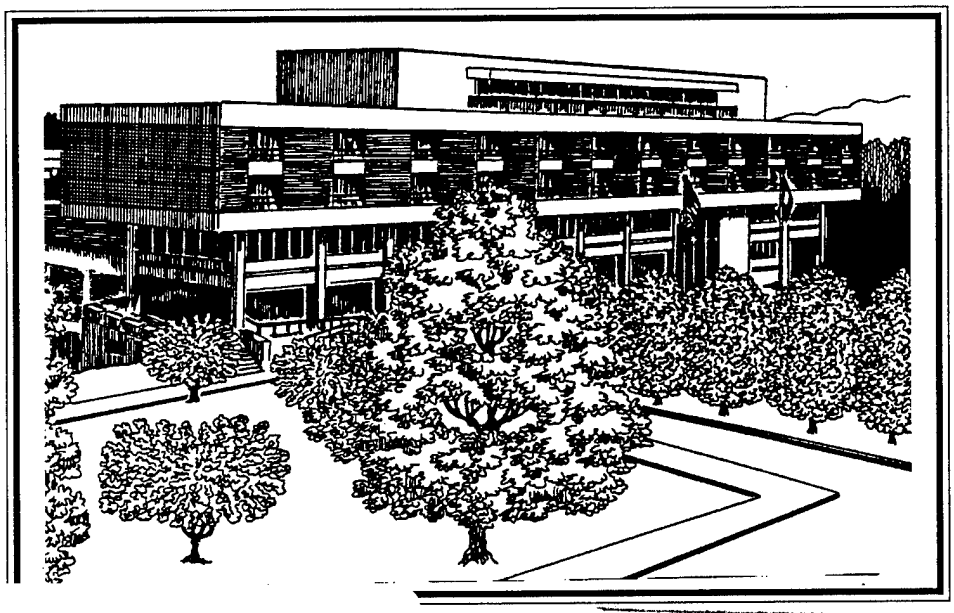
# DEFENSIVE FEDERAL LITIGATION



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## ADMINISTRATIVE AND CIVIL LAW DEPARTMENT

THE JUDGE ADVOCATE GENERAL'S SCHOOL
UNITED STATES ARMY
CHARLOTTESVILLE, VIRGINIA
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## PREFACE

This compilation of cases and materials on defensive federal litigation is designed to provide primary source material for students at The Judge Advocate General's School.

Cases and other legal authorities are arranged to develop both the procedural and the substantive law governing federal court review of military activities. Substantive topics are discussed in chapters covering jurisdiction of federal courts over cases involving military activities, the remedies available in military cases, the requirement to exhaust military remedies before resort to the federal courts, the concept of reviewability, and the scope of judicial review of military activities. Finally, a chapter concerning the personal liability of government officials is included.

This casebook does not purport to promulgate Department of the Army policy or to be in any sense directory. The organization and development of legal materials are the work product of the members of The Judge Advocate General's School faculty and do not necessarily reflect the views of The Judge Advocate General or any governmental agency. The words "he" and "his" when used in this publication represent both the masculine and feminine genders unless otherwise specifically stated.

DEFENSIVE FEDERAL LITIGATION
(JA 200)

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# CHAPTER 1

# CASE MANAGEMENT, REPRESENTATION OF GOVERNMENT DEFENDANTS, AND REMOVAL

## 1.1 General.

Suits routinely encountered by military attorneys may be brought initially in state court, in any of the 94 United States district courts,[1] or the United States Court of Federal Claims,[2] depending upon the relief sought and the expertise of the plaintiff's attorney.

Actions may be brought against named defendants, agencies, or the United States. Suits against government personnel in their individual capacities must be distinguished from suits against them in their official capacities because if actions beyond the scope of authority are at issue, government representation may not be extended and, if the action has been brought in a state court, it may not be removable.

The responsibilities of the Army lawyer include reporting litigation to the Litigation Division, Office of The Judge Advocate General (Army Litigation) and the Department of Justice (DOJ), assisting in the decision whether to represent named federal defendants, assisting in removal of the case to federal court if it was filed in state court, and assisting in the continuing defense of the case once these preliminary matters are disposed

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[1] 5 U.S.C. §§ 81-131.

[2] Id.

of. The remainder of Chapter 1 is devoted to these preliminary steps.

## 1.2 Coordination with the Department of the Army and the Department of Justice.

Army Regulation 27-40, entitled Legal Services: Litigation)," sets out the basic responsibilities of lawyers in the field and Army personnel generally with respect to litigation.

Staff judge advocates are expected to establish and maintain liaison with the United States attorney in each district in their area.[3] Apart from the staff judge advocate and his personnel, only representatives of the Chief of Engineers and elements of the Office of The Judge Advocate General (including Army Litigation, Contract Law Division, United States Army Claims Service, Regulatory Law Office, Intellectual Property Law Division, Labor and Employment Law Office, Contract Appeals Division, Environmental Law Division, Criminal Law Division, and Procurement Fraud Division) are authorized to represent the Army or contact the Department of Justice.[4] More specifically, Army personnel may not "confer or correspond with any representative of DOJ concerning legal proceedings" except as provided in AR 27-40.[5]

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[3]Dep't of Army, Reg. 27-40, Legal Services: Litigation, para. 1-5b (19 Sep. 1994) [hereinafter AR 27-40].

[4]Id., para. 1-4.

[5]Id., para. 1-5a.

Liaison with the United States attorney ensures that the United States attorney will notify the local installation of suits filed against the Army or its personnel.[6] This allows the local judge advocate or legal adviser and Army Litigation to enter the suit early and influence the course of the litigation. The local judge advocate or legal adviser must promptly contact the United States attorney when he becomes aware of a suit which has been filed. The United States attorney need not be notified in cases involving taxation, utility rate proceedings, or actions solely against contractors. When local judge advocates inform the United States attorney of a case, they should provide any process or pleadings and other assistance as requested, unless instructed to the contrary by The Judge Advocate General.

Generally, process and pleadings served on any Army personnel, command, or agency, including nonappropriated fund instrumentalities, are promptly referred to the servicing legal officer, or to the legal officer of the next higher organization where there is no servicing legal officer.[7] Military members and employees who are sued for damages arising from the performance of their official duties have the personal responsibility of informing their superior or commander of the suit and delivering process and pleadings to him. The commander or supervisor must then notify the legal officer.[8]

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[6] Id., para. 1-5b.

[7] Id., para. 3-2b.

[8] Id., paras 3-2, 4-4. See 10 U.S.C. § 1089(b) (1982); 28 U.S.C. § 2679(c) (1982); 28 C.F.R. § 15.1(a) (1987).

In suits involving possible congressional or Department of the Army (DA) interest or that require the attention of Army Litigation, the staff judge advocate or legal adviser must immediately notify HQDA, Army Litigation, the United States attorney, and/or the DOJ.[9] Examples of cases requiring the immediate attention of Army Litigation include lawsuits against an employee in his individual capacity, habeas corpus petitions, motions for temporary injunctive relief, or any other case in which the return date is less than 60 days. The regulation explains what is required to be in this advisory report.

In most cases, whether or not an advisory report has been made, all process, pleadings, and allied papers are promptly faxed or mailed to Army Litigation with copies to superior headquarters.[10]

When an SJA or legal adviser learns of a criminal charge or a lawsuit alleging individual liability against DA personnel resulting from performance of official duties, AR 27-40 requires, among other things, direct coordination with Army Litigation and the appropriate United States attorney. The SJA must fax or express deliver copies of all process and pleadings.[11] Army Litigation will determine the DA position with regard to scope of employment and coordinate that position with DOJ.[12] If the defendant was acting within the scope of employment, the United States will usually be substituted

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[9]AR 27-40, chap. 3.

[10]Id., para. 3-3a.

[11]Id., para. 4-4a.

[12]Id., para. 4-4b.

as the defendant pursuant to 28 U.S.C. § 2679. United States attorneys are authorized to make the certification of scope of employment under this statute to effect the substitution.[13]

After advising Army Litigation of the pending litigation, the responsible staff judge advocate or legal adviser will prepare an investigative report (or litigation report) when directed by HQDA.[14] A copy of the investigative report is sent to Army Litigation and the United States Attorney Office handling the case.[15]

While any suit remains pending, Army lawyers in the field must monitor the litigation and advise Army Litigation of all significant developments.[16]

1.3 Responsibility for Conducting Litigation.

By statute, "the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General."[17] The Attorney General's "plenary power and supervision over all government litigation" precludes any agency from taking direct part in

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[13]28 C.F.R. § 15.3(a) (1993).

[14]AR 27-40, para. 3-9.

[15]Id., para. 3-9g.

[16]Id., chap. 3.

[17]28 U.S.C. § 516 (1982). See id. § 519 (1982).

litigation except where expressly authorized by statute or the DOJ.[18]

Consequently, the agency and its attorneys are subordinated to the DOJ. But at the same time, the DOJ has some obligation to its agency clients. In S&E Contractors v. United States,[19] for example, the DOJ took the position that it could appeal a final agency decision in a contract claim. Implicit in the position was that agency decisions are not binding on the DOJ. The Supreme Court observed, however, that "where the responsibility for rendering a decision is vested in a coordinate branch of government, the duty of the Department of Justice is to implement their decision and not to repudiate it."[20]

Most litigation involving the Army is handled by the local United States attorney. United States attorneys are appointed for four-year terms by the President for each judicial district.[21] Assistant United States attorneys are appointed by the Attorney General.[22] "Except as provided by law, each U.S. attorney" and his assistant United States attorneys prosecute "all offenses against the United States" and "prosecute or defend, for the government, all civil actions, suits or proceedings in which the United States is concerned."[23]

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[18]I.C.C. v. Southern Railway Co., 543 F.2d 534 (5th Cir. 1976), reh'g denied, 551 F.2d 95 (5th Cir. 1977). See AR 27-40, paras. 1-4a, 3-1a.

[19]406 U.S. 1 (1972).

[20]406 U.S. at 13.

[21]28 U.S.C. § 541 (1982).

[22]Id. § 542 (1982).

[23]Id. § 547 (1982).

