

THE FIGHT FOR THE RIGHT TO FIGHT AND THE FORGOTTEN NEGRO PROTEST MOVEMENT:

THE HISTORY OF EXECUTIVE ORDER 9981 AND ITS EFFECT UPON *BROWN V. BOARD OF EDUCATION* AND BEYOND

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I. INTRODUCTION

“The colored man in uniform is expected by the War Department to develop a high morale in a community that offers him nothing but humiliation and mistreatment. . . . The War Department has failed to secure to the colored soldier protection against violence on the part of civilian police and to secure justice in the courts in communities near-by to Southern stations. . . . On the training fields the development of morale does not take into consideration Jim-Crow laws and customs. The “Four Freedoms” cannot be enjoyed under Jim-Crow influences.”

-Brigadier General Benjamin O. Davis, Sr.¹

With these words, the first black general in the United States military, Brigadier General Benjamin O. Davis, Sr., accurately expressed the deep-felt resentment held by virtually every black military member during World War II. Although blacks were members of the military, they continued to be subject to the indignities of discrimination in the form of poor treatment by local communities, the military establishment

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1. 5 BLACKS IN THE UNITED STATES ARMED FORCES, BASIC DOCUMENTS 292 (Morris J. MacGregor & Bernard C. Nalty eds., 1977) [hereinafter 5 BASIC DOCUMENTS] (Letter from General Davis, to John J. McCloy (Nov. 10, 1943). For a discussion of the Four Freedoms, see discussion *infra* note 30.

(including superiors, contemporaries, and subordinates), and Jim Crow military policies. General Davis, along with many other military and civilian proponents of military equality, fought discrimination on all fronts. From privates in the field reporting discriminatory treatment up the chain of command, to A. Philip Randolph's demand for an Executive Order, virtually all segments of black society recognized the irony of black soldiers fighting for the freedom of oppressed peoples abroad while simultaneously being subjected to oppression themselves. The result of the struggle for the Right to Fight and equality in the military, Executive Order 9981,² not only began a new day for blacks in the military, but had implications in the fight for broader civil rights. The Executive Order was a presidential proclamation of the right to bear arms for one's country as a civil right. It also provided ammunition for advocates presenting subsequent challenges against discrimination in other contexts, namely education. The change from segregation to integration in the military represented more than a mere change of military policy; it represented a change in the understanding of the social fabric of our nation. As such, Executive Order 9981 was an important precursor to *Brown v. Board of Education of Topeka*³ and subsequent efforts to achieve equality of opportunity in America.

The purpose of this Note is to bring Executive Order 9981 and the struggle to desegregate the military into conversation with the literature on *Brown* and subsequent civil rights gains in the sphere of race and education. In its attempt to recognize the importance of the parallel demands for civil rights made to the executive and judicial branches during the period penned as the Forgotten Years of the Civil Rights movement,⁴ current literature tends to focus primarily on the importance of only one of A. Philip Randolph's petitions to the executive branch, the March on Washington Movement (MOWM).⁵ Many commentators view the MOWM as both the ultimate expression of African American rights consciousness during the war period and as a key step in the civil rights fight which led to the *Brown* decision.⁶ However, if, as it has been

2. Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948).

3. 347 U.S. 483 (1954).

4. RICHARD M. DALFUME, *DESEGREGATION OF THE U.S. ARMED FORCES I* (1969).

5. The March on Washington Movement, spearheaded by A. Philip Randolph, aimed to convince President Roosevelt to issue an Executive Order banning segregation and racial discrimination. Included in Randolph's list of demands was the integration of the army and naval forces. Seeking to avoid the possibility of civil unrest, President Roosevelt issued Executive Order 8802 in 1941. *TAPS FOR A JIM CROW ARMY: LETTERS FROM BLACK SOLDIERS IN WORLD WAR II* 127-28 (Philip McGuire ed., 1993) [hereinafter *TAPS FOR A JIM CROW ARMY*]. Executive Order 8802 fell significantly short of Randolph's demands. It prohibited discrimination, not segregation, in the nation's defense industries but said nothing about discrimination and segregation in the military. *Id.* at 128.

6. See generally Richard M. Dalfume, *The "Forgotten Years" of the Negro Revolution*, 55 J. AM. HIST. 90, 99 (1968) (discussing how Executive Order 8802 fostered a hope that energized subsequent black protest); Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 19-20 (1994) (recognizing the attainment of political concessions for blacks as a result of the March on Washington Movement).

suggested, the importance of the MOWM to the *Brown*-era civil rights movement has almost been forgotten,⁷ the even more effectual Committee Against Jim Crow in Military Training (CAJC) and the resulting Executive Order 9981 have been overlooked. The efforts to achieve equality in the military during the Forgotten Years, as well as the post-war petition for military integration by Randolph, were necessary precursors to advancements made during the *Brown*-era civil rights movement. While Executive Order 8802⁸ was an initial step in the right direction and provided the necessary initial momentum, Executive Order 9981 made a more concrete step toward integration in American society and provided essential momentum for the *Brown* decision.

The two major issues of the period were independently significant, yet inextricably linked: employment discrimination and military service. During World War II, the federal government was a significant American employer, and the military was the most significant federal employer of minorities.⁹ The fight against discrimination in federal employment (engaged by the Fair Employment Practices Committee (FEPC), a body created by Executive Order 8802 in 1941) ran in logical parallel to the fight against discrimination in the military. While Executive Order 8802 and the FEPC provided a decent start, further action was needed to ensure equality in the military. Executive Order 9981 filled the significant hole left by Executive Order 8802's absence of language prohibiting discrimination in the military. Executive Order 8802 was, in effect, a deferral of action on the issue of discrimination by the federal government, setting up a committee to evaluate the problem of discrimination (the FEPC), in lieu of taking direct action.¹⁰ Executive

7. See Dalfiume, *supra* note 6, at 98.

8. Exec. Order No. 8802, 6 Fed. Reg. 3109 (June 25, 1941).

9. MORRIS J. MACGREGOR, JR., *INTEGRATION OF THE ARMED FORCES 1940-1945*, at 17 (1981).

10. The inefficacy of Executive Order 8802 is highlighted upon inspection of A. Philip Randolph's original demands:

[A]n executive order forbidding government contracts to be awarded to a firm which practiced discrimination in hiring, an executive order abolishing discrimination in government defense training courses, an executive order requiring the United States Employment Service to supply workers without regard to race, an executive order abolishing segregation in the armed forces, an executive order abolishing discrimination and segregation on account of race in all departments of the federal government, and a request from the President to Congress to pass a law forbidding benefits of the National Labor Relations Act to unions denying Negroes membership.

Dalfiume, *supra* note 6, at 99. *But see* Dalfiume, *supra* note 6, at 99 (recognizing that, although the extent of the success of the MOWM is questionable, the movement had the positive effect of capturing the imagination of the black masses); William J. Collins, *Race, Roosevelt, and Wartime Production: Fair Employment in World War II Labor Markets*, 91 AM. ECON. REV. 272, 272 (2001) ("[T]he Roosevelt administration's effort to enforce a nondiscrimination policy in war-related employment played an economically significant role in opening doors for black workers."); MERL E. REED, *SEEDTIME FOR THE MODERN CIVIL RIGHTS MOVEMENT: THE PRESIDENT'S COMMITTEE ON FAIR EMPLOYMENT PRACTICE, 1941-1946*, at 317 (1991) (citing the fact that while the FEPC was a weak agency, it did manage to conduct well-publicized hearings and investigations, exposing racist conditions and spurring black protest).

Order 9981, on the other hand, represented a direct assault on discrimination.

The frontal attack on segregation and discrimination in the military marked a historical shift in thinking on equality. The elimination of Jim Crow in federal employment and the military invigorated the fight against discrimination in other areas. With discrimination on the ropes in the venue of federal government, it was only a matter of time before broader fights against societal injustice could be successfully raised and won. The case of *Brown v. Board of Education of Topeka* and subsequent cases (e.g., the 2003 affirmative action cases *Grutter v. Bollinger*¹¹ and *Gratz v. Bollinger*¹²) were logical beneficiaries of the social changes initiated by Executive Order 9981.¹³ The proclamation that blacks should be able to pursue their right to fight absent discrimination was an essential precursor to *Brown*; the presidential decree demonizing discrimination in federal employment was a powerful social statement which helped form the Court's contemporary thinking on social equality.

II. THE POST-WORLD WAR I WORLD

Imagine a world-class athlete in the form of an All-American halfback, intercollegiate golf champion, and championship-caliber swimmer, being told he could not join his military base's baseball team, merely because he was black. Imagine a black uniformed Army officer, owed all the privileges and respect accorded such a position, being told to sit at the back of a bus, even though the bus was a *military* bus. Both of these injustices were inflicted upon one Lieutenant Jackie Robinson.¹⁴ Segregationist Army policies and a reluctant military establishment operated in concert to make the black soldier's pursuit of his right to fight for his country extremely difficult.

