹²⁹ In such circumstances, the court “merely determines whether the procedures were followed by applying the facts to the statutory or regulatory standard.”¹³⁰

Also relevant to service members seeking relief in federal court are the Tucker Act and the Military Pay Act.¹³¹ Service members can sue the federal government through the Tucker Act, which gives federal courts “jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department.”¹³² Although the claim must be one for money damages not sounding in tort, federal courts have been granted jurisdiction to “provide an entire remedy and to complete the relief afforded by the judgment” and have been authorized to “issue orders directing restoration to office or position and correction of applicable records.”¹³³

In the context of military discharge cases, the applicable “money-mandating” statute that is generally invoked is the Military Pay Act.¹³⁴ In order to bring a military discharge case in the Court of Federal Claims, a service member must allege that, because of unlawful discharge, they are entitled to money in the form of the pay that they otherwise would have received but for the unlawful discharge.¹³⁵ Thus, service members of the armed forces wrongfully discharged before the current end of their enlistment would have the right to pay based on procedural irregularity or a failure to comply with the service’s own applicable regulations.¹³⁶ The application of the APA, Tucker Act, and Military Pay Act to administrative separations exposes the armed services to financial and reputational harm when service members seek relief

¹²⁸ 92 F. Supp. 2d. at 164–65 (W.D.N.Y. 2000) (citing *Gunning v. Walker*, 663 F. Supp. 941, 943 (D.Conn. 1987)); *see also* *Phillips v. United States*, 910 F. Supp. 101, 108 (holding that the APA requires the United States Military Academy to act in accordance with the procedures it has imposed upon itself to ensure that due process requirements are met).

¹²⁹ *See, e.g.*, *Lippmann v. United States*, 127 Fed. Cl. 238, 244 (2016) (citing *Murphy v. United States* 993 F.2d 871, 873 (Fed. Cir. 1993)); *Mack v. Rumsfeld*, 784 F.2d 438, 439 (2d Cir.1986); *see also* *Crawford v. Cushman*, 531 F.2d 1114, 1120 (2d Cir.1976) (citing *Harmon v. Brucker*, 355 U.S. 579 (1958)).

¹³⁰ 127 Fed. Cl. at 244 (2016) (citing 993 F.2d at 873).

¹³¹ 28 U.S.C. § 1491; 37 U.S.C. § 204.

¹³² 28 U.S.C. § 1491(a)(1); *see also* *United States v. Mitchell*, 463 U.S. 206, 212 (1983).

¹³³ *United States v. King*, 395 U.S. 1, 2-3 (1969); 28 U.S.C. § 1491(a)(1)–(2).

¹³⁴ *Lippmann v. United States*, 127 Fed.Cl. 238, 246 (2016) (citing *Martinez v. United States*, 333 F.3d 1295, 1303 (Fed. Cir. 2003)).

¹³⁵ *Id.*

¹³⁶ *See* *Fisher v. United States*, 402 F.3d 1167, 1177 (Fed. Cir. 2005).

for violations of their due process rights at these administrative separation hearings.

ii. Agency Deference

Proponents of VTC technology may argue that using VTC at administrative separation hearings is permissible because federal courts should give deference to an agency's interpretation of a rule. Because the EPAB permits the use of VTC, the Coast Guard might argue this policy fulfills the member's right "to be present" outlined in the AIM.¹³⁷ However, in order to receive such deference, the agency's interpretation of their own regulation must pass the multi-factor test set out in *Kisor v. Wilkie*.¹³⁸ Two parts of this test are particularly relevant here. First, the agency's interpretation of its regulation must "implicate its substantive expertise," as "the basis for deference ebbs when the subject of a dispute is distant from agency's ordinary duties."¹³⁹ In this context, the Coast Guard regulation permitting the use of VTC does not implicate any area of military expertise. Rather, the regulation involves procedural due process—a matter which the courts are best suited to interpret.¹⁴⁰

Second, the regulation at issue must be "genuinely ambiguous" after exhausting "all the traditional tools of construction," including the "text, structure, history and purpose of the regulation."¹⁴¹ Here, the AIM affords service members the explicit guarantee to be "present" at separation proceedings. The AIM is silent as to the use of VTC, despite the technology's viability in 2007 when the manual was published.¹⁴² Per the *expressio unius est exclusio alterius* canon of construction, the positive expression of one matter implies the exclusion of others, suggesting that the policy in the AIM is not ambiguous as to whether the right to be "present" encompasses the use of VTC.¹⁴³ Further, physical presence is necessary in order to protect other rights provided in the AIM. For example, the AIM guarantees a right "to examine and to object to the introduction of documentary and physical evidence as well as

¹³⁷ ENLISTED ADMINISTRATIVE BOARDS MANUAL, *supra* note 60 at 5-2.

¹³⁸ *Kisor v. Wilkie*, 139 S. Ct. 2400, 2403 (2019). Specifically, *Kisor* expanded on the requirements necessary for an agency to receive *Auer* deference when interpreting its own regulations by establishing a five-step test. *See id.* at 2403 (citing *Auer v. Robbins*, 519 U.S. 452 (1997)).