Although the local United States attorney conducts most Army litigation, the DOJ in Washington, D.C., may conduct the litigation itself depending on the nature of the case. These selected cases are handled by the Civil Division based on the Attorney General's general supervisory power under 28 U.S.C. § 519, which provides that

> the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys . . . in the discharge of their respective duties.

This provision and 28 U.S.C. §§ 517 and 518(b), which allow any officer of the DOJ to appear in any court, enables trial attorneys in Washington, D.C., to supersede the local United States attorney.

Under Federal Rules of Civil Procedure 4(d)(4), the summons and complaint initiating litigation against the United States is either mailed or delivered to the United States attorney and mailed to the Attorney General, and, where the order of an officer or agency is involved, to the officer or agency concerned. The Attorney General and United States attorney must also be served where suit is directly against an officer or agency.[24] This gives the DOJ an opportunity to review the complaint and to determine whether it should reserve authority. Routinely, a letter is sent to the agency (usually, in Army cases, to Army Litigation which takes action on all such letters) indicating whether the case

[24]Fed. R. Civ. P. 4(d)(5).

will be handled from Washington, D.C., or locally by the United States attorney.

Army Litigation is the office authorized to represent the Army's position in all civil litigation.[25] The extent of such representation is subject to the statutory authority of the Attorney General.[26] Apart from providing support to those involved in the actual conduct of litigation, local Army lawyers are not authorized to conduct litigation on behalf of the Army without specific approval of TJAG after appropriate coordination with DOJ.[27] The sole exception to this is the authority for commanders to designate officers to prosecute minor offenses before magistrates (now misdemeanors).[28] Officers acting in this capacity will be appointed as Special Assistant United States Attorneys (SAUSAs) under 28 U.S.C. § 543;[29] they prosecute felony and misdemeanor cases committed on the installation--in which the Army has an interest--in federal court. These attorneys work under the supervision of the local United States attorney and only represent the United States in civil litigation if authorized by Army Litigation.

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[25]AR 27-40, para. 1-4d.

[26]On the general subject of the relationship between the DOJ and agency attorneys in government litigation, see G. Bell, The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many?, 46 Fordham L. Rev. 1049 (1978).

[27]AR 27-40, para. 1-4f.

[28]Id., para. 1-4e(1). See Magistrates Act of 1979, Pub. L. No. 96-82, § 7(c), 93 Stat. 646 (1979).

[29]See Department of Defense Authorization Act for Fiscal Year 1984, Pub. L. No. 98-84, 97 Stat. 655 (1983). See DAJA-AL 1979/3958; DAJA-AL 1980/3252.

## 1.4 Representation of Individual Defendants.

Soldiers and employees are often sued in their individual capacities by plaintiffs seeking relief directly from them. Whether a person is being sued individually or only in his official capacity is sometimes unclear and is determined only from a close reading of the complaint. Judge advocates must focus on the nature of the relief sought in the complaint and the characterization of the defendant's alleged acts.

When a person is sued individually, one of the major concerns is whether the government will provide legal representation. It is DOJ policy to represent military personnel and employees who are sued or criminally charged "as a result of the performance of their official duties."[30] In cases where "time for response is limited," the local Army lawyer will request the United States attorney to temporarily represent the defendant and will promptly advise Army Litigation.[31] Army Regulation 27-40 provides clear guidance on requesting DOJ legal representation in civil and criminal actions alleging individual liability (medical malpractice lawsuits, suits resulting from motor vehicle accidents, constitutional torts, common law torts, environmental crimes and motor vehicle accidents resulting in criminal charges).[32] In general, the SJA or legal adviser must prepare a report for Army Litigation that details the facts of the incident and an opinion on

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[30]AR 27-40, paras. 4-1, 4-2.

[31]Id., para. 4-4a(1).

[32]Id., chap. 4. See 28 C.F.R. § 15.1 (1993).

whether the named employee was acting within the scope of employment at the time of the alleged incident.[33]

Although it is easy to satisfy the requirements of AR 27-40 regarding representation, lawyers advising individual defendants should fully understand how and why the representation decision is made by the DOJ so that they can adequately advise personnel who are sued. The DOJ will represent personnel sued in their official capacities without a formal request.[34] Representation of defendants sued individually is another matter.[35]

The authority to represent persons in their individual capacities flows from a liberal reading of 28 U.S.C. § 517, which provides that

> [t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district . . . to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States (emphasis added).

Authority to represent government employees has also been inferred from 28 U.S.C. § 513, which allows the service secretaries to seek advice on "a question of law" from the Attorney General, and from 28 U.S.C. § 514, which allows agency heads to request the service of counsel from the Attorney General to resolve any

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[33]AR 27-40, para. 4-4a(5).

[34]See 4 U.S. Atty. Man. § 4-13.000.

[35]See generally Euler, Personal Liability of Military Personnel for Actions Taken in the Course of Duty, 113 Mil. L. Rev. 137, 158-60 (1986).

claim pending in the agency. The decision to extend representation is within the complete discretion of the DOJ. In Green v. James,[36] a civilian plaintiff, suing a military officer individually for allegedly tortious conduct, challenged the decision to provide the officer with government representation. The court held as follows:

> Representation by the Attorney General or the United States Attorney in this matter appears to be most proper. Sections 513, 514, 517 of Title 28, U.S. Code appear sufficiently broad to authorize such representation, and it further appears to be very clear that initial determinations at least as regards the existence of governmental interest, will be made unilaterally within governmental channels.[37]

Department of Justice regulations provide that both current and former government personnel may request representation for state criminal proceedings and in civil and congressional proceedings in which they may be sued or subpoenaed.[38] Historically, representation of a current or former federal employee in connection with a federal criminal matter has been expressly precluded by regulation.[39] Recently, however, the DOJ has

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[36]333 F. Supp. 1226 (D. Hawaii 1971), rev'd on other grounds, 473 F.2d 660 (9th Cir. 1973).

[37]333 F. Supp. at 1228. See Moore v. Califano, 471 F. Supp. 146 (S.D. W. Va. 1979), appeal dismissed, 622 F.2d 585 (5th Cir. 1980) (U.S. attorney has authority to represent employees despite lack of express authority in 28 U.S.C. § 547); Government of Virgin Islands v. May, 384 F. Supp. 1035 (D.V.I. 1974) (authority to offer representation in criminal cases).

[38]28 C.F.R. § 50.15(a) (1990).

[39]E.g., 28 C.F.R. § 50.15(b)(1) (1989).

acknowledged that while representation in federal criminal matters is generally inappropriate, "important non-prosecutorial Executive Branch interests may be implicated in federal criminal proceedings."[40] Accordingly, the DOJ amended the representation regulations to permit, under certain circumstances, limited representation in connection with federal criminal proceedings.[41] Under the amended regulations, a current or former federal employee may be provided representation by an attorney from the DOJ if it is determined that representation is in the interest of the United States and the employee has not become the subject of a federal criminal investigation.[42] If the employee has become the subject of an investigation, but no decision has been made to seek a federal indictment or information against the employee, the employee may be provided representation by private counsel at government expense if the Attorney General or his designee determines that such representation is in the interest of the United States.[43] The DOJ will neither provide representation nor authorize representation by private counsel at government expense once a federal indictment is sought or an information is filed against the employee or former employee.[44]

Representation is conditioned on submission of a request for representation by the defendant and a

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[40]See 55 Fed. Reg. 13,129-13,130 (1990).

[41]See id. at 13,129 (1990) (codified at 28 C.F.R. §§ 50.15; 50.16).

[42]28 C.F.R. §§ 50.15(a)(4); (7) (1990).

[43]See id. §§ 50.15(a)(7); 50.16(a); (d)(4) (1990).

[44]See id.

recommendation by the agency to the DOJ as to whether it should grant representation. Accompanying the request and recommendation is a statement from the agency indicating whether the defendant was acting within the scope of his employment at the time he allegedly committed the actionable acts or omissions at issue.[45] However, according to 28 C.F.R. § 50.15(b)

> [r]epresentation is not available to a federal employee whenever:
>
> (1) The conduct with regard to which the employee desires representation does not reasonably appear to have been performed within the scope of his employment with the federal government;
>
> (2) It is otherwise determined by the department that it is not in the interest of the United States to provide representation to the employee.

What the "interests" of the United States are is unclear. In one instance representation was denied where only some of the acts complained of were within the scope of employment.[46] A second instance where representation was found not to be in the interests of the United States is when the employee failed to promptly request representation and the case has progressed to a point where the DOJ's ability to defend has been prejudiced. It is the DOJ's position that a decision to deny representation is not subject to

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[45] Id. § 50.15(a)(1) (1990). A federal employee must also deliver all process served on him or her within the time limits established by the DOJ. Failure to do so may preclude the federal official from asserting an entitlement to immunity. See Tassin v. Neneman, 766 F. Supp. 974 (D. Kan. 1991).

[46] 57 Comp. Gen. 444 (1978).

judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 701-706.[47] Congress changed this rule in 1988, but only with respect to cases involving state law torts. If an individual government employee is sued for a state law tort and the Attorney General refuses to certify that the employee was within the scope of employment, the employee can petition the court for a finding that he was acting within the scope of employment.[48]

Instances/situations exist in which the DOJ may elect to provide representation by private counsel at federal expense. Examples include when a person is under criminal investigation, but no decision as to indictment or information has been made; when a conflict exists between the "legal or factual positions" of several employees being sued; where a conflict exists between the interests of the United States and the defendant; or where professional ethics would otherwise require.[49] Providing private counsel at federal expense is conditioned on a decision that the alleged acts or omissions were within the scope of office or employment.

Even if represented, the individual defendant remains liable for any money judgment.[50] As a matter of policy, the United States will pay tort judgments and

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[47]See Falkowski v. EEOC, 719 F.2d 470, 481-83 (D.C. Cir. 1983), vacated, 471 U.S. 1001 (1985) (decision that representation decisions reviewable summarily vacated).

[48]28 U.S.C. § 2679(d)(3) (1995).

[49]28 C.F.R. § 50.16(a) (1993); see AR 27-40, para. 4-5.