11. 539 U.S. 306 (2003), *reh'g denied* 124 S. Ct. 35 (2003).

12. 539 U.S. 244 (2003).

13. The desegregation of the military was used by amici curiae in all three cases, and Executive Order 9981 was specifically cited by *Grutter* and *Gratz* amici curiae. For more discussion of Executive Order 9981's importance to the *Brown*, *Grutter*, and *Gratz* decisions, see discussion *infra* Part V.

14. LOU POTTER ET AL., *LIBERATORS: FIGHTING ON TWO FRONTS IN WORLD WAR II* 5 (1992). It is interesting to note that just two days after the bus incident, and during Robinson's subsequent court martial, the Secretary of War forbade segregation on government transportation. *Id.* at 120. This directive was no doubt influenced by the Secretary's recognition of Robinson's fame and influence on black troops. Some of the charges against Robinson were eventually dropped; he was acquitted of the remaining charges. *Id.* at 128.

A. THE PLIGHT OF THE AFRICAN-AMERICAN SOLDIER

1. ARMY POLICY

The official Army policy on Negro military service for the inter-war period was simply stated in a letter from Army Chief of Staff G.C. Marshall to an inquiring United States Senator: "It is the policy of the War Department not to intermingle colored and white enlisted personnel in the same regimental organization. The condition which has made this policy necessary is not the responsibility of the Department"¹⁵ This letter was drafted on the same day a conference was held at the White House to discuss discrimination against blacks in the military, attended by President Roosevelt; the Secretary of Navy and the Assistant Secretary of War; A. Philip Randolph, President of the Brotherhood of Sleeping Car Porters; Walter White, Secretary of the NAACP; and T. Arnold Hill of the National Youth Administration.¹⁶ While the aim of the conference was to end discrimination *and* segregation in the military, the resultant policy merely called for utilization of blacks "on a fair and equitable basis."¹⁷ In effect, the new policy established a "separate but equal" regime, allowing for segregation according to race, but striving for equality of opportunity within the segregated Negro units themselves.¹⁸ The policy statement expressly rejected integration, further entrenching segregative efforts: "The policy of the War Department is not to intermingle colored and white enlisted personnel in the same regimental organizations."¹⁹ The White House attempted to imply that the black leaders in attendance had ratified the wording of the War Department policy.²⁰ In a telegram to the White House, the three black conferees expressly rejected the implication of their approval and vociferously protested the President's approval of the new policy.²¹

The policy of segregation was also perpetuated by the Selective Service and Training Act of 1940. Black leaders had hoped that this Act, the vehicle by which Americans entered the military, would enforce notions of equality and fairness in military recruiting. In an effort to ensure equality, several spokesmen testifying before the House Committee on Military Affairs, the committee that played a significant role in the wording of the Act, urged the adoption of amendments

15. 5 BASIC DOCUMENTS, *supra* note 1, at 28 (Letter from G.C. Marshall, to H.C. Lodge, Jr. (Sept. 27, 1940)).

16. *Id.* at 26 (Conference at the White House on Discrimination Against Negroes in the Armed Forces of the United States).

17. *Id.* at 29-30 (War Department Policy in Regard to Negroes).

18. The policy called for separate Negro units in every branch of the service, the assignment of black officers only to black units, and the establishment of Negro-only aviation units. *Id.* at 30.

19. *Id.* at 30.

20. *See id.* at 36.

21. *White House Blesses Jim Crow*, CRISIS, Nov. 1940, at 350.

explicitly forbidding discrimination in the conscription and voluntary service process.²² When the Act was passed, it only banned discrimination insofar as it established a ten percent hiring quota for blacks;²³ this small percentage would be afforded an opportunity to volunteer for induction into the military regardless of race.²⁴ While these provisions appeared on their face to decrease discrimination in military hiring, a loophole in the Act undercut its ostensible ameliorative goals. The loophole provided that

no man shall be inducted for training and service under this act *unless and until he is acceptable to the land or naval forces for such training* . . . [and] no men shall be inducted . . . until adequate provision shall have been made for [separate facilities] . . . as may be determined . . . to be essential to public and personal health.²⁵

This loophole allowed discrimination in military hiring to continue under the auspices of legislation purporting to end such discrimination.

Segregation in the military was justified as a means of preventing racial trouble. Military leaders believed that, as long as segregation was the national norm, the Army was not to be a source of racial experimentation.²⁶ The thought was that if units were integrated, the racial strife generated would not only affect morale but also readiness and efficiency.²⁷ Segregation remained the express Army policy for the duration of the World War II period and even for a period shortly thereafter.²⁸

2. RIGHTS CONSCIOUSNESS, RIGHTS DENIED

Rights consciousness among black servicemen arose in concert with social consciousness among the black citizenry as a whole. The crisis in Europe gave blacks more reasons and opportunity to protest racism at home. This social consciousness was carried into the military arena by forward-thinking, democracy-hungry black soldiers. Simply by looking at their white counterparts, black soldiers were aware of the

22. ULYSSES LEE, *THE EMPLOYMENT OF NEGRO TROOPS* 72 (1994). One such proposal, supported by Howard University's Rayford W. Logan, proposed the following wording: "No provision of this act shall be construed or administered so as to discriminate against any person on account of race, creed, or color." *Id.*

23. *BLACKS IN THE MILITARY: ESSENTIAL DOCUMENTS* 103 (Bernard C. Nalty & Morris J. MacGregor eds., 1981) [hereinafter *ESSENTIAL DOCUMENTS*].

24. LEE, *supra* note 22, at 73-74.

25. *Id.* at 74 (emphasis added).

26. MACGREGOR, *supra* note 9, at 323.

27. *See generally id.* at 317.

28. Even in 1948, the Army Chief of Staff, General Omar Bradley, reiterated the need to maintain segregation as long as it was the national pattern. *Id.*

rights and privileges that they were denied. While civil equality (equality in employment in military service) was the focus of the servicemen's efforts, the related categories of political and social equality were also goals of servicemen and servicewomen entering World War II. Many black servicemen entered the military expressly because they believed that the military offered a better chance of equality than what they could obtain in the civilian world.²⁹ At bottom, blacks wanted the Four Freedoms: freedom of speech and expression, freedom of worship, freedom from want, and freedom from fear.³⁰ Blacks wanted nothing inconsistent with the Constitution or the Bill of Rights.³¹ African Americans wanted complete economic, political, and social equality,³² including the right to die for their country.³³ It was thought that equality could be achieved through military service, but black servicemen quickly realized this was not the case.

The military during World War II offered many types of career fields, the vast majority of which were off-limits to black servicemen. When allowed to enlist, blacks were primarily limited to serving in support roles. In 1940, the Navy restricted blacks to the messman's branch, while the Marine Corps and Air Corps contained no blacks at all.³⁴ Little had changed upon the nation's entry into World War II in December 1941. The military continued to deny blacks entry into majority-white career fields.³⁵ As a result, most blacks ended up in the Army Quartermaster and Engineer Corps.³⁶ The cover of the July 1940 issue of *The Crisis* most accurately described the plight of blacks in regard to military service. It depicted military warplanes flying over an

29. *See id.* at 125.

30. Charles H. Wesley, *The Negro Has Always Wanted the Four Freedoms*, in WHAT THE NEGRO WANTS 90-91 (Rayford W. Logan ed., 1944). The Four Freedoms was a list of basic human rights formulated by President Franklin D. Roosevelt in his State of the Union message to Congress on Jan. 6, 1941. Later that year they were in large part incorporated into the Atlantic Charter, a joint British and American statement of aims for a peaceful world. In his speech before Congress, Roosevelt proposed a lend-lease program to send Britain tools of war to fend off the German threat to democracy. For another description of the Four Freedoms, see THE REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS: TO SECURE THESE RIGHTS 6-9 (1947) [hereinafter PRESIDENT'S COMMITTEE].

31. Roy Wilkins, *The Negro Wants Full Equality*, in WHAT THE NEGRO WANTS 116 (Rayford W. Logan ed., 1944).

32. Doxey A. Wilkerson, *Freedom—Through Victory in War and Peace*, in WHAT THE NEGRO WANTS 193 (Rayford W. Logan ed., 1944).

33. *See* PRESIDENT'S COMMITTEE, *supra* note 30, at 40-41 ("Moreover, since equality in military service assumes great importance as a symbol of democratic goals, minorities have regarded it not only as a duty but as a right."). The right to fight was noted as being closely linked to one's right to full manhood. *For Manhood in National Defense*, CRISIS, Dec. 1940, at 375.

34. *See* DALFUME, *supra* note 4, at 26.

35. One tool used by the War Department to discriminate against blacks was illiteracy; illiterate whites, however, were accepted without question. *See* TAPS FOR A JIM CROW ARMY, *supra* note 5, at xxviii. The Secretary of War even admitted that literacy requirements were used "mainly to keep down the number of colored troops." *Id.* Therefore, it is probable that an unspoken right demanded by black servicemen was to be able to be 'just as dumb as the dumbest white soldier,' and, despite his 'dumbness,' be allowed to serve his country.