¹³⁹ *Id.*

¹⁴⁰ ENLISTED ADMINISTRATIVE BOARDS MANUAL, *supra* note 60 at 1-14 (2014) (guaranteeing due process in separation proceedings).

¹⁴¹ *Kisor v. Wilkie*, 139 S. Ct. 2400, 2404 (2019).

¹⁴² A Notice by the Administrative Conference of the United States, 76 Fed. Reg. 48789 (Aug. 09, 2011) ("Since the early 1990s, video conferencing technology ('VTC') has been explored by various entities in the public and private sectors for its potential use in administrative hearings and other adjudicatory proceedings.")

¹⁴³ *See Christensen v. Harris County*, 529 U.S. 576, 583 (2000) ("We accept the proposition that '[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode.'")

written statements.”¹⁴⁴ The fact that it would be physically impossible to adequately examine and confront physical evidence from a remote location reinforces the requirement of an in-person appearance before a board. Thus, the explicit requirement for an in-person appearance at administrative separation hearings, and the silence on VTC technology use as a substitute, suggests that the Coast Guard is not entitled to deference when interpreting the member’s right “to be present” outlined in the AIM.¹⁴⁵

iii. Authorization of VTC is Contrary to the APA

The authorization of VTC in a subsidiary Coast Guard regulation is contrary to the Coast Guard’s own superseding regulations and therefore a violation of the APA.¹⁴⁶ Although the Commandant permissibly delegated authority to the Personnel Service Center to establish Coast Guard policy governing enlisted separation boards, the EPAB’s policy on the use VTC technology exceeds the scope of this authority. An administrative separation is a formal administrative investigation.¹⁴⁷ The AIM states that for formal investigations, members must be “accorded their *rights to be present* and challenge evidence.”¹⁴⁸ Because the EPAB permits using VTC, contrary to the AIM’s guarantee of the right to appear in person in a formal investigation, the EPAB has exceeded its delegated authority; as such, a hearing using VTC no longer affords the rights guaranteed in a formal investigation. Additionally, as discussed in Section II, courts generally will not interpret the right to be “present” as encompassing the use of VTC, unless explicitly stated by the statute or regulation.¹⁴⁹ Because neither the AIM nor the MMS explicitly contemplates the use of VTC in administrative separation proceedings, the EPAB policy permitting the use of the VTC is contrary to the Coast Guard’s own regulations.

¹⁴⁴ ADMINISTRATIVE INVESTIGATIONS MANUAL, *supra* note 117 at 10-1.

¹⁴⁵ *Kisor v. Wilke*, 139 S. Ct. 2400, 2404 (2019). A third step in the *Kisor* test states that a court may not defer to a new interpretation that creates an unfair surprise. *Id.* at 2407. In practice, the Coast Guard has entitled its service members to an opportunity to defend themselves in person against an unjust discharge and even seek retention. Indeed, the Coast Guard has provisions protecting this right in all of its manuals that deal with administratively separating service members from the Service. See ADMINISTRATIVE INVESTIGATIONS MANUAL, *supra* note 117; ENLISTED ADMINISTRATIVE BOARDS MANUAL, *supra* note 60; MILITARY SEPARATIONS, *supra* note 119. Thus, service members’ reliance on such entitlements and practice is expected and reasonable. Yet, the EPAB’s VTC policy eliminates this right to appear in person without any consideration of reliance interests on the previous guarantee of the right to appear in person.

¹⁴⁶ See *Montilla v. I.N.S.*, 926 F.2d 162, 169 (2d Cir. 1991)

¹⁴⁷ “The Coast Guard enlisted service member whose conduct or performance of duty is under review by an administrative board is the ‘respondent.’ Although the respondent in an administrative board is a ‘party’ to a formal investigation as defined in Article 1.D.8. of the AIM, he or she shall be referred to as the ‘respondent’ in all board records and reports to ensure consistent application of terms.” ENLISTED ADMINISTRATIVE BOARDS MANUAL, *supra* note 60 at 1-2.

¹⁴⁸ *Id.* at 1-3.

¹⁴⁹ See *infra* Section II.B.3.a.

CONCLUSION

The use of VTC does not satisfy a service member's right to appear in person before an administrative separation board. Due to the broad prosecutorial and administrative discretion afforded to military commanders, Congress has historically emphasized the importance of allowing service members the opportunity to present a defense in person at separation proceedings. Additionally, the quasi-criminal nature of administrative separation proceedings creates situations incomparable to civil hearings where the use of VTC has been held to be constitutional. A military administrative separation board conducted by VTC would violate the APA, at least in the case of the Coast Guard, where a comprehensive examination of the different regulations governing administrative separations warrants this conclusion. The Coast Guard, and presumably other federal agencies, often have conflicting or contradictory regulations and authorities, especially concerning the use of a burgeoning technology. The Coast Guard is headed dangerously close to violating the procedural rights of enlisted service members facing involuntary separation under other than honorable conditions. Because VTC has yet to be used at an administrative separation hearing, the Coast Guard (and other armed services similarly situated) have the opportunity to chart a course correction before any military member suffers such a due process violation.

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