[50]28 C.F.R. § 50.15(a)(8)(iii) (1993).

settlements entered jointly against the government and individual federal defendants.[51]

Courts recognize the commitment of the government to represent government personnel.[52]

## 1.5 Removal of Cases.

Some cases against Army personnel for acts or omissions within the scope of office or employment are initially brought in state court. These cases require fast and attentive care as they usually involve short return dates and delays in responding may weaken the defense posture of the case. In these cases, the first step after resolving the representation question is removal to federal court.

The authority and procedures for removal of cases from state court to federal court are found in 28 U.S.C. §§ 1441-1451.[53] The general removal statute, 28 U.S.C.

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[51]Department of Justice, Torts Branch Monograph, Damage Suits Against Federal Officials 13 (1981).

[52]E.g., Stafford v. Briggs, 444 U.S. 527, 552 (1980). See Berman, Integrating Governmental and Official Tort Liability, 77 Colum. L. Rev. 1175, 1190-1193 (1978) (brief discussion of the representation issue).

[53]In addition to these more generalized removal statutes, several specialized statutes exist that contain their own removal provisions. For the government attorney, perhaps the most important specialized removal statute is 28 U.S.C. § 2679(d)(2), as amended by the Federal Employees Liability Reform and Tort Compensation Act of 1988. Under 28 U.S.C. § 2679(d)(2), as amended, common law tort suits against federal employees may be removed from state court without bond on certification by the Attorney General or his designee that the employee was acting within the scope of employment in connection with the (continued...)

§ 1441, allows removal at the instance of all defendants sued where the district court into which the case is removed would have had original jurisdiction.[54] Courts construe this general removal statute strictly and against removal.[55]

The general removal statute is the only method of removal for nonfederal defendants. Government personnel, in their official or individual capacities, may remove under 28 U.S.C. § 1442 as follows:

> (a) A civil action or criminal prosecution . . . against any of the following persons may be removed by them to the district court of the United States for the district . . . wherein it is pending:
>
> (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.
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> (2) A property holder whose title is derived from any such officer, where such

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[53](...continued)
activities giving rise to the lawsuit. See 10 U.S.C. § 1054(c) (removal of certain suits against DOD attorneys); 10 U.S.C. § 1089(c) (removal of certain suits against DOD physicians).

[54]28 U.S.C. § 1441(b) (1995).

[55]Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941); American Fire & Casualty Co. v. Finn, 341 U.S. 6 (1951). But see Mignogna v. Sair Aviation, Inc., 679 F. Supp. 184 (N.D.N.Y. 1988) (a third-party defendant with a separate and independent claim that could have been filed in federal court initially can remove the case although the removal statutes have no provision for removal by third-party defendants).

action or prosecution affects the validity of any law of the United States.

(3) Any officer of the courts of the United States, for any Act under color of office or in the performance of his duties.

(4) Any officer of either House of Congress, for any act in the discharge of his official duty under an order of such House.

(b) A personal action commenced in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States and is a nonresident of such State, wherein jurisdiction is obtained by the State court by personal service of process, may be removed by the defendant to the district court of the United States for the district and division in which the defendant was served with process.

The military is primarily concerned with § 1442(a)(1), which deals with federal officers and persons acting under them.[56] Note that under § 1442(a), either civil or criminal cases can be removed and that removal is to the federal court in the district of the state in which the case is pending. The only exception to this "venue" rule is essentially where the federal defendant is: (1) sued by a non-citizen; (2) in a state in which the defendant is not located and of which he is not a citizen; and (3) personal jurisdiction is obtained under a long-arm statute. In these circumstances,

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[56]As the Supreme Court recently explained, section 1442(a)(1) applies only to individuals, i.e., officers of the United States or officers of agencies of the United States, not to agencies themselves. See International Primate Protection League v. Administrators of Tulane Educ. Fund, 111 S. Ct. 1700 (1991) (National Institutes of Health lacked authority under 28 U.S.C. § 1442(a)(1) to remove to federal court a lawsuit against it by animal rights group alleging inhumane treatment of monkeys used in research).

§ 1442(b) allows removal to the district where service was made rather than where suit was brought.

Removal is usually from a state "court." Matters before some state administrative agencies, however, may also be subject to removal.[57] Exposure of military officers to state administrative orders, particularly in environmental law cases, which may ignore official immunity, make removal a course of action to consider pursuing.[58]

The history of § 1442 was explained by Justice Marshall in Willingham v. Morgan:[59]

> The first such removal provision was included in an 1815 customs statute. . . . It was part of an attempt to enforce an embargo on trade with England over the opposition of the New England States, where the War of 1812 was quite unpopular. It allowed federal officials involved in the enforcement of the customs statute to remove to the federal courts any suit or prosecution commenced because of any act done "under colour" of the statute. Obviously, the removal provision was an attempt to protect federal officers from interference by hostile state courts. This provision was not, however, permanent; it was by its terms to expire at the end of the war. But other periods of national stress spawned similar enactments. South Carolina's threats of nullification in 1833 led to the passage of

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[57]See Floeter v. C.W. Transport, Inc., 597 F.2d 1100 (7th Cir. 1979); Volkswagen de Puerto Rico, Inc. v. Puerto Rico Labor Relations Bd., 454 F.2d 38 (1st Cir. 1972); Annot., 48 A.L.R. Fed. 733 (1980).

[58]See United States v. Pennsylvania Envtl. Hearing Bd., 584 F.2d 1273, 1276 (3d Cir. 1978) (commander of Scranton Army Depot held liable in state water pollution enforcement proceeding).

[59]395 U.S. 402, 405 (1969).

> the so-called Force Bill, which allowed removal of all suits or prosecutions for acts done under the customs laws. . . . A new group of removal statutes came with the Civil War, and they were eventually codified into a permanent statute which applied mainly to cases growing out of enforcement of the revenue laws. . . . Finally, Congress extended the statute to cover all federal officers when it passed the current provision as part of the Judicial Code of 1948. See H. R. Rep. No. 308, 80th Cong., 1st Sess., A134 (1947).
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> The purpose of all these enactments is not hard to discern. As this Court said nearly 90 years ago in Tennessee v. Davis, 100 U.S. 257, 263 (1880), the Federal Government
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> > "can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offence against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection,--if their protection must be left to the action of the State court,--the operations of the general government may at any time be arrested at the will of one of its members."[60]

In addition to § 1442, other statutes provide for removal in specific circumstances.[61]

An additional right of removal is provided for military personnel generally under § 1442a:

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[60]395 U.S. at 405.

[61]See note 53, supra.

> A civil or criminal prosecution . . . against a member of the armed forces . . . on account of an act done under color of his office or status, or in respect to which he claims any right, title, or authority under a law of the United States respecting the armed forces thereof, or under the law of war, may at any time before the trial or final hearing thereof be removed for trial into the district court of the United States for the district where it is pending in the manner prescribed by law . . . which shall proceed as if the cause had been originally commenced therein. . . .

Originally Article of War 117, § 1442a was made a separate statute by the Act of May 5, 1950,[62] which established the Uniform Code of Military Justice (UCMJ). Although § 1442 also covers military personnel and did in 1950, § 1442a survives as an independent ground for removal. Originally, the reason for having a separate statute for removal in military cases was that § 1442 was limited to removal in revenue cases. Consequently, absent Article of War 117, there was no authority for the removal of cases involving military defendants. When the scope of § 1442 was extended to all federal officers, including the military, there was no further need for the separate military statute. Nevertheless, § 1442a remains available as alternative for removal.

The only advantage of § 1442a is that removal of either a civil or criminal case can occur anytime before trial or final hearing. Removals under § 1442a, on the other hand, are subject to the time limits in § 1446. Section 1446(b) requires the removal process in a civil case to begin within 30 days of service upon or receipt by the defendant of the initial pleading or summons, whichever is earlier. Where there are multiple

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[62]Pub. L. No. 81-506, 64 Stat. 107 (1950).

defendants, the 30 days arguably begin to run when the first defendant is served.[63] Section 1446(c)(1) requires removal in a criminal case to generally begin within 30 days of the state arraignment or anytime before trial, whichever is earlier.

One advantage to § 1442 is that it allows a nonfederal officer acting under the direction of a federal officer to remove his case to federal court whereas this feature is absent from § 1442a. Apart from these differences, there is no relevant distinction between § 1442(a)(1) and § 1442a.[64]

As compared with the general removal statute, these federal officer removal statutes provide substantial advantage to the federal defendant. First, not all defendants need join in removal.[65] Thus, even if several nonfederal defendants object, the case can be removed. Second, the removing defendant does not have to show that the district court would have had original jurisdiction over the case had it initially been brought in the federal rather than state forum.[66] Hence, the absence of diversity or a federal question is irrelevant when a federal officer wants to remove. Once removed, additional federal claims can be added to the

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[63]Balestrieri v. Bell Asbestos Mines, Ltd., 544 F. Supp. 528 (E.D. Pa. 1982).

[64]Mir v. Fosburg, 646 F.2d 342, 344 (9th Cir. 1980).

[65]Bradford v. Harding, 284 F.2d 307 (2d Cir. 1960).

[66]Mir, 646 F.2d at 344; S.S. Silberblatt, Inc. v. East Harlem Pilot Block, 608 F.2d 28, 35 (2d Cir. 1979).

complaint.[67] If a defect exists in service of process in the original suit, the plaintiff can perfect service after removal.[68]

The major concern in removal is demonstrating that the case bears some relation to the defendant's official duties. The defendant (or one acting under him under § 1442(a)(1)) must show that he is being sued for or charged with an act "under color" of his office or "on account of any right, title or authority claimed under any [law] for the apprehension or punishment of criminals," (if removal is under § 1442(a)(1)) or where he "claims any right title, or authority under a law . . . respecting the armed forces . . . or under the law of war" (if removal is under § 1442a). Unlike the general removal statute which courts construe strictly, courts construe this language of § 1442(a)(1) and § 1442a broadly.[69]

The case leading case on the scope of removal is Willingham v. Morgan.