36. *See* MACGREGOR, *supra* note 9, at 24.

airfield, with the words "FOR WHITES ONLY" emblazoned across the picture and the following caption at the bottom: "Warplanes—Negro Americans may not build them, repair them, or fly them, but they must help pay for them."³⁷ Blacks who not only met, but far exceeded, the requirements for a given career field were often bypassed. For example, one soldier who held a Bachelor of Science in physics, a minor in mathematics, and was a physics instructor and physicist at the National Bureau of Standards enlisted with the hopes of obtaining a position commensurate with his skill set. The Army assigned him the job of mail clerk.³⁸

The fortunate few blacks who found themselves able to serve, albeit unable to fight, were forced to realize that the federal government was the largest Jim Crow institution in the nation. The imposition of racially separate facilities was commonplace and included theaters, post exchanges, service clubs, and military buses.³⁹ More often than not, the segregated facilities were substandard and makeshift at best.⁴⁰

The plight of the black enlisted man was intolerable, as he was both a de facto and de jure subordinate to the white military command establishment. The indignities suffered by black officers, however, presented a particularly poignant reminder of the status of blacks in the military. As a military officer, one was supposed to be afforded both responsibility and respect. And even if respect was not earned, it was given merely for the fact that one wore an officer's insignia on one's uniform. Thus, while every officer was a subordinate to a higher-ranking official, the officer was still, according to military protocol, considered superior to all enlisted personnel. Such respect was never afforded the black officer.⁴¹ In 1942, only 0.35% of blacks in the Army were officers.⁴² Even after the number of black officers increased, the career fields offered to them were limited to non-command positions (e.g., recreation officer, as was one of Lt. Jackie Robinson's career fields), and the locations at which they could serve were limited by the nonavailability of segregated living and recreational facilities for black officers.⁴³ The lack of viable career fields for blacks was further exacerbated by the fact that the Army forbade blacks to outrank or command white officers.⁴⁴ These restrictions prevented black officers

37. CRISIS, July 1940.

38. *Hearing Before the Senate Armed Services Comm.*, 80th Cong. (Mar. 30, 1948) (statement of Albert Black, World War II Veteran), *microformed on Papers of A. Philip Randolph*, r. 13, fr. 178.

39. MACGREGOR, *supra* note 9, at 36.

40. *See id.*

41. *See id.* at 37.

42. *Id.* at 36.

43. *Id.* at 37.

44. MACGREGOR, *supra* note 9, at 37.

from proving their ability to lead, and thus perpetuated the myth of black officers' incompetence.⁴⁵

While black officers endured certain injustices unique to their status as commissioned officers, all black service personnel were routinely denied fundamental substantive entitlements normally afforded American soldiers. Blacks were often times given what amounted to other-than-honorable discharges, preventing them from obtaining many of the veterans' benefits enjoyed by most white veterans.⁴⁶ There were instances where, even if a black serviceman obtained an honorable discharge, the Veterans Bureau routinely frustrated or, in many cases, outright denied the attempts of black veterans to receive veterans' benefits.⁴⁷ The denial of two particular substantive military rights was especially difficult to accept: the denial of proper treatment as a military member as compared to the concomitant preferential treatment given to German and Italian prisoners of war,⁴⁸ and the segregation of black children in government schools.⁴⁹

While the struggle for black servicemen to achieve equality in military service ensued, a parallel fight was being waged: the struggle for black women to achieve equality in military service. Black women were doubly marginalized; their daunting struggle was for acceptance not only as blacks, but as women. Compared to their white female counterparts,

45. A poignant first-hand account of a black officer's plight was described in one black officer's letter to the President of the Afro-American Newspapers Association:

Then, there is the most painful case of all. I a commissioned officer of the United States Army, am denied the rights and privileges of an officer. I am excluded by members of my own rank and station in the Army. I am denied the privilege to use the Officer's Club. Although members of my race are used as waiters and general help around the club, I am denied the privilege of using it. . . . [W]hat would you say [to a] soldier, who respected you as an officer of the Army, knew that you, an officer sworn to uphold and defend the principles of this democracy, were being denied the very thing you are [] asking them to lay down their life for[?] How can we demand the respect of men under our command when we are not respected by members of our own rank[?]

TAPS FOR A JIM CROW ARMY, *supra* note 5, at 42.

46. See generally Letter from Pvt. Marion Hill, to William G. Nunn, in TAPS FOR A JIM CROW ARMY, *supra* note 5, at 22.

47. One letter written to the NAACP contained one such complaint of denial of veterans' benefits:

I hope you will be successful in helping us colored people. I am a veteran of War One and am permanently disabled and I can't get no pension through the Veterans Bureau in the State of Arkansas. Can I be examined by a Bureau in the Northern states and where is the best bureau for a colored veteran?

Letter from Willie Wash, to NAACP, *microformed on Papers of the NAACP*, pt. 9, ser. C, r. 10, fr. 1323.

48. POTTER, *supra* note 14, at 104. In American camps holding prisoners of war (POWs), enemy officers who died while imprisoned received full military honors, including rifle salutes and coffins draped with the Nazi flag. *Id.* Nazi POWs were assigned cleanup duties throughout their camps, but did not clean the areas of camp where black soldiers lived. *Id.* The POWs were even allowed to use the post exchange, while black soldiers could not. *Id.* at 104-05.

49. See generally MACGREGOR, *supra* note 9, at 487-91. The fight for integration in military schools served as an apt prequel for *Brown v. Board of Education of Topeka*, discussed *supra* pt. V.

black female soldiers were placed at the bottom of the list for consideration for equality. White women were afforded the opportunity to be nurses from the start of the war, could work in secretarial capacities, and were allowed to fly military aircraft as members of the Women Air Service Pilots.⁵⁰ By comparison, black servicewomen were assigned as cleaners, laundry workers, and kitchen help, and only 500 of the 50,000 female army nurses were black.⁵¹

While the attempts to equalize substantial rights for war-fighting servicemembers were stifled, at least there was obvious precedent to show what rights as servicemembers blacks were supposed to enjoy: any right or privilege accorded white servicemembers should have been accorded to blacks. The battle for social equality within the ranks was much more difficult to obtain. Commonly held prejudices and ignorance were transported from contemporary American culture into Army policy, and they were adopted in everyday interactions between black and white soldiers, as well as between black soldiers and white civilians. For example, even in the face of dire need, the Army, in concert with the American Red Cross, maintained segregated blood supplies during the war. In a letter from Major General James C. Magee, the Army Surgeon General, a weak rationale for this practice was offered:

For reasons not biologically convincing but which are commonly recognized as psychologically important in America, it is not deemed advisable to collect and mix Caucasian and negro blood indiscriminately for later administration to members of the military forces.⁵²

In the same letter, General Magee addressed a suggestion that blood donor stations themselves be segregated.⁵³ General Magee disagreed with such a system, opting to keep donor stations integrated and storage of plasma segregated, purely on grounds of efficiency: "[I]n my opinion, this additional expense would not be justified by the relatively small amount of negro blood to be obtained under such a plan."⁵⁴ It is curious to note that while General Magee recognized both the inefficiency of the policy of separate storage and processing⁵⁵ and the dubious

50. Permitting women to fly military aircraft was done out of necessity (a need to release male pilots for combat), not necessarily because the military wanted to allow women to be military aviators. See MOLLY MERRYMAN, *CLIPPED WINGS: THE RISE AND FALL OF THE WOMEN AIRFORCE SERVICE PILOTS (WASPs) OF WORLD WAR II* 7 (1998).

51. POTTER, *supra* note 14, at 67.

52. 5 BASIC DOCUMENTS, *supra* note 1, at 139 (Letter from James C. Magee, to John J. McCloy (Sept. 3, 1941)). The cruel irony of this policy is that the person responsible for developing methods to store blood plasma was Dr. Charles Drew, an African American. POTTER, *supra* note 14, at 66.

53. 5 BASIC DOCUMENTS, *supra* note 1, at 139.