WILLINGHAM v. MORGAN
395 U.S. 402 (1969)

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Petitioners Willingham and Jarvis are, respectively, the warden and chief medical officer at the United States Penitentiary at

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[67]See Pavlov v. Parsons, 574 F. Supp. 393 (S.D. Tex. 1983).

[68]28 U.S.C. § 1448 (1995).

[69]But see Virginia v. Harvey, 571 F. Supp. 464 (E.D. Va. 1983) (removal of involuntary manslaughter charge against Marine driver denied).

Leavenworth, Kansas. Respondent Morgan was a prisoner at the penitentiary at the time he filed this suit in the Leavenworth County District Court. He alleged in his complaint that petitioners and other anonymous defendants had on numerous occasions inoculated him with "a deleterious foreign substance" and had assaulted, beaten, and tortured him in various ways, to his great injury. He asked for a total of $3,285,000 in damages from petitioners alone. . . . Petitioners filed a petition for removal of the action to the United States District Court for the District of Kansas, alleging that anything they may have done to respondent "was done and made by them in the course of their duties as officers of the United States . . . and under color of such offices. . . ." The Federal District Judge denied respondent's motion to remand the case to the state courts. . . . [T]he Tenth Circuit . . . found insufficient basis in the record to support the District Court's refusal to remand the case to the state courts. . . . We reverse.

I.

The court below held that the "color of office" test of § 1442(a)(1) "provides a rather limited basis for removal. . . ." It noted that the record might well have supported a finding that petitioners were protected from a damage suit by the official immunity doctrine. But it held that the test for removal was "much narrower" than the test for official immunity . . . and accordingly that petitioners might have to litigate their immunity defense in the state courts. The government contends that this turns the removal statute on its head. It argues that the removal statute is an incident of federal supremacy, and that one of its purposes was to provide a federal forum for cases where federal officials must raise defenses arising from their official duties. On this view, the test for removal should be broader, not narrower, than the test for official immunity. We agree. . . .

[T]he right of removal under § 1442(a)(1) is made absolute whenever a suit in a state court is for any act "under color" of federal

office, regardless of whether the suit could originally have been brought in a federal court. Federal jurisdiction rests on a "federal interest in the matter," Poss v. Lieberman, 299 F.2d 358, 359 (C. A. 2d Cir.), cert. denied, 370 U.S. 944 (1962), the very basic interest in the enforcement of federal law through federal officials.

Viewed in this context, the ruling of the court below cannot be sustained. The federal officer removal statute is not "narrow" or "limited." Colorado v. Symes, 286 U.S. 510, 517 (1932). At the very least, it is broad enough to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law. One of the primary purposes of the removal statute--as its history clearly demonstrates--was to have such defenses litigated in the federal courts. The position of the court below would have the anomalous result of allowing removal only when the officers had a clearly sustainable defense. The suit would be removed only to be dismissed. Congress certainly meant more than this when it chose the words "under color of . . . office." In fact, one of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court. The officer need not win his case before he can have it removed. In cases like this one, Congress has decided that federal officers, and indeed the federal government itself, require the protection of a federal forum. This policy should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1).

II.

The question remains, however, whether the record in this case will support a finding that respondent's suit grows out of conduct under color of office, and that it is, therefore, removable. Respondent alleged in his motion for remand that petitioners had been acting "on a frolic of their own which had no relevancy to their official duties as employees or officers of the United States. . . ." Willingham declares that the only contact he has had with respondent was

"inside the walls of the United States Penitentiary . . . and in performance of [his] official duties as Warden of said institution." Petitioner Jarvis declares, similarly, that his only contact with respondent was at the prison hospital "and only in the performance of [his] duties as Chief Medical Officer . . ."

The Judicial Code requires defendants who would remove cases to the federal courts to file "a verified petition containing a short and plain statement of the facts" justifying removal. 28 U.S.C. § 1446(a). Moreover, this Court has noted that "the person seeking the benefit of [the removal provisions] should be candid, specific and positive in explaining his relation to the transaction" which gave rise to the suit. Maryland v. Soper (No. 1), 270 U.S. 9, 35 (1926); see Colorado v. Symes, supra, at 518-521. These requirements must, however, be tailored to fit the facts of each case.

It was settled long ago that the federal officer, in order to secure removal, need not admit that he actually committed the charged offenses. Maryland v. Soper (No. 1), supra, at 32-33. Thus, petitioners in this case need not have admitted that they actually injured respondent. They were, therefore, confronted with something of a dilemma. Respondent had filed a "scattergun" complaint, charging numerous wrongs on numerous different (and unspecified) dates. If petitioners were to be "candid, specific and positive" in regard to all these allegations, they would have to describe every contact they had ever had with petitioner, as well as all contacts by persons under their supervision. This would hardly have been practical, or even possible, for senior officials like petitioners.

[W]e think it was sufficient for petitioners to have shown that their relationship to respondent derived solely from their official duties. Past cases have interpreted the "color of office" test to require a showing of a "causal connection" between the charged conduct and asserted official authority. Maryland v. Soper (No. 1), supra, at 33. "It is enough that

> [petitioners'] acts or [their] presence at the place in performance of [their] official duty constitute the basis, though mistaken or false, of the state prosecution." Ibid. In this case, once petitioners had shown that their only contact with respondent occurred inside the penitentiary, while they were performing their duties, we believe that they had demonstrated the required "causal connection." The connection consists, simply enough, of the undisputed fact that petitioners were on duty, at their place of federal employment, at all the relevant times. If the question raised is whether they were engaged in some kind of "frolic of their own" in relation to respondent, then they should have the opportunity to present their version of the facts to a federal, not a state, court. . . .

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Removal should be liberally allowed where a federal officer can raise a defense arising out of his duty to enforce federal law, such as the official immunity defense that the defendants in Willingham sought to introduce.[70] As the Supreme Court recently held, the presence of a federal defense is critical to sustaining removal of a state criminal prosecution.[71]

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[70]See Williams v. Brantley, 492 F. Supp. 925 (W.D.N.Y. 1980), aff'd, 738 F.2d 419 (2d Cir. 1984).

[71]See Willingham v. Morgan, 395 U.S. 402 at 409, n. 4 (1969). E.g., North Carolina v. Cisneros, 947 F.2d 1135 (4th Cir. 1991) (corporal's allegation that brakes on military vehicle failed did not involve a federal defense and thus state prosecution for vehicular homicide could not be removed to federal court); Application of Donovan, 601 F. Supp. 574 (S.D.N.Y. 1985) (former Secretary of Labor seeks to remove state felony indictment charging state crimes allegedly committed while he was in office); Colorado v. Maxwell, 125 F. Supp. 18 (D. Colo. 1954) (state sheriff who detained a soldier at the request of military authorities shot him when he tried to escape).

MESA v. CALIFORNIA
489 U.S. 121 (1989)

Justice O'CONNOR delivered the opinion of the Court.

We decide today whether United States Postal Service employees may, pursuant to 28 U.S.C. § 1442(a)(1), remove to Federal District Court state criminal prosecutions brought against them for traffic violations committed while on duty.

I

In the summer of 1985 petitioners Kathryn Mesa and Shabbir Ebrahim were employed as mail truck drivers by the United States Postal Service in Santa Clara County, California. In unrelated incidents, the State of California issued criminal complaints against petitioners, charging Mesa with misdemeanor-manslaughter and driving outside a laned roadway after her mail truck collided with and killed a bicyclist, and charging Ebrahim with speeding and failure to yield after his mail truck collided with a police car. . . .

[T]he United States Attorney for the Northern District of California filed petitions in the United States District Court for the Northern District of California for removal to that court of the criminal complaints brought against Ebrahim and Mesa. The petitions alleged that the complaints should properly be removed to the Federal District Court pursuant to 28 U.S.C. § 1442(a)(1) because Mesa and Ebrahim were federal employees at the time of the incidents and because "the state charges arose from an accident involving defendant which occurred while defendant was on duty and acting in the course and scope of her employment with the Postal Service."

. . . .

The United States and California agree that Mesa and Ebrahim, in their capacity as employees of the United States Postal Service, were "person[s] acting under" an "officer of

the United States or any agency thereof" within the meaning of § 1442(a)(1). Their disagreement concerns whether the California criminal prosecutions brought against Mesa and Ebrahim were "for act[s] under color of such office" within the meaning of that subsection. The United States, largely adopting the view taken by the Court of Appeals for the Third Circuit in Pennsylvania v. Newcomer, 618 F.2d 246 (1980), would read "under color of office" to permit removal "whenever a federal official is prosecuted for the manner in which he has performed his federal duties. . . ." California, following the Court of Appeals below, would have us read the same phrase to impose a requirement that some federal defense be alleged by the federal officer seeking removal.

. . . .

The government's view, which would eliminate the federal defense requirement, raises serious doubt whether, in enacting § 1442(a), Congress would not have "expand[ed] the jurisdiction of the federal courts beyond the bounds established by the Constitution." Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 491, 103 S. Ct. 1962, 76 L.Ed.2d 81 (1983). In Verlinden, we discussed the distinction between "jurisdictional statutes" and "the federal law under which [an] action arises, for Art. III purposes," and recognized that pure jurisdictional statutes which seek "to do nothing more than grant jurisdiction over a particular class of cases" cannot support Art. III "arising under" jurisdiction. Id., at 496, 103 S. Ct., at 1970, citing The Propeller Genesse Chief v. Fitzhugh, 12 How. 443, 451-543, 13 L.Ed. 1058 (1852); Mossman v. Higginson, 4 Dall. 12, 1 L.Ed. 720 (1800). In Verlinden we held that the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1330, is a "comprehensive scheme" comprising both pure jurisdictional provisions and federal law capable of supporting Art. III "arising under" jurisdiction. 461 U.S., at 496, 103 S. Ct., at 1972.