54. *Id.*

55. *Id.*

psychological underpinnings, the Army maintained this policy throughout the war.⁵⁶

Another social right demanded by blacks, and frequently interfered with by the white military establishment, was that of freedom of association in the form of interracial dating. While interracial marriage in America was taboo, if not illegal in many states, black soldiers had occasion to date white women overseas. Even in foreign lands, American views regarding this practice were fully enforced. The unofficial enforcement of the prohibition against interracial dating, even as between blacks and non-American whites, is reflected in a letter home by a white sergeant: "Every time we have seen a nigger with a white girl we have run him away. I would like to shoot the whole bunch of them."⁵⁷

Discontent with the denial of economic equality (e.g., equality in military employment) and social equality manifested itself in instances of open protest. On the civilian side, in June 1943, competition between blacks and whites for jobs in Detroit erupted into the largest race riot of the 1940s.⁵⁸ One of the most famous military confrontations occurred at Freeman Field, Indiana, in the spring of 1945. Freeman Field housed about 2500 personnel in support of a black bombardment group and service group.⁵⁹ The base contained a contingent of nearly 400 black officers.⁶⁰ After the base commander attempted to enforce segregation in the base officers' club,⁶¹ several black officers entered, demanding service; 101 black officers were subsequently arrested for refusing to sign the base's segregation regulation.⁶² The Army Air Forces supported the policy of segregation, primarily citing the fact that the clubs were for social interaction, which often included officers' families.⁶³ The issue eventually reached the desk of Assistant Secretary of War John McCloy, who determined that the base commander exceeded his authority when he segregated facilities funded by the federal government.⁶⁴

One key belief was present in the consciousness of all African Americans, both military and civilian, in the struggle for economic and social equality: segregation was discrimination. This thinking was

56. *Id.*

57. 5 BASIC DOCUMENTS, *supra* note 1, at 143.

58. MACGREGOR, *supra* note 9, at 126.

59. 7 BLACKS IN THE UNITED STATES ARMED FORCES, BASIC DOCUMENTS 179 ((Morris J. MacGregor & Bernard C. Nalty eds., 1977) [hereinafter 7 BASIC DOCUMENTS]) (excerpt from THE TRAINING OF NEGRO COMBAT TROOPS BY THE FIRST AIR FORCE).

60. MACGREGOR, *supra* note 9, at 128.

61. A separate club for black officers was made available under the guise of a necessary separation of permanent party personnel (whites) and training unit personnel (blacks). 7 BASIC DOCUMENTS, *supra* note 59, at 181.

62. See JAMES C. WARREN, THE FREEMAN FIELD MUTINY 56-58 (1996).

63. MACGREGOR, *supra* note 9, at 128.

64. *Id.* For further discussion of the actions of John McCloy, see *infra* pt. III.A.1).

captured in a piece circulated by A. Philip Randolph's Committee Against Jim Crow in Military Service and Training:

The military authorities, like the Supreme Court, deny that segregation is in itself discrimination. Actually, however, the record of the armed forces to date in this war is the strongest possible proof that discrimination is inextricably bound up with segregation. The Negro civilian in jimcrow states finds that, even if he is willing to accept segregation, he does not in actuality—whatever legal theories the Supreme Court may spin about it—get equal educational, housing and transportation facilities. And the Negro soldier or sailor also discovers, and even more dramatically, that even if he accepts segregation, he gets anything but equal treatment.⁶⁵

It was this fundamental understanding of the situation in the military that guided the actions of the press, even those organizations that were opposed to any idea of mass, coordinated, direct action to obtain military equality.

B. *UNITED STATES EX REL. LYNN V. DOWNER*

In the absence of a concerted litigation effort to end segregative policies in the military during World War II, black servicemen experienced violations of their rights at the hands of both white servicemen and white civilians. At Fort Benning, Georgia, in May of 1941, the body of an African American private was found hanging from a tree.⁶⁶ In August of the same year, a white soldier and a black soldier were killed in a gun battle in Fayetteville, North Carolina after an alleged episode of brutality by white military police.⁶⁷ Even after the war concluded, veterans continued to face threats. In February of 1946, army veteran Issac Woodard was ejected from a commercial bus and beaten by civilian police, resulting in permanent blindness; he was dressed in his military uniform at the time of the beating.⁶⁸ While these and many more instances of egregious behavior spurred numerous NAACP complaints, the complaints caused few, if any, changes in segregative policies.⁶⁹ Furthermore, there was a noticeable lack of activity in the

65. Dwight MacDonald, *The War's Greatest Scandal: The Story of Jim Crow in Uniform*, at 9, microformed on Papers of A. Philip Randolph, r. 13, fr. 489.

66. *Id.* at 2, microformed on Papers of A. Philip Randolph, r. 13, fr. 486.

67. *Id.*

68. MACGREGOR, *supra* note 9, at 129.

69. *Id.* at 126.

federal courts on behalf of the rights of servicemen. The *Lynn* case⁷⁰ is the only instance of a direct attack on the military's policy of segregation in the federal courts during the Forgotten Years.

In June of 1942, Winfred W. Lynn was notified that he had been placed on "1-a" status, making him eligible to be drafted.⁷¹ In response, he wrote the following letter to the draft board:

Gentlemen: I am in receipt of my draft-reclassification notice. Please be informed that I am ready to serve in any unit of the armed forces of my country which is not segregated by race. Unless I am assured that I can serve in a mixed regiment and that I will not be compelled to serve in a unit undemocratically selected as a Negro group, I will refuse to report for induction.⁷²

Shortly thereafter, on September 8, Lynn received notification to report for induction on September 18.⁷³ After failing to obey the induction order because he had not received the assurances he wanted, he was indicted on charges of draft evasion.⁷⁴ Lynn claimed that his induction into segregated units (under the auspices of a quota) violated Section 4(a) of the 1940 Act, which provided that "there shall be no discrimination against any person on account of race or color."⁷⁵ Lynn filed a writ of habeas corpus, which the district court dismissed.⁷⁶ Upon the advice of his attorneys (one of whom was his brother), Lynn entered the Army in order to enable him to raise the question of discrimination more fully.⁷⁷ He then appealed the dismissal of his case before the United States Court of Appeals for the Second Circuit, which upheld the district court's ruling that the racial quota system used by the military was not discriminatory.⁷⁸ The court cited the Army's history of segregating black and white soldiers, proclaiming "[t]o hold that the provision in section 4 forbidding discrimination invalidates such induction routine would frustrate . . . the development of an effective armed force, the prompt creation of which was the very purpose and object of the Act."⁷⁹ The dissent aptly noted that legislative history showed that the majority ignored the intent of the proponents of the Act's anti-discrimination clause, which was to disallow army induction on the basis of race or

70. *United States ex rel. Lynn v. Downer*, 140 F.2d 397 (2d Cir. 1944).

71. Dwight MacDonald, *The Novel Case of Winfred Lynn*, *NATION*, Feb. 20, 1943, at 268.

72. *Id.*

73. *Lynn*, 140 F.2d at 398.

74. *See id.*

75. TAPS FOR A JIM CROW ARMY, *supra* note 5, at xxxvi; *See also Lynn*, 140 F.2d at 398.

76. *Lynn*, 140 F.2d at 398.

77. *Id.*

78. *Id.* at 400.

79. *Id.* at 399-400.

color.⁸⁰ The case was appealed to the United States Supreme Court, which denied Lynn's writ for the reason that the case was moot; Lynn was no longer under the command of respondent Downer but was serving with another unit.⁸¹ By denying certiorari, the Supreme Court gave a de facto rubber stamp of the military's discriminatory policies.⁸²

Lynn was not significant for changing Army policy; on the contrary, until the issuance of Executive Order 9981 in 1948, segregation and discrimination remained military policy. The significance of the case was that, for the first time, it brought before the Supreme Court the question of segregation practiced not by the South, but by the federal government itself.⁸³ By avoiding the issue at this time, the Court postponed addressing the issue of segregation in the federal context until the *Brown* companion, *Bolling v. Sharpe*.⁸⁴

III. COMMITTEE AGAINST JIM CROW IN MILITARY SERVICE AND TRAINING

"I can think of no greater set-back for Negro Americans than a permanent jimcrow draft, even if simultaneously Congress should enact FEPC legislation, an anti-lynching bill and every other measure necessary to implement the recommendations of the President's Committee on Civil Rights."

-A. Philip Randolph⁸⁵

While many organizations (the NAACP, the black press, and others) contributed in major and minor part to the eventual issuance of Executive Order 9981, A. Philip Randolph, President of the Brotherhood of Sleeping Car Porters, has rightfully been given the most credit for forcing President Truman's hand. In no insignificant way, Randolph's efforts may be seen as a continuance of his March on Washington Movement, the demands of which were only partially met by Executive

80. *Id.* at 401 (Clark, J., dissenting).

81. See *United States ex rel. Lynn v. Downer*, 322 U.S. 756, 757 (1944), *reh'g denied*, 323 U.S. 817 (1945).

82. The Court's avoidance of the issue of military segregation was used as fodder for critique by A. Philip Randolph in his final testimony before the Committee on Armed Services before the enactment of Executive Order 9981. *Universal Military Training: Hearing Before the Committee on Armed Services*, 80th Cong. (1948) (Statement of A. Philip Randolph), reprinted in *ESSENTIAL DOCUMENTS*, *supra* note 23, at 237-38.

83. MacDonald, *supra* note 65, at 6, *microformed on Papers of A. Philip Randolph*, r. 13, fr. 488.

84. 347 U.S. 497 (1954). The Court therein held that racial segregation in the public schools of the District of Columbia (operated under federal, as opposed to state, auspices) was a denial of the due process of law under the Fifth Amendment.

85. *Papers of A. Philip Randolph*, r. 12, fr. 612.