Section 1442(a), in our view, is a pure jurisdictional statute, seeking to do nothing more than grant district court jurisdiction

over cases in which a federal officer is a defendant. Section 1442(a), therefore, cannot independently support Art. III "arising under" jurisdiction. Rather, it is the raising of a federal question in the officer's removal petition that constitutes the federal law under which the action against the federal officer arises for Art. III purposes. The removal statute itself merely serves to overcome the "well-pleaded complaint" rule which would otherwise preclude removal even if a federal defense were alleged. See Verlinden, supra, at 494, 103 S. Ct., at 1971-72; Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 808, 106 S. Ct. 3229, 3232, 92 L.Ed.2d 650 (1986) (under the "well-pleaded complaint" rule "[a] defense that raises a federal question is inadequate to confer federal jurisdiction"); Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149, 29 S. Ct. 42, 53 L.Ed. 126 (1908). Adopting the government's view would eliminate the substantive Art. III foundation of § 1442(a)(1) and unnecessarily present grave constitutional problems. We are not inclined to abandon a longstanding reading of the officer removal statute that clearly preserves its constitutionality and adopt one which raises serious constitutional doubt. . . .

At oral argument the government urged upon us a theory of "protective jurisdiction" to avoid these Art. III difficulties. Tr. of Oral Art. 6. In Willingham, we recognized that Congress enactment of federal officer removal statutes since 1815 served "to provide a federal forum for cases where federal officials must raise defenses arising from their official duties . . . [and] to protect federal officers from interference by hostile state courts." 395 U.S., at 405, 89 S. Ct., at 1815. The government insists that the full protection of federal officers from interference by hostile state courts cannot be achieved if the averment of a federal defense must be a predicate to removal. More important, the government suggests that this generalized congressional interest in protecting federal officers from state court interference suffices to support Art. III "arising under" jurisdiction.

We have, in the past, not found the need to adopt a theory of "protective jurisdiction" to support Art. III "arising under" jurisdiction, Verlinden, supra, 461 U.S., at 491, n. 17, 103 S. Ct., at 1970, n. 17, and we do not see any need for doing so here because we do not recognize any federal interests that are not protected by limiting removal to situations in which a federal defense is alleged. In these prosecutions, no state court hostility or interference has even been alleged by petitioners and we can discern no federal interest in potentially forcing local district attorneys to choose between prosecuting traffic violations hundreds of miles from the municipality in which the violations occurred or abandoning those prosecutions. . . .

> "[U]nder our federal system, it goes without saying that preventing and dealing with crime is much more the business of the States than it is of the federal government. Because the regulation of crime is pre-eminently a matter for the States, we have identified a strong judicial policy against federal interference with state criminal proceedings." Arizona v. Manypenny, 451 U.S. 232, 243, 102 S. Ct. 1657, 1665, 68 L.Ed.2d 58 (1981) (citations and internal quotations omitted).

It is hardly consistent with this "strong judicial policy" to permit removal of state criminal prosecutions of federal officers and thereby impose potentially extraordinary burdens on the States when absolutely no federal question is even at issue in such prosecutions. We are simply unwilling to credit the government's ominous intimations of hostile state prosecutors and collaborationist state courts interfering with federal officers by charging them with traffic violations and other crimes for which they would have no federal defense in immunity or otherwise. That is certainly not the case in the prosecutions of Mesa and Ebrahim, nor was it the case in the removal of the state prosecutions of federal revenue agents that

confronted us in our early decisions. In those cases where true state hostility may have existed, it was specifically directed against federal officers' efforts to carry out their federally mandated duties. E.g., Tennessee v. Davis, 100 U.S. 257, 25 L.Ed. 648 (1880). As we said in Maryland v. Soper (No. 2), 270 U.S., at 43-44, 46 S. Ct., at 193-94, with respect to Judicial Code § 83:

> "In answer to the suggestion that our construction of § 33 and our failure to sustain the right of removal in the case before us will permit evilly minded persons to evade the useful operations of § 33, we can only say that, if prosecutions of this kind come to be used to obstruct seriously the enforcement of federal laws, it will be for Congress in its discretion to amend § 33 so that the words . . . shall be enlarged to mean that any prosecution of a federal officer for any state offense which can be shown by evidence to have had its motive in a wish to hinder him in the enforcement of federal law, may be removed for trial to the proper federal court. We are not now considering or intimating whether such an enlargement would be valid; but what we wish to be understood as deciding is that the present language of § 33 can not be broadened by fair construction to give it such a meaning. These were not prosecutions, therefore, commenced on account of acts done by these defendants solely in pursuance of their federal authority. With the statute as it is, they can not have the protection of a trial in the federal court. . . ."

Chief Justice Taft's words of 63 years ago apply equally well today; the present language of § 1442(a) cannot be broadened by fair construction to give it the meaning which the Government seeks. Federal officer removal under 28 U.S.C. § 1442(a) must be predicated upon averment of a federal defense.

> Accordingly, the judgment of the Court of Appeals is affirmed.
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> SO ORDERED.
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> [Footnotes and concurring opinion omitted.]

Although removal should be sustained where the criteria of the statutes are met, removal may be improvident if an agency is little more than a stakeholder in the litigation. A typical example is a divorce case in which entitlement to military retired pay is at issue.[72]

The procedure for removal is provided in 28 U.S.C. § 1446 which, apart from the time limits in removal actions based on § 1442(a)(1), requires the party seeking removal to file:

> . . . [A] notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings and orders served upon such defendant or defendants in such action.[73]

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[72]See Murray v. Murray, 621 F.2d 103 (5th Cir. 1980) (U.S. garnishee in alimony action based on Veterans' Administration disability benefits to retired soldier); Williams v. Williams, 427 F. Supp. 557 (D. Md. 1976); Wilhelm v. United States Dep't of the Air Force Accounting and Finance Center, 418 F. Supp. 162 (S.D. Tex. 1976) (Air Force retired pay). See also Matter of Marriage of Smith, 549 F. Supp. 761, 765-66 (W.D. Tex. 1982) (no grounds for removal of contempt action against retired soldier for failing to pay share of retired pay in divorce--contempt action is not civil action or criminal prosecution commenced in state court).

[73]28 U.S.C. § 1446(a) (1995).

Pending state proceedings in civil cases stop as soon as the petition is filed in the district court and a copy is filed with the state court.[74] Despite the filing of the petition, the proceedings in a criminal case may continue up to, but short of entry of conviction, but they stop when the removal petition is granted.[75] In a criminal case, a defendant in state custody is released to a marshal on a writ of habeas corpus which the district will issue on granting removal.[76]

In civil cases, removal occurs immediately on filing of the notice in the federal and state court and service of notice on all parties. A motion to remand the case to the state court on the basis of any defect in removal procedure must be made within 30 days of filing the notice of removal.[77] In criminal cases, an evidentiary hearing must be held before removal can be granted.[78] Hence, the state prosecutor can attempt to block removal before it occurs, and, if he fails, he can then move to remand, as in a civil case.

An order remanding a case that was removed under § 1442 or § 1442a cannot be appealed when the removal was improvident and without jurisdiction.[79] If the

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[74]Id. § 1446(d) (1995).

[75]Id. § 1446(c)(3) (1995).

[76]Id. § 1446(e) (1995).

[77]Id. § 1446(b) (1995).

[78]Id. § 1446(c)(5) (1995).

[79]Id. § 1447(d) (1995). See, e.g., Hammons v. Teamsters, 754 F.2d 177 (6th Cir. 1985).

remand order was based on other, impermissible grounds, appeal may be possible by way of mandamus.[80] Denial of a motion to remand is not a final judgment and, therefore, generally cannot be appealed as an interlocutory matter,[81] although relief in criminal cases may be sought by mandamus.[82] Once granted, an order to remand can neither be set aside nor reconsidered by the court.[83] On remand, the court may require the defendant seeking removal to pay the opposing party's costs and expenses, including attorney fees, incurred as a result of the removal.[84]

After removal, the action proceeds as it would had it been brought in the district court first. The substantive law of the state remains applicable after removal. The Supreme Court addressed this point in Arizona v. Manypenny,[85] where it considered whether Arizona could appeal the judgment of acquittal of a federal border patrolman accused of maiming an illegal

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[80]Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976) (remand based on overcrowded docket was appealable). See Sheet Metal Workers Inter. Assoc. v. Seay, 696 F.2d 780 (10th Cir. 1983) (mandamus to retain jurisdiction in federal court granted where reason for remand was that state court was more convenient forum).

[81]Aucoin v. Matador Serv., Inc., 749 F.2d 1180 (5th Cir. 1985); Dixon v. Georgia Indigent Legal Serv., Inc., 388 F. Supp. 1156 (S.D. Ga. 1974), aff'd, 532 F.2d 1373 (5th Cir. 1976).

[82]Pennsylvania v. Newcomer, 618 F.2d 246, 248-49 (3d Cir. 1980).

[83]E.g., Three J. Farms, Inc. v. Alton Box Board Co., 609 F.2d 112 (4th Cir. 1979), cert. denied, 445 U.S. 911 (1980).

[84]28 U.S.C. § 1447(c) (1995).

[85]451 U.S. 232 (1981).

immigrant. The prosecution, begun in state court, was removed under § 1442(a)(1). State authorities then prosecuted the case in district court, applying Arizona law. Despite a jury verdict of guilty, the court later rendered a judgment of acquittal based on official immunity. The state sought to appeal, but the Ninth Circuit decided that no federal statute authorized appeal by a state in a removal case. The Supreme Court held that removal could not cut off the right of appeal that the state would have had if the case remained in the state court. The Court emphasized the predominance of state law in the removal process:

> The Court of Appeals concluded that the fact of removal substantially alters the State's right to seek review. Reasoning that a case brought pursuant to § 1442(a)(1) arises under federal law, the court held that state enabling statutes retain no significance. But a state criminal proceeding against a federal officer that is removed to federal court does not "arise under federal law" in this pre-empting sense. Rather, the federal court conducts the trial under federal rules of procedure while applying the criminal law of the State. Tennessee v. Davis, 100 U.S. 257, 271-272 (1880). See Fed. Rule Crim. Proc. 54(b)(1), Advisory Committee Notes, 18 U.S.C. App., pp. 1480-1481.
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> . . . .
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> [T]he invocation of removal jurisdiction by a federal officer does not revise or alter the underlying law to be applied. In this respect, it is a purely derivative form of jurisdiction, neither enlarging nor contracting the rights of the parties. Federal involvement is necessary in order to insure a federal forum, but it is limited to assuring that an impartial setting is provided in which the federal defense of immunity can be considered during prosecution under state law. Thus, while giving full effect to the purpose of removal, this Court retains the

> highest regard for a State's right to make and enforce its own criminal laws. Colorado v. Symes, 286 U.S., at 517-518. . . .[86]

As the Court noted, even though state substantive law applies, federal law applies to procedure and other federal questions.[87] Official immunity is one of the most important issues that is decided under federal law rather than under state law, as demonstrated by the district court decision in Arizona v. Manypenny.[88]

In practice, removal of cases involving federal officers is not a complex or difficult procedure. It does, however, require close and timely coordination between the defendant being sued, the local staff judge advocate or legal adviser, Army Litigation, and the Department of Justice.