Order 8802.⁸⁶ It must be understood at the outset that Randolph's tactics of agitation and confrontation differed from those of the mainstream civil rights activists of the period. The path chosen by the NAACP was one of orderly petitioning of the government for redress of racial grievances, using the court system as its primary tool and the legislature and executive branches as secondary (and often ineffective) alternatives.⁸⁷ Randolph's Committee Against Jim Crow in Military Service and Training, with its threat of mass action and civil disobedience in the form of a refuse-the-draft campaign, was a harbinger of a new civil rights movement, the likes of which would be seen again in the 1960s.⁸⁸ An evaluation of events immediately preceding the announcement of Executive Order 9981 is necessary before examining Randolph's contribution.

A. ATTEMPTS AT APPEASEMENT

1. THE MCCLOY COMMITTEE

As World War II progressed, many military leaders realized that their separate-but-equal policy was not working.⁸⁹ Not only was it inefficient in terms of troop utilization, it was also disastrous for the morale and discipline of black troops.⁹⁰ As a result of the failure of the Army's Negro policy, the War Department established the Advisory Committee on Negro Troop Policies (McCloy Committee) in August 1942.⁹¹ The McCloy Committee was charged with making the separate-but-equal policy work,⁹² a monumental task in light of the policy's inherent flaw: the fact that separate was inherently unequal.

The War Department's acknowledgement of black rights consciousness and discontent was reflected in a letter from Colonel J. S. Leonard to Secretary McCloy. Therein, Colonel Leonard recognized growing discontent, citing a *New York Times* article which contained several demands of the Army.⁹³ The demands included, among others, "[f]ull integration of the Negro into the armed forces without segregation, . . . [a]bolition of quotas by race in the Medical Corps, Nurses Corps, technical and other branches of the service, . . . [a]bolition of segregation in recreational and other facilities at Army posts, . . . [and]

86. For discussion, see *supra* pt. I and accompanying footnotes.

87. MACGREGOR, *supra* note 9, at 124.

88. *See id.*

89. *Id.* at 34-39.

90. *Id.* at 34.

91. *Id.* at 34-35. The committee was named after its chairman, Assistant Secretary of War John J. McCloy.

92. *See* ESSENTIAL DOCUMENTS, *supra* note 23, at 104.

93. 5 BASIC DOCUMENTS, *supra* note 1, at 282 (Letter from J.S. Leonard, to John J. McCloy (Dec. 17, 1943)).

[a]bolition of segregation of blood plasma.”⁹⁴ Colonel Leonard advised that “information dealing with the special problem of Negro troops [be] made available,” since many of the problems of blacks probably came as a result of the fact that many officers had no previous experience with blacks in civilian life.⁹⁵

The Committee’s response to complaints like Colonel Leonard’s was measured, and the policies enacted by the Committee did bear some fruit. The Committee was successful in convincing combat commanders to accept black infantry divisions and other combat units, and it made some headway in obtaining more black officers and improving the quality of white officers who commanded black organizations.⁹⁶ Unsurprisingly, the Committee made bolder steps in late 1943 during Truman’s heated presidential campaign. Throughout that time, better relations were established between the War Department and the Negro press. A movie publicizing blacks’ contribution to the war was produced and informational pamphlets explaining the official War Department position on Negro soldiers were distributed.⁹⁷ In July 1944, the McCloy Committee attempted to direct all facilities, including theaters, post exchanges, and transportation, to be utilized without restriction because of race; this directive had little effect because by the time the order was issued, most military posts had constructed completely separate facilities, and commanders continued segregation as usual.⁹⁸ Perhaps the most important contribution made by the McCloy Committee was its encouragement of the use of black troops in the war. However, it was not until December 1944 that black platoons and companies were regularly used within front-line divisions.⁹⁹

In spite of the advancements made by the McCloy Committee, it fell woefully short of its goal of improving troop morale and increasing military efficiency through increased use of black troops on the front lines. The shortfalls of the committee led one of its members, General Benjamin O. Davis, to charge the committee with perpetuation of Jim Crow practices by failing to recognize that separate was inherently unequal.¹⁰⁰ Much more had to be done before equality for black servicemen could be achieved. The McCloy Committee disbanded shortly after the conclusion of the war.

94. *Id.*

95. *Id.* at 286.

96. See ESSENTIAL DOCUMENTS, *supra* note 23, at 104.

97. See DALFUME, *supra* note 4, at 88.

98. *Id.* at 88-89.

99. See ESSENTIAL DOCUMENTS, *supra* note 23, at 104. The Tuskegee Airmen, the famed group of black Army Air Forces aviators, entered the war in April 1943. MACGREGOR, *supra* note 9, at 29.

100. See generally POTTER, *supra* note 14, at 113-15.

2. THE GILLEM GROUP AND THE GILLEM REPORT

As it became more apparent that the War Department's separate-but-equal policy was faulty, Secretary McCloy recommended to the Secretary of War that a special board of officers be appointed to consider a re-evaluation of Negro policy in order that black manpower be used more efficiently in the post-war military.¹⁰¹ The Gillem Board, named after its chairman, General Alvan C. Gillem, was established on October 1, 1945.¹⁰² After extensive interviews with top military officials and evaluation of documentary materials, the Board issued its report on November 17, 1945.¹⁰³ The Gillem Report (also known as War Department Circular 124) would state the military's policy regarding Negro troops from the date of its announcement until 1948. The board based its findings on two foundational principles: blacks had a constitutional right and obligation to fight, and the Army was obligated to make the most effective use of every soldier, including black soldiers.¹⁰⁴ Recognizing that blacks were used inefficiently during World War II, the Gillem Report recommended several steps to improve the Army's utilization of black manpower. Recommendations included: integration of blacks into overhead units (i.e. administrative jobs); ensuring that blacks formed ten percent of the Army; that black units be integrated into composite white units; that the number of black officers be increased and afforded equal rights and opportunities for advancement; continued enforcement of War Department policy that post recreational facilities be used without regard to race; and the creation of a staff group to ensure the new Negro policy was implemented.¹⁰⁵

Despite its ambitious recommendations, the Gillem Board was unsuccessful in effecting change.¹⁰⁶ The main reason for its failure was that the Board did not challenge the premise of the Army's overall policy regarding blacks: segregation.¹⁰⁷ The report did not clearly spell out a policy toward integration. It appeared as if the true goal of the Gillem Board was to allow segregation to continue, while slowly removing

101. MACGREGOR, *supra* note 9, at 130-31.

102. *See* DALFUME, *supra* note 4, at 150.

103. MACGREGOR, *supra* note 9, at 155.

104. *See* War Department Circular 124, Apr. 27, 1946, at 3, available at http://www.trumanlibrary.org/whistlestop/study_collections/desegregation/large/1946/daf15-3.htm.

Although not fully recognized, the idea of a right to fight was first asserted in a War Department pamphlet. This pamphlet was circulated among Army leadership on a restricted basis and it attempted to educate commanders on the difficulties of commanding black troops. *Command of Negro Troops*, WAR DEPARTMENT PAMPHLET NO. 20-6 (Feb. 29, 1944), reprinted in 5 BASIC DOCUMENTS, *supra* note 1, at 307, 309. The point that blacks had a right to fight was made again two years later by President Truman's Committee on Civil Rights. *See* PRESIDENT'S COMMITTEE, *supra* note 30, at 40-41 ("[S]ince equality in military service assumes great importance as a symbol of democratic goals, minorities have regarded it not only as a duty but as a right.").

105. War Department Circular 124, Apr. 27, 1946, at 3, available at http://www.trumanlibrary.org/whistlestop/study_collections/desegregation/large/1946/daf15-3.htm.

106. *See* DALFUME, *supra* note 4, at 153.

107. *See id.* at 151.

discrimination; the Board did not see segregation as discrimination.¹⁰⁸ The Gillem Report received varied reviews from the Negro press and leadership. Roy Wilkins of the NAACP and Lester Granger of the National Urban League criticized the report for "leaving unanswered certain questions of segregation," citing that the policy was "a little foggy and [fell] far short of its advance advertising that it would abolish segregation in the Army."¹⁰⁹ The Gillem Report did receive at least one positive review from the Negro press. The conservative *Pittsburgh Courier* gave a favorable review of the Report, commending it for "officially" rejecting the idea that black troops were inferior and could only serve in noncombatant roles.¹¹⁰ However, even the *Courier* eventually carried pieces critiquing the Report, to include one that proclaimed that "[t]his new Army directive indicates that the Army command has undergone no real change of heart"¹¹¹ Conflicting statements from military leadership did not help the confusion generated by the report. In 1946, Secretary of War Patterson informed the Negro press that the policy espoused in the report meant that segregation was no longer required; in 1948, Patterson's successor Kenneth Royall described the policy as providing "equality of opportunity on the basis of segregation."¹¹²

There was an inherent inequity on the face of the new Negro policy; it claimed as a goal maximum use of all available American manpower, yet at the same time it imposed a ten percent quota on the number of blacks hired for military employment. This fallacy was pointed out by the Commander of the Army Air Forces, Carl Spaatz. In a memorandum to the Chief of Staff, General Spaatz provided the following blunt feedback:

[I]t is believed that the proposed approach to the utilization of this manpower is faulty. Never in history has an Army selected its manpower on the basis of a proportionate share of the population, be that selection on the basis of color or creed. The basis for selection which has been used by all armies in peacetime is that of professional ability. Selection on any other basis would be wasteful and inefficient¹¹³

108. See MACGREGOR, *supra* note 9, at 215.

109. *Army's Negro Policy Termed Inadequate*, N.Y. TIMES, Mar. 5, 1946, at 10.

110. Truman K. Gibson, Jr., *Gillem Report Aims to End Segregation in U.S. Army*, PITTSBURGH COURIER, Mar. 23, 1946, at 13. It should be noted that the author was a former aide to the Secretary of War.

111. DALFUME, *supra* note 4, at 151-52 (quoting PITTSBURGH COURIER, May 11, 1946).

112. *Id.* at 151.

113. 7 BASIC DOCUMENTS, *supra* note 59, at 403 (Memorandum from General Carl Spaatz, to Chief of Staff (Apr. 1946)).

The new Negro policy presented in the Gillem Report did nothing to change the military's separate-but-equal policy. Once again, further work needed to be done, and many blacks, to include soldiers, those wanting to be soldiers, and A. Philip Randolph, were running out of patience.

3. UNIVERSAL MILITARY TRAINING

When an individual enters the service of the country, he necessarily surrenders some of the rights and privileges which inhere in American citizenship. The government in return undertakes to protect his integrity as an individual and the dignity of his profession.¹¹⁴

On October 29, 1947, President Harry Truman's specially appointed Committee on Civil Rights issued a report filled with suggestions for strengthening and improving federal, state, and local governments to "safeguard the civil rights of the people."¹¹⁵ The formation of this committee was spurred by the President's concern over the lynchings, property destruction, and assaults meted out against black servicemen and civilians in 1946.¹¹⁶ The committee made several specific recommendations regarding the military, all based upon the premises that segregation in the military not only denied black soldiers their right to fight but was also an "inefficient use of human resources," and that by allowing racism to exist in the military, the country was "not making use of one of the most effective techniques for educating the public to the practicability of American ideals as a way of life."¹¹⁷ The committee made two specific recommendations to the President regarding the military: to encourage the enactment of legislation to end discrimination and segregation in the Armed Services, and legislation ensuring that no serviceman be subject to discrimination by any public authority or place of public accommodation.¹¹⁸

With the President's Committee on Civil Rights report as a backdrop, proponents of black servicemen's rights were hopeful that positive legislation would ensue. Legislation did ensue, but not the kind of legislation that was desired. Legislation to enact a Universal Military

114. PRESIDENT'S COMMITTEE, *supra* note 30, at 46.

115. MACGREGOR, *supra* note 9, at 295.

116. *See id.* at 294.

117. PRESIDENT'S COMMITTEE, *supra* note 30, at 46-47. This appears to be a direct acknowledgement of the international community's chief criticism of the United States' participation in World War II: the hypocrisy of fighting for democracy abroad while denying democracy to its own citizens.

118. *Id.* at 162-63. The report cited the need to ban discrimination and segregation in recruitment, assignment, and training and to include selection for the service academies, as well as in recreational facilities and post exchanges. *Id.* at 162.

Training (UMT) system was introduced to Congress in late 1947, with hearings on the bill scheduled for 1948. The bill, which called for institution of a peacetime draft and provided policies for peacetime training, had a fundamental flaw: there was no explicit proscription against segregation.¹¹⁹ Reaction to UMT was swift and sharp. A *Crisis* editorial captured the sentiment of many blacks: "This is as good a time as any to repeat that the vast body of Negro Americans is opposed to this training as long as it is to be on a segregated basis."¹²⁰ Those most directly affected by the enactment of UMT, American youth, also expressed dissatisfaction with the proposed bill. Youth attending the second annual youth legislative conference of the NAACP in March 1948 passed resolutions voicing opposition to a segregated system of military training.¹²¹

It was apparent that UMT would do nothing to change the segregative policies enacted by the Gillem Report. Introduction of the UMT bill was even more audacious in light of the findings by the President's Commission on Civil Rights. The introduction of UMT legislation caused A. Philip Randolph, in cooperation with New York state official Grant Reynolds, to form the Committee Against Jim Crow in Military Service and Training in November 1947.¹²²

B. RANDOLPH FORCED INTO ACTION

The Committee Against Jim Crow in Military Service and Training (CAJC) was guided by the following statement made by its founder: "If Negroes must fight, let them fight as free men and not as Jim Crow slaves."¹²³ The CAJC's plan of attack was twofold. First, it would submit a proposal to Congress and President Truman for the elimination of discrimination in the armed forces. Second, if necessary, the CAJC would back up its demand by marching on Washington, D.C.¹²⁴ The specific demands of the CAJC included: an explicit anti-segregation clause in the UMT act; amendments barring segregation in the draft and in interstate travel by draftees; amendments making attacks against soldiers in uniform a federal crime; and an elimination of the poll tax for draftees in federal elections.¹²⁵

119. DALFUME, *supra* note 4, at 155. In response to opposition from the Army, Congress deleted the nonsegregation clause originally included in the bill. The Army wished to follow the Gillem Report's policy of gradual change. *Id.*

120. *Universal Military Training*, *CRISIS*, Feb. 1948, at 41.

121. *Youth Oppose UMT and Regional College*, *NORFOLK J. & GUIDE*, Apr. 10, 1948, at 4.

122. DALFUME, *supra* note 4, at 155.

123. THE COMMITTEE AGAINST JIM CROW IN MILITARY SERVICE AND TRAINING: ITS PRINCIPLES AND OBJECTIVES, *microformed on Papers of A. Philip Randolph*, r. 13, fr. 525.

124. See MACGREGOR, *supra* note 9, at 300.

125. DALFUME, *supra* note 4, at 163.

The President's call for the enactment of UMT confused and disappointed many,¹²⁶ including A. Philip Randolph. Randolph attempted to meet with the President numerous times to discuss the issue but was constantly put off by both the President and members of the President's staff;¹²⁷ he finally met with the President on March 22, 1948. At that meeting, Randolph made clear the CAJC's desire to end segregation in the military and informed the President that blacks were hesitant to serve in the armed forces without explicit guarantees against segregation and discrimination.¹²⁸ In a follow up letter to President Truman, Randolph reminded the President about the results and recommendations provided by the President's own Committee on Civil Rights.¹²⁹ The letter concluded with a demand for an Executive Order ending all discrimination in the Armed Forces.¹³⁰

The CAJC did not limit its activity to the executive branch; Randolph launched a parallel attack in Congress. Just one week after meeting with President Truman, Randolph found himself testifying before the Senate Committee on Armed Services on the issue of Universal Military Training. In his testimony, he repeated his assertion made to President Truman that blacks would not fight for democracy

126. It must be recognized that the attack on UMT came from many fronts. For example, The National Council Against Conscription listed its several criticisms of UMT in a "Questionnaire on Universal Military Service." The questionnaire asked respondents to "check the *two* arguments against Universal Military Service that you consider most telling." Among the options were "Universal Military Service is anti-democratic," "Universal Service will not prevent war," and "A program of Universal Service would result in lowering the Army's physical and mental standards if every 18-year-old boy were inducted." Questionnaire on Universal Military Service, *microformed on Papers of A. Philip Randolph*, r. 12, fr. 613 (emphasis in original).

127. Shortly after word of the UMT proposal was out, Randolph attempted to meet with President Truman. See Memorandum from Matthew Connely, Secretary, to President Truman, to David Niles, Administrative Assistant to President Truman (Dec. 13, 1947) (forwarding a request from the CAJC to discuss segregation in the military with the President). This initial request was met by an offer for a meeting with David Niles, to which Randolph refused and renewed his request for an audience with the President. Letter from A. Philip Randolph, to President Truman (Dec. 28, 1947). Randolph made another attempt at gaining an audience with the President in a Jan. 12, 1948 letter, and was finally offered a meeting date with Truman (proposed for the first week of February) on Jan. 20. All letters mentioned in this footnote *available at* http://www.trumanlibrary.org/whistlestop/study_collections/desegregation/large/index.php?action=docs.

128. *Negro Defense View Told: Truman Advised of Hesitancy to Serve Without Anti-Bias Pledge*, N.Y. TIMES, Mar. 23, 1948, at 28. Randolph told reporters that he had found that blacks did not want to "shoulder a gun to fight for democracy abroad unless they get democracy at home." *Id.*

129. Randolph chided the President:

In your message to Congress on March 17, 1948, your appeal for enactment of Universal Military Training and for revival of Selective Service contained no reference to military segregation and discrimination on the basis of race, despite the recommendations of the President's Committee on Civil Rights. Your Committee specifically recommended that there be no segregation nor discrimination in any peacetime draft and in the already existing military establishment.