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[86]451 U.S. at 241-43. Compare City of Aurora v. Erwin, 706 F.2d 295 (10th Cir. 1983) (state right to jury trial binding on federal magistrate in trial of petty offense removed from state court).

[87]See, e.g., Fed. R. Crim. P. 54(b)(1).

[88]See Maryland v. Chapman, 101 F. Supp. 335 (D. Md. 1951) (although state law applied to removed manslaughter prosecution of Air Force pilot who crashed in a populated area, defendant held to have official immunity); Montana v. Christopher, 345 F. Supp. 60 (D. Mont. 1972) (traffic citation removed under § 1442a and airman held to have official immunity despite applicability of state law).

# CHAPTER 2

# PRETRIAL PREPARATION AND PROCEDURE IN FEDERAL LITIGATION

## 2.1 General.

The pretrial stage of federal litigation with its many procedural rules is generally of greater importance to judge advocates involved in litigation than the procedure related to trial and judgment since many cases terminate before trial, either upon settlement or the success of a dispositive motion. Additionally, the greater demands on judge advocates in the field usually are made at the beginning of litigation and during the discovery phase. This chapter briefly discusses the most significant aspects of the Federal Rules of Civil Procedure (hereafter referred to as the Rules) that relate to the complaint and answer, motions that are intended to cut off the plaintiff as early in the litigation as possible, and discovery. A short discussion of habeas corpus practice follows the section on discovery.

## 2.2 Beginning the Litigation - Complaint and Answer.

The federal civil action is commenced by the filing of a complaint.[1] When the complaint is filed, the applicable statute of limitations generally tolls.[2]

This distinguishes federal practice from that in some other jurisdictions where service of process tolls the limitations period.

Consider the case where the complaint is filed within the statute of limitations, but process is not served until after the statute has run. Some older cases held that the remedy for a delay in service was a motion to dismiss for failure to prosecute under Rule 41(b).[3] Other cases held that Rule 3 was qualified by the service of process rules in Rule 4 and, as a result, failure to make service "nullified" the effect of filing the complaint.[4]

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[1]Fed. R. Civ. P. 3. See, e.g., Baldwin County Welcome Center v. Brown, 466 U.S. 147 (1984); Birge v. Delta Air Lines, Inc., 597 F. Supp. 448, 454 (N.D. Ga. 1984) (cases holding complaint, not Title VII right-to-sue letter, commences civil action); compare Lewis v. Richmond City Police Dept., 947 F.2d 733 (4th Cir. 1991) (delivery to prison authorities for mailing to clerk of court constitutes "filing" for confined prisoner).

[2]Sentry Corp. v. Harris, 802 F.2d 229 (7th Cir. 1986), cert. denied, 481 U.S. 1004 (1987). In most cases against the United States, the statute of limitations, under 28 U.S.C. § 2401(a), is six years, although shorter periods are provided in specific actions; see, e.g., 28 U.S.C. § 2401(b) with respect to Federal Tort Claims Act actions.

[3]Messenger v. United States, 231 F.2d 328 (2d Cir. 1956).

[4]Hukill v. Pacific & Arctic Ry. & Navigation Co., 159 F. Supp. 571 (D. Alaska 1958).

This issue was largely resolved with the 1983 statutory change to Rule 4 which mandates dismissal without prejudice on motion or by the court on its own when a defendant is not served within 120 days of the filing of the complaint, absent a showing of good cause.[5]

The "pleadings" consist only of the complaint and answer, a reply to a counterclaim, or cross-claim and a third-party complaint.[6] Under Rule 8(a), the complaint must contain the following elements:

a. a "short and plain statement of the grounds" for jurisdiction,

b. a "short and plain statement of the claim" showing entitlement to relief, and

c. a demand for judgment.

Under the concept of notice pleading on which the federal rules are based, the plaintiff need only state his claim rather than all the facts on which his claim is based, as would be required under traditional notions of code pleading.[7] On the other hand, some factual

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[5]Fed. R. Civ. P. 4(i); Federal Rules of Civil Procedure Amendments Act of 1982, Pub. L. No. 97-462, 96 Stat. 2527 (1983). E.g., Frasca v. United States, 921 F.2d 450 (2d Cir. 1990) (filing of complaint tolls the running of the statute of limitations for 120 days and complaint was properly dismissed for failure to make service before the expiration of the statute of limitations).

[6]Fed. R. Civ. P. 7(a).

[7]See C. Clark, Handbook of the Law of Code Pleading §§ 8, 35 (2 ed. 1947).

allegations are necessary to allow the defendant to respond to the complaint.[8] The requirement under Rule 8(a) is best described by Justice Black in Conley v. Gibson,[9] where the Court reversed dismissal of a complaint alleging discrimination against black railway workers:

> The respondents also argue that the complaint failed to set forth specific facts to support its general allegations of discrimination and that its dismissal is therefore proper. The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. Following the simple guide of Rule 8(f) that "all pleadings shall be so construed as to do substantial justice," we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.[10]

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[8] E.g., Mountain View Pharmacy v. Abbott Laboratories, 630 F.2d 1383 (10th Cir. 1980).

[9] 355 U.S. 41, 47 (1957).

[10] 355 U.S. at 48 (1957).

While the complaint in Gibson was challenged for being too succinct and failing to apprise defendants of just what plaintiff thought they did wrong, the following case, filed by a former Assistant U.S. Attorney against the Department of Justice and the U.S. Attorney, illustrates the opposite side of the problem:

WINDSOR v. A FEDERAL EXECUTIVE AGENCY
614 F. Supp. 1255 (M.D. Tenn. 1984)
aff'd, 767 F.2d 923 (6th Cir. 1984)

> The rules governing pleading in the federal courts require a complaint to contain ". . . a short and plain statement of the claim . . ." and the averments therein must be " . . . simple, concise, and direct." Rule 8(a)(2), (e)(1), F.R.Civ.P.; see United States v. School Dist. of Ferndale, 577 F.2d 1339, 1345 (6th Cir. 1978). This is the only permissible pleading authorized for filing in a federal district court. Harrell v. Directors of Bur. of Narcotics, Etc., 70 F.R.D. 444, 446[2] (D.C. Tenn. 1975). The complaint herein is deficient.
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> Mr. Windsor's complaint consists of 11 pages with a 7-1/2 page exhibit appended thereto. He proposes to amend such complaint so as to add thereto five more pages of allegations along with some 24 pages of exhibits. Since exhibits to a pleading are considered a part thereof, Rule 10(c), F.R.Civ.P., the plaintiff offers a complaint containing a total of 47-1/2 pages. This is excessive.
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> Stripped of its verbosity, Mr. Windsor's claim seems to be that the defendants wronged him, by submitting to the disciplinary arm of the Supreme Court of Tennessee a document containing false information about him and that, as a proximate result thereof, he was damaged and is entitled to be compensated therefor. In the opinion of the Court, it does not require nearly four-dozen pages to state such a relatively simple claim and to

outline briefly the legal grounds for recovery.

In addition to its length (and, logically, as a result), the complaint is confusing and distracting; it contains numerous allegations which are irrelevant and otherwise improper. The detailed history of Mr. Windsor's difficulties with his former employer is well-documented, see Windsor v. The Tennessean, 719 F.2d 155 (6th Cir. 1983), and need not be rehashed herein; his earlier lawsuit is a part of the records of this Court and, to the extent such might become relevant herein, the Court can take judicial notice thereof. Rule 201(b), F.R.Evid.; Harrington v. Vandalia-Butler Bd. of Ed., 649 F.2d 434, 441[7] (6th Cir. 1981).

" . . . [T]he purpose of a pleading is to state the ultimate facts constituting the claim or defense relied upon in short and plain terms without pleading the evidence in support of such facts. . . ." Commissioner of Internal Revenue v. Licavoli, 252 F.2d 268, 272[1] (6th Cir. 1958). Thus, it is not required that a plaintiff plead evidentiary matters, Mathes v. Nugent, 411 F. Supp. 968, 972[8] (N.D. Ill. 1976); and " . . . [i]t has long been basic to good pleading that evidentiary matters be deleted. . . ." Control Data Corp. v. International Business Mach. Corp., 421 F.2d 323, 326 (8th Cir. 1970). Mr. Windsor's complaint is replete with evidentiary statements adding nothing but confusion.

Lastly, the complaint is overly-confusing because the plaintiff has not separated adequately his different claims for relief. Although Rule 10(b), F.R.Civ.P., may not require expressly the use of separate counts in the statement of different theories of recovery, such is often desirable: ". . . Pleadings will serve the purpose of sharpening and limiting the issues only if claims based on [one theory of recovery] are set forth separately from those based on [another theory of recovery]. . . ." O'Donnel v. Elgin, J. &

E. Ry. Co., 338 U.S. 384, 392, 70 S.Ct. 200, 205[5], 94 L.Ed. 187 (1949).

> In this Circuit, a complaint seeking relief under more than a single statute must set out the different claims separately. Distributing Company v. Gelmore Distilleries, 267 F.2d 343, 345[3] (6th Cir. 1959). ". . . The objective of Rule 8, supra, was to make complaints simpler, rather than more expansive. . . ." Harrell v. Directors of Bur. of Narcotics, Etc., supra, 70 F.R.D. at 445[2], citing Conley v. Gibson, 355 U.S. 41, 47, 78 S.Ct. 99, 103[10], 2 L.Ed.2d 80 (1957). Obviously, that objective has not been fulfilled herein, because the complaint does not comply with the requirements of Rule 8, supra.

Pro se complaints, especially those by prisoners, are held to less stringent standards than those prepared by an attorney.[11] These complaints, encountered frequently in Government practice, can be major irritants, especially where courts, unwilling to dismiss them, place the defendant in the position of having to virtually construct a case for the plaintiff in order to set the stage for a successful dispositive motion.

On the other hand, where a pro se complaint is hopelessly prolix, rambling, or nonspecific, courts will be willing to dismiss.[12] Where the pro se plaintiff is

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[11]See Hughes v. Rowe, 449 U.S. 5 (1980); Estelle v. Gamble, 429 U.S. 97 (1976); Haines v. Kerner, 404 U.S. 519 (1972). But see Holsey v. Collins, 90 F.R.D. 122 (D.C. Md., 1981) (even pro se litigants must meet minimum pleading standards). Cf. Graham v. Three or More Members of Six Member Army Reserve General Officer Selection Bd., 556 F. Supp. 669, 671-2 (S.D. Tex. 1983) (pro se lawyer pleadings not entitled to deference).

[12]E.g., United States ex rel. Dattola v. National (continued...)

proceeding in forma pauperis the district court can dismiss frivolous complaints sua sponte before service of process on the defendant.[13] In some cases in which pro se plaintiffs repeatedly file the same complaint or frivolous complaints, the court may impose sanctions, such as conditioning the filing of new complaints on the court's prior approval.[14]

Pleadings and motions must be signed, either by an attorney where a party is represented by counsel or by the party where he is acting pro se.[15] Presenting the pleading to the court constitutes a certification by the presenter that, after reasonable inquiry, he knows or believes that: (1) it is not presented for improper purpose; (2) its claims, defenses, and other legal contentions are grounded in existing law or a nonfrivolous extension of it; (3) its factual contentions have evidentiary support or, if specifically so identified, are likely to be supported by discovery; and (4) denials of factual contentions are warranted by the evidence or, if specifically so identified, are reasonably based on lack of information.[16] Sanctions "may" be imposed for violations of the rule. New procedures require service of a sanctions motion on the offending party 21 days prior to filing with the court.

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[12](...continued)
Treasury Employees Union, 86 F.R.D. 496 (W.D. Pa. 1980).

[13]Phillips v. Mashburn, 746 F.2d 782 (11th Cir. 1984); Franklin v. Murphy, 745 F.2d 1221 (9th Cir. 1984).

[14]E.g., Demos v. Kincheloe, 563 F. Supp. 30 (E.D. Wash 1982); In re Green, 669 F.2d 779 (D.C. Cir. 1981); McDonald v. Hall, 610 F.2d 16 (1st Cir. 1979).

[15]Fed. R. Civ. P. 11(a).

[16]16 Fed. R. Civ. P. 11(b).

Withdrawal of the unwarranted contention during this "safe harbor" period protects the offender from imposition of sanctions.[17] Sanctions shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. The rule, if imposed pursuant to motion and warranted for effective deterrence, allows for a party to recover some or all of the cost of responding to a frivolous motion.

The complaint may be amended at any time prior to service of the answer or thereafter with the court's permission or with the consent of the other party.[18]

Where the defendant is the United States or a federal agency or a federal officer sued in his official capacity, an answer or a motion to dismiss or for summary judgment (or other motion under Rule 12) must be served within 60 days after service on the U.S. attorney.[19] Otherwise, the time for service of the answer is 20 days unless service of summons has been timely waived by the defendant pursuant to Rule 4(d) in which case he shall have 60 days to serve an answer.[20] If a Rule 12 motion is filed and denied, the answer must be filed 10 days after notice of denial.[21]

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[17]Fed. R. Civ. P. 11(c).

[18]Fed. R. Civ. P. 15(a).

[19]Fed. R. Civ. P. 12(a)(3) and (4).

[20]Fed. R. Civ. P. 4(d)(3) and 12(a). Cf. Dickens v. Lewis, 750 F.2d 1251 (5th Cir. 1984) (federal sixty-day limit applicable to federal official sued in an individual capacity for acts committed under color of office).

[21]Fed. R. Civ. P. 12(a)(4)(A).

Where the United States fails to timely answer, it remains exceptionally difficult for a plaintiff to obtain a default judgment[22] against the Government, especially where a dispositive motion is filed shortly after the answer date.[23]

Rule 8(b) states the general requirements for the answer:

> A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make denials as specific denials of designated averments or paragraphs, or may generally deny all averments except such designated averments or paragraphs as the pleader expressly admits; but, when the pleader does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial subject to the obligations set forth in Rule 11.

Generally, the answer consists of numbered paragraphs corresponding to those of the complaint. In

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[22]See Fed. R. Civ. P. 55e.

[23]E.g., Ross v. United States, 574 F. Supp. 536, 538 (S.D.N.Y. 1983).

each paragraph, the specific allegations of the complaint are admitted, denied, or a lack of knowledge or information sufficient to form a belief as to the truth of the allegations is asserted, as required by Rule 8(b). Nonfactual allegations, such as jurisdictional allegations, are usually answered by the statement that no response is required, but to the extent that the averment is an allegation of fact, it is denied, if appropriate.

Following admissions, denials, and qualifications of the plaintiff's allegations, the defendant enters whatever additional factual averments are necessary to the defense. Previous statements may be incorporated by reference.[24] A general denial usually follows thereafter, to the effect that any averment not admitted, denied, or otherwise qualified is denied. The general denial protects against the penalty of Rule 8(d) which provides that averments not denied are admitted. What happens where a defendant neither admits or denies an allegation but rather claims privilege? National Acceptance Company of America v. Bathalter,[25] holds that Rule 8(d) will not operate in this circumstance. Consequently, the failure to deny will not be treated as an admission.

The last part of the answer is the listing of affirmative defenses and the defendant's request for judgment.

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[24]See Fed. R. Civ. P. 10(c).

[25]705 F.2d 924, 932 (7th Cir. 1983).

In addition to Rule 12(b) defenses which must be raised in the answer or by motion,[26] Rule 8(c) requires that all affirmative defenses be pleaded in the answer. The rule lists 19 specific affirmative defenses, such as estoppel, laches, res judicata, and statute of limitations, which must be pleaded. Other affirmative defenses that some courts have held should be listed include the unconstitutionality of a statute,[27] that an official was not acting in his official capacity when the act which is complained of occurred,[28] personal immunity defenses,[29] and sovereign immunity.[30] Although affirmative defenses ordinarily must be raised in the answer and not by a pre-answer motion to dismiss,[31] there are circumstances under which an affirmative defense may be asserted in a motion to dismiss.[32] But a failure to raise affirmative defenses in a pre-answer motion to dismiss does not result in their waiver.[33]

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[26]See Fed. R. Civ. P. 12(b).

[27]Butts v. Curtis Publishing Co., 225 F. Supp. 916, 920 (N.D. Ga. 1964), aff'd, 351 F.2d 702 (5th Cir. 1965), aff'd, 388 U.S. 130 (1967).

[28]Willie v. Harris County, 202 F. Supp. 549, 552-553 (S.D. Tex. 1962).

[29]Perkins v. Cross, 562 F. Supp. 85, 87 (E.D. Ark. 1983), citing Gomez v. Toledo, 446 U.S. 635, 640 (1980).

[30]Green v. James, 473 F.2d 660, 661 (9th Cir. 1973).

[31]See § 2.4 infra.

[32]See, e.g., Scott v. Kuhlmann, 746 F.2d 1377 (9th Cir. 1984) (defense raises no disputed question of fact); Swift v. United States Border Patrol, 578 F. Supp. 35 (S.D. Tex. 1983), aff'd, 731 F.2d 886 (5th Cir. 1984) (defense clearly appears on face of complaint).

[33]Birge v. Delta Airlines, Inc. 597 F. Supp. 448, 450-52 (N.D. Ga. 1984).

Affirmative defenses not raised are waived.[34] If the defendant later introduces evidence of the affirmative defense and plaintiff fails to object, the defense may be revived.[35]

Another instance where an affirmative defense remains viable despite failure to include it in the answer is where it is jurisdictional. An example is the FTCA statute of limitations. By statute, an FTCA action can be brought only where a claim has been timely filed. Because this filing requirement is part of the statutory description of the cause of action, a failure to file in time is jurisdictional and can be raised at any time.[36]

Even where existing case law does not favor a defense, it should be raised so that it will be available should the law change.[37]

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[34]E.g., Shook & Fletcher Insulation Co. v. Central Rigging & Contracting Corp., 684 F.2d 1383 (11th Cir. 1982); Depositors Trust Co. v. Slobusky, 692 F.2d 205 (1st Cir. 1982).

[35]Jones v. Miles, 656 F.2d 103, 107 n.7 (5th Cir. 1981). See also Allied Chemical Corp. v. MacKay, 695 F.2d 854 (5th Cir. 1983); Standridge v. City of Seaside, 545 F. Supp.1195 (N.D. Cal. 1982). But see Ross v. United States, 574 F. Supp. 536, 539 (S.D.N.Y. 1983) (citing Rowley v. McMillan, 502 F.2d 1326, 1332-1333 (4th Cir. 1974)) (defense not raised cannot be revived by amending complaint).

[36]Ippolito-Lutz, Inc. v. Harris, 473 F. Supp. 255 (S.D.N.Y. 1979); Perkins v. United States, 76 F.R.D. 593 (W.D. Okla. 1976).

[37]Cf. Zets v. Scott, 498 F. Supp. 884 (W.D.N.Y. 1980) (failure to raise lack of personal jurisdiction because of prior incorrect circuit interpretation of limits of in rem jurisdiction under Shaeffer v. Heitner, 433 U.S. 186 (1977), resulted in waiver).

## 2.3 Pretrial Conferences - Rule 16.

Rule 16 permits the court to hold a pretrial conference with the parties. Pretrial conferences are often thought of as a procedural step just before trial. Increasingly, the pretrial conference is playing a significant role as a case management tool early in the litigation.