Memorandum from A. Philip Randolph, to President Truman (Mar. 22, 1948), *available at* http://www.trumanlibrary.org/whistlestop/study_collections/desegregation/large/1948/daf201-2.htm.

130. *Id.*

overseas while being denied democracy at home.¹³¹ He also gave an unveiled threat of civil disobedience: "Today I should like to make clear to the Senate Armed Services Committee . . . to Congress and the American people that passage now of a Jim Crow draft may only result in a mass civil disobedience movement along the lines of the magnificent struggles of the people of India against British imperialism."¹³² Randolph concluded his statement by saying that "Negroes are just sick and tired of being pushed around and we just do not propose to take it, and we do not care what happens."¹³³

Randolph acknowledged the power and consequences of his pledge. After receiving a warning from a Republican senator that his actions "may well lead to indictments for treason and [have other] very serious repercussions," Randolph responded that he anticipated widespread terrorism against blacks refusing to serve. He accepted that possibility if it would be the only way blacks could attain democracy.¹³⁴ Randolph also had to be aware that the black community, while in agreement with his cause, was not necessarily unified in support of his methods. The NAACP, which had positioned itself as a champion of rights in the courts, did not fully endorse Randolph's pledge of civil disobedience. NAACP Secretary Walter White said that he did not believe that Randolph's civil disobedience pledge was necessary but stipulated that the only solution to the impending political dilemma would be "the immediate and total abolition of segregation."¹³⁵ While the organization would not advise individuals to boycott the draft, it did not dismiss Randolph's proposal completely, reminding "those who expect[] [draftees] to be enthusiastic soldiers should remember that their memories of mistreatment in the last war are bitter green,"¹³⁶ and further pledged to give legal aid to those who did boycott.¹³⁷

The Negro press also tended to espouse an opinion against mass disobedience. A *Norfolk Journal and Guide* editorial decried Randolph's threat for civil disobedience as "untimely," saying that the threat "tends to embarrass Mr. Truman's civil rights proposals."¹³⁸ The leadership of the *Pittsburgh Courier* maintained a similar opinion. In a personal letter to Randolph, the editor of the *Courier* counseled Randolph against

131. *Universal Military Training: Hearing Before the Committee on Armed Services*, 80th Cong. (1948) (Statement of A. Philip Randolph), reprinted in *ESSENTIAL DOCUMENTS*, *supra* note 23, at 237.

132. *Id.*

133. *Id.* at 239.

134. C.P. Trussell, *Congress Told UMT Racial Bars Would Unleash Civil Disobedience*, *N.Y. TIMES*, Apr. 1, 1948, at 1, 10.

135. *Crisis in the Making: U.S. Negroes Tussle with Issue of Resisting a Draft Law Because of Racial Segregation*, *NEWSWEEK*, June 7, 1948, at 29 [hereinafter *Crisis in the Making*].

136. DALFUME, *supra* note 4, at 165.

137. *Crisis in the Making*, *supra* note 135, at 29.

138. Arthur P. Davis, *With a Grain of Salt: Civil Disobedience Threat Considered Untimely and Harmful to Civil Rights*, *NORFOLK J. & GUIDE*, Apr. 17, 1948, at 8.

appearing to force the President's hand by demanding an Executive Order, citing the *Courier's* opinion that to do so would cause Truman to stonewall, thereby hampering efforts to desegregate the military.¹³⁹

Despite words of discouragement, Randolph knew one thing: notwithstanding his chosen means of effecting change, the vast majority of black Americans, including the NAACP and black press, agreed that something had to be done. In an NAACP poll of 2200 black college students, seventy-one percent reported that they favored Randolph's proposal to resist the draft.¹⁴⁰ When asked if they would be willing to serve in the event of a real war or emergency, eighty-two percent responded that they would, but only fifty-one percent responded that they would do so only if segregation was abolished.¹⁴¹ These results reflected the mood among young blacks that hopes for reform through slow, step-by-step efforts toward integration were quickly coming to an end. The only way to effect change would be through civil disobedience. As Randolph had said in his testimony before the Senate Armed Services Committee, blacks were tired of being pushed around and were ready to do what it took to change the status quo.¹⁴²

On June 26, 1948, after receiving no affirmative pledge of desegregation from either the President or Congress, Randolph created the League for Non-Violent Civil Disobedience Against Military Segregation.¹⁴³ This group threatened that if an Executive Order ending military segregation was not issued before August 16, 1948, the date on which the UMT was to take effect, Randolph would actively encourage black youth to refuse to register.¹⁴⁴ One month later, on July 26, 1948, President Truman issued Executive Order 9981.¹⁴⁵

IV. THE RIGHT TO FIGHT: EXECUTIVE ORDER 9981

The injustice of calling men to fight for freedom while subjecting them to humiliating discrimination within the fighting forces is at once apparent. Furthermore, by preventing entire groups from making their maximum contribution to the national defense, we weaken our defense

139. See Letter from Editor, Pittsburgh Courier, to A. Philip Randolph (June 28, 1948), *microformed on Papers of A. Philip Randolph*, r. 12, fr. 714.

140. *Crisis in the Making*, *supra* note 135, at 29.

141. *Id.*

142. See *Universal Military Training: Hearing Before the Committee on Armed Services, 80th Cong. (1948) (Statement of A. Philip Randolph)*, reprinted in *ESSENTIAL DOCUMENTS*, *supra* note 23, at 238.

143. DALFUME, *supra* note 4, at 168-69.

144. *Id.* at 169.

145. See Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948).

to that extent and impose heavier burdens on the remainder of the population.¹⁴⁶

This finding from the President's Committee on Civil Rights captures at once the two reasons why the military establishment eventually yielded to the call for equality in the armed services: the recognition of the unjustness of military policy and, more importantly, the negative effect of that policy upon military efficiency. True awareness of the necessity of desegregation was unfortunately not had until the President issued an edict commanding the end of military segregation. The most important directive of the Executive Order regarding the military was contained in the following excerpt:

Whereas it is essential that there be maintained in the armed services of the United States the highest standards of democracy, with equality of treatment and opportunity for all those who serve in our country's defense . . . It is hereby declared to be the policy of the President that there shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin. This policy shall be put into effect as rapidly as possible, having due regard to the time required to effectuate any necessary changes without impairing efficiency or morale.¹⁴⁷

The order also created the President's Committee on Equality of Treatment and Opportunity in the Armed Services, charged with bringing the policies, practices and procedures of the armed forces in line with the new policy.¹⁴⁸

Not unlike the initial reaction to Randolph's plan for civil disobedience, the Negro press and black organizations were not unified in their opinion of Executive Order 9981. A favorable review was contained in a *Chicago Defender* editorial, praising Truman for moving "forward toward a fuller realization of the high ideals of our democratic system."¹⁴⁹ Other black organizations and leaders, however, were not so easily swayed by the President's order. It was felt by many that the Executive Order was purposely vague because it failed to mention either segregation or integration directly.¹⁵⁰ The CAJC itself was initially

146. PRESIDENT'S COMMITTEE, *supra* note 30, at 162.

147. Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948).

148. *Id.*

149. *Mr. Truman Makes History*, CHICAGO DEFENDER, Aug. 7, 1948, at 14.

150. MACGREGOR, *supra* note 9, at 312. The failure to mention integration may not have been so egregious in light of the fact that the aim of civil rights leaders at the time was equality of treatment and opportunity, and not integration per se. *Id.* at 312-13.

concerned that the Executive Order was not clear.¹⁵¹ The President cleared up any confusion regarding his intent three days after issuance of Executive Order 9981. When asked whether his desire for equality of treatment and opportunity in the armed forces “envision[ed] eventually the end of segregation,” Truman simply replied “Yes.”¹⁵² In light of this response, and after reviewing the Executive Order, Randolph discontinued the CAJC’s call for mass disobedience.¹⁵³ In spite of Randolph’s announced discontinuance of the civil disobedience campaign, not all felt Executive Order 9981 was sufficient. The League for Non-Violent Civil Disobedience Against Military Segregation, created by Randolph to force the President to issue an Executive Order, vowed to continue the campaign.¹⁵⁴

In spite of continued resistance by elements within the military, the services were eventually completely integrated, and segregation within the branches was eradicated. Mr. Randolph’s successful struggle for executive branch recognition of the need for equality of treatment and opportunity in the military did not only benefit black soldiers. Executive Order 9981’s effects, primarily the President’s implication that segregation was inherently unequal, were positively felt throughout American society, particularly in the courts, where the struggle for civil rights continued.

V. EPILOGUE: *BROWN* AND BEYOND

On May 17, 1954, the Supreme Court delivered its decision in the landmark case of *Brown v. Board of Education of Topeka*.¹⁵⁵ On June 23, 2003, the Court delivered equally important decisions in *Grutter v. Bollinger*¹⁵⁶ and *Gratz v. Bollinger*,¹⁵⁷ cases which presented a direct

151. Letter from Grant Reynolds, National Chairman, Committee Against Jim Crow in Military Service and Training, to Senator J. Howard McGrath (Aug. 1, 1948), available at http://www.trumanlibrary.org/whistlestop/study_collections/desegregation/large/1948/daf43-21.htm (asking the senator to clarify whether it was the intention of the President that segregation be eliminated from the armed forces).

152. President’s News Conference, July 29, 1948, reprinted in *ESSENTIAL DOCUMENTS*, *supra* note 23, at 240.

153. See Letter from A. Philip Randolph, to Rev. J. Raymond Henderson (Aug. 24, 1948) (explaining that, as a result of Executive Order 9981 and subsequent clarification in the press, the civil disobedience campaign was abandoned), microformed on Papers of A. Philip Randolph, r. 12, fr. 783-84.

154. Letter from George M. Houser, to A. Philip Randolph (Aug. 18, 1948), microformed on Papers of A. Philip Randolph, r. 12, fr. 800. Houser claimed to maintain the belief of rank-and-file people that Executive Order 9981 had little meaning and that the promises therein did not justify the calling off of the civil disobedience campaign. *Id.*

155. 347 U.S. 483 (1954). The decision announced that segregation of black and white children in state public schools solely on the basis of race, pursuant to state laws permitting or requiring such segregation, is a violation of the Equal Protection Clause of the Fourteenth Amendment—even though the physical facilities and other “tangible” factors of the black and white schools may be equal. *Id.* at 493.

156. 539 U.S. 306 (2003), *reh’g denied*, 539 U.S. 982 (2003).

attack upon the efficacy of affirmative action—a tool used by colleges and universities to counter a historical effect of segregation: low numbers of minorities in higher education.¹⁵⁸ Both *Brown* and the 2003 affirmative action cases of *Grutter* and *Gratz* benefited from Randolph's fight against segregation in the military, as well as President Truman's subsequent issuance of Executive Order 9981.

President Truman's Executive Order was based on the underlying assumption that segregation in the military bred inherent inequities. By attacking segregation in the military, the President's actions provided a concrete and official statement against the institution of segregation. Six years later in *Brown*, Thurgood Marshall made the same argument to the Supreme Court in the context of secondary education.¹⁵⁹ While no direct mention of Executive Order 9981 or the military's fight to end segregation in federal service was mentioned in the transcript of the oral argument, the Court nevertheless was reminded of the significance of the Executive Order through amicus briefs. In its amicus brief, the American Federation of Teachers urged the Court to consider the fact that "[t]he armed forces, once completely segregated has in three years, almost become totally desegregated."¹⁶⁰ The American Veteran's Committee, Inc. urged that the Court recognize the impact of segregated schools upon national defense.¹⁶¹ And in November of 1954, when the Court was deciding how to implement its decision, another amicus brief from the American Veterans Committee, Inc. reminded the Court of the

157. 539 U.S. 244 (2003).

158. The University of Michigan and other schools have relied on another landmark case, *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), in order to justify their affirmative action programs.

159. It should be noted that the military also saw the first somewhat successful fight to integrate secondary schools. Prior to 1953, Department of Defense dependent schools contained a mixture of segregated and integrated schools. The majority of the integrated schools were located overseas, while a few integrated schools were located in the United States. MACGREGOR, *supra* note 9, at 490. At a March 19, 1953 press conference, President Eisenhower, upon commenting upon the efficacy of Public Law 874 (which proponents of school integration claimed to bar segregation in federally-funded schools), declared:

[W]henver Federal funds are expended for anything, I do not see how any American can justify . . . discrimination in the expenditure of those funds as among our citizens. . . . If there is any benefit to be derived from them, I think they must all share, regardless of such inconsequential factors as race and religion.

Id. at 489. On January 12, 1954, the Secretary of Defense ordered that "no new school shall be opened for operation on a segregated basis, and schools presently so conducted shall cease operating on a segregated basis, as soon as practicable . . ." Memorandum, Sec. of Defense for Sec. of the Army, et al. (Jan. 12, 1954), reprinted in ESSENTIAL DOCUMENTS, *supra* note 23, at 315.

160. Brief of Amicus Curiae by the American Federation of Teachers, *Brown v. Board of Education*, 347 U.S. 483 (1954), 1953 WL 48692, at *22.

161. "It is a discrimination with far-reaching effects. Educational qualifications are often the basis for exercising citizenship rights and participating in civil government and military affairs." Brief of Amicus Curiae by the American Veterans Committee, Inc., *Brown v. Board of Education*, 347 U.S. 483 (1954), 1952 WL 47252, at *14.

rapid and smooth desegregation of the military.¹⁶² Although not cited in its opinion, the efforts of those who fought against segregation and discrimination in the military context, as well as the resulting Executive Order, provided a backdrop for the Court's decision in *Brown*.

On June 23, 2003, just eleven months shy of *Brown*'s fiftieth anniversary, the Court was again confronted with the issue of segregation in schools. In *Grutter v. Bollinger* and its companion case, *Gratz v. Bollinger*, the issue was not the elimination of segregation in education, but the protection of affirmative action, a remedial tool used by the University of Michigan's Law School and undergraduate institutions to rectify past segregation and discrimination. On this occasion, the amicus curiae specifically cited Executive Order 9981 in its argument supporting the University of Michigan's affirmative action program.¹⁶³ After describing the positive effect Executive Order 9981 and subsequent integration had on the military and national defense, the amici urged that "[t]he modern military judgment is that full integration and other policies combating discrimination [e.g., affirmative action] are essential to good order, combat readiness, and military effectiveness."¹⁶⁴ A great portion of the oral arguments for *Grutter* and *Gratz* contained discussion on the need for educating minorities for the purpose of military defense and the concomitant need for programs to increase the number of minorities in institutions of higher learning.¹⁶⁵ Finally, in upholding the law school's program in *Grutter*, the majority made reference to the need to support diversity in higher education in light of national security and found that the law school had a narrowly tailored program which supported a "compelling interest in attaining a diverse student body."¹⁶⁶ The ideals set forth in Executive Order 9981 were appropriately used to support a tool in the combat against one of the historical effects of segregation, namely the low number of minorities in higher education.

VI. CONCLUSION

It is not my claim that rights consciousness on the part of black soldiers and civilians alone was the sole reason for Executive Order 9981. Presidential electoral politics,¹⁶⁷ a concurrent court victory for

162. Brief of Amicus Curiae by the American Veterans Committee, Inc., *Brown v. Board of Education*, 347 U.S. 483 (1954), 1954 WL 45716, at *20. The amici were attempting to convince the court that a policy of gradualism was inadvisable. *Id.* at **19-20.

163. Consolidated Brief of Amicus Curiae by Lt. Gen. Julius W. Becton, Jr. et al., *Grutter v. Bolinger*, 539 U.S. 306 (2003), 2003 WL 1787554, at *11.

164. *Id.* at *12.

165. See generally Oral Argument, *Grutter v. Bolinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 1728613, at *7-13; Oral Argument, *Gratz v. Bolinger*, 539 U.S. 244 (2003) (No. 02-516), 2003 WL 1728816, at *27-33.

166. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

167. See Klarman, *supra* note 6, at 27-34. Issuance of the Executive Order itself was part of a two-pronged political plan by the President to seize the initiative in the 1948 campaign. See

civil rights,¹⁶⁸ and military manpower necessity were significant forces behind issuance of the order. However, the ability of A. Philip Randolph to combine these factors into a cohesive effort and use their combined momentum proved to be essential in the eventual presidential order. The CAJC and threat of civil disobedience would never have arisen had Executive Order 8802 adequately met the demands of the MOWM. Randolph's CAJC and Executive Order 9981 merely represented a continuation of Randolph's efforts in 1941. Although focused on equality of treatment and opportunity for black servicemen, the pursuit of the Four Freedoms and the fight for an Executive Order had positive social and judicial repercussions.¹⁶⁹ Executive Order 9981, by announcing that segregation was inherently unequal in the context of the military, removed a significant brick in the wall of segregation built by *Plessy v. Ferguson*¹⁷⁰ and established momentum toward one of the most important civil rights decisions to date, *Brown v. Board of Education of Topeka*.¹⁷¹

DALFUMIE, *supra* note 4, at 156. The day after Executive Order 9981 was announced, the President issued a special message to Congress, urging Congress to enact legislation to carry out the suggestions urged by the President's Commission on Civil Rights. *Id.* at 156-57.

168. A key Supreme Court civil rights case provided momentum. In *Shelley v. Kraemer*, 334 U.S. 1 (1948), the Court held state-court enforcement of racially restrictive covenants to be a violation of the Equal Protection Clause of the 14th Amendment.

169. See discussion, *supra* pt. V.

170. 163 U.S. 537 (1896).

171. 347 U.S. 483 (1954).