Amendments to Rule 16 in 1983 and 1993 emphasize case management as an objective of the conference.[38] While leaving a good deal of discretion in the court as to the use of pretrial conferences, Rule 16b nevertheless requires the judge (or magistrate when authorized by local rule) to enter a "scheduling order" that limits the time for amendments to pleadings, filing of motions, and completion of discovery. The order follows informal consultation with the parties by telephone, mail, or in a meeting. Because the scheduling order ordinarily will issue within 90 days after a defendant first appears, judge advocates can expect their cases in litigation to be subject to tighter judicial control than would otherwise be the case. In the event that a party disobeys a scheduling order or any other pretrial order, Rule 16(f) allows the judge to impose sanctions, including those available for

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[38]See Elliott v. Perez, 751 F.2d 1472, 1481 (5th Cir. 1985); Fed R. Civ P. 16 advisory committee note.

disobedience to discovery orders[39] and expenses incurred as a result of the party's noncompliance.[40]

The optional pretrial conference is a potent device for the court and the parties. Conference participants may consider and take action to eliminate frivolous claims or defenses, or dispose of issues without having to go through a motion to dismiss or for summary judgment discussed below. Moreover, if a party fails to identify an issue for the court at the pretrial conference, the right to have the issue tried is waived.[41]

2.4 Dismissing the Complaint - Rule 12(b).

Before answering the complaint, the defendant may file a motion under Rule 12(b) on one of the following seven grounds:

12(b)(1) lack of subject matter jurisdiction,

12(b)(2) lack of personal jurisdiction,

12(b)(3) improper venue,

12(b)(4) insufficiency of process,

12(b)(5) insufficiency of service,

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[39]See S 2.6 infra.

[40]See Scarborough v. Eubanks, 747 F.2d 871 (3d Cir. 1984); Poulis v. State Farm Fire & Casualty Co., 747 F.2d 863 (3d Cir. 1984).

[41]Fed. R. Civ. P. 16 advisory committee note.

12(b)(6) failure to state a claim, and

12(b)(7) failure to join an indispensable party under Rule 19.

The defendant may decide not to move to dismiss and answer instead. By doing so, no defense is waived so long as it is asserted in the answer. Nevertheless, the rules contemplate that only one motion to dismiss will be filed and that it be filed before answering. Some authority suggests that filing the answer does not preclude filing a post-answer motion to dismiss.[42] Defenses listed in Rule 12(b)(1)-(7) cannot be raised piecemeal in several motions.[43] Moreover, if the defendant moves to dismiss, a failure to include any one of the grounds (b)(2)-(b)(5) (personal jurisdiction, venue, process, service) waives that ground forever.[44] Once made and decided, a motion cannot be amended (and renewed) to add new grounds for dismissal.[45] The remaining grounds (subject matter jurisdiction, failure to state a claim, failure to join a party) are not waived by failure to raise them in the motion.[46]

Rather than looking at each separate ground for dismissal in turn, we should first examine lack of

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[42]E.g., Birge v. Delta Air Lines, Inc., 597 F. Supp. 448, 450 (N.D. Ga. 1984).

[43]Fed. R. Civ. P. 12(g).

[44]Fed. R. Civ. P. 12(h)(1)(A).

[45]Myers v. American Dental Ass'n, 695 F.2d 716, 720-21 (3d Cir. 1982), cert. denied, 462 U.S. 1106 (1983).

[46]Fed. R. Civ. P. 12(h)(2, 3).

subject matter jurisdiction[47] and failure to state a claim[48] together because they are perhaps the most important and because they are frequently and incorrectly used interchangeably. After discussing these two grounds, we can turn to the others.

a. Rule 12(b)(1), 12(b)(6): Subject Matter Jurisdiction and Failure to State a Claim.

Lack of subject matter jurisdiction is never waived. The court has the obligation to consider the issue sua sponte whenever it appears to be raised.[49] Although failure to state a claim is not waived by failing to include it in a 12(b) motion, it is waived if not asserted at trial.

As § 2.2 indicates above, the plaintiff must state the grounds for jurisdiction. This requirement is usually met by citing an independent statutory basis for jurisdiction,[50] and sufficient facts to demonstrate a nexus between the jurisdictional statute and the claim. Failure to cite a jurisdictional statute is not fatal if the facts pleaded demonstrate that jurisdiction exists.[51] If the claim itself, however, is wholly insubstantial or

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[47]12(b)(1).

[48]12(b)(6).

[49]Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 278 (1977); Liberty Mutual Ins. Co. v. Wetzel, 424 U.S. 737, 740 (1976); Booth v. United States, 990 F.2d 617 (Fed. Cir. 1993).

[50]See § 3.3 infra.

[51]Scheuer v. Rhodes, 416 U.S. 232, 234 n.2 (1974).

frivolous, it can be dismissed for lack of jurisdiction even if a statutory basis for jurisdiction is set out.

The 12(b)(6) motion tests the formal sufficiency of the plaintiff's claim. The claim is dismissed only where plaintiff can prove no set of facts in support of his claim which would entitle him to relief.[52] As discussed above, a frivolous claim is dismissed for lack of jurisdiction where, for example, the allegations bear no relation to a federal question where that is the alleged basis for jurisdiction. On the other hand, a claim that is substantial enough to demonstrate the existence of jurisdiction may still be subject to a 12(b)(6) dismissal where the allegations, fully proven, would fall short of entitlement to relief.

The difference between motions under 12(b)(1) and 12(b)(6) is often blurred. The kinds of issues appropriate to each kind of motion are frequently confused by counsel and courts.[53]

Whether there is a case or controversy as required by Article III is a 12(b)(1) ground. The case or controversy requirement is "designed to screen out cases seeking answers to abstract legal questions."[54] It includes standing ("whether the plaintiff has 'alleged

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[52]Conley v. Gibson, 355 U.S. 41, 45-46 (1957); District of Columbia v. Air Florida, Inc. 750 F.2d 1077, 1081-82 (D.C. Cir. 1984); Carter v. Cornwell, 983 F.2d 52 (6th Cir. 1993).

[53]Johnsrud v. Carter, 620 F.2d 29, 32 (3d Cir. 1980), citing Montana Dakota Co. v. Public Serv. Co., 341 U.S. 246, 249 (1951).

[54]Gulf Publishing Co. v. Webb, 679 F.2d 44 (5th Cir. 1982). See S 3.4 infra.

such a personal stake in the outcome' . . . as to warrant his invocation of federal jurisdiction"), ripeness ("whether the harm asserted has matured sufficiently to warrant judicial intervention"), and mootness ("whether the occasion for judicial intervention persists").[55]

If there is no case or controversy under Article III, the case is said to be nonjusticiable. There are other issues which relate to nonjusticiability. For example, a matter exclusively committed by the Constitution to a coordinate branch of government is nonjusticiable.[56] Hence, in Gilligan v. Morgan,[57] the type of training, weapons, and equipment of the Army National Guard was a nonjusticiable issue. In this instance, there was a case or controversy, but the issue was nonjusticiable because the issue involved a matter exclusively committed to Congress and the Executive. Where there is a case or controversy, but an issue is otherwise nonjusticiable, then it is dismissed for failure to state a claim under 12(b)(6) rather than lack of jurisdiction under 12(b)(1).[58] Baker v. Carr, the reapportionment case in which the Supreme Court provided the definitive explanation of the political question doctrine, also provides the best explanation of the difference between 12(b)(1) and 12(b)(6) in questions relating to justiciability:

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[55]Gulf Publishing Co. v. Webb, 679 F.2d 44 (11th Cir. 1982). See § 3.4 infra.

[56]See § 3.4c infra.

[57]413 U.S. 1 (1973).

[58]E.g., Id.; Johnsrud v. Carter, 620 F.2d 29 (3d Cir. 1980).

BAKER v. CARR
369 U.S. 186 (1962)

Mr. Justice Brennan delivered the opinion of the Court.

This civil action was brought under 42 U.S.C. §§ 1983 and 1988 to redress the alleged deprivation of federal constitutional rights. The complaint, alleging that . . . "these plaintiffs and others similarly situated, are denied . . . equal protection . . . by virtue of the debasement of their votes," was dismissed by a three-judge court. . . . The court held that it lacked jurisdiction of the subject matter and also that no claim was stated upon which relief could be granted. 179 F Supp 824. . . . We hold that the dismissal was error. . . .

The District Court's Opinion and Order of Dismissal.

Because we deal with this case on appeal from an order of dismissal granted on appellees' motions, precise identification of the issues presently confronting us demands clear exposition of the grounds upon which the District Court rested in dismissing the case. The dismissal order recited that the court sustained the appellee's grounds "(1) that the Court lacks jurisdiction of the subject matter, and (2) that the complaint fails to state a claim upon which relief can be granted. . . ."

In the setting of a case such as this, the recited grounds embrace two possible reasons for dismissal:

First: That the facts and injury alleged, the legal bases invoked as creating the rights and duties relied upon, and the relief sought, fail to come within that language of Article III of the Constitution and of the jurisdictional statutes which define those matters concerning which United States District Courts are empowered to act;

Second: That, although the matter is cognizable and facts are alleged which

establish infringement of appellants' rights as a result of state legislative action departing from a federal constitutional standard, the court will not proceed because the matter is considered unsuited to judicial inquiry or adjustment.

We treat the first ground of dismissal as "lack of jurisdiction of the subject matter." The second we consider to result in a failure to state a justiciable cause of action. . . .

In light of the District Court's treatment of the case, we hold today only (a) that the court possessed jurisdiction of the subject matter; (b) that a justiciable cause of action is stated upon which the appellants would be entitled to appropriate relief; and (c) because appellees raise the issue before this Court, that the appellants have standing to challenge the Tennessee apportionment statutes. . . .

Jurisdiction of the Subject Matter.

The District Court was uncertain whether our cases withholding federal judicial relief rested upon a lack of federal jurisdiction or upon the inappropriateness of the subject matter for judicial consideration--what we have designated "nonjusticiability." The distinction between the two grounds is significant. In the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded. In the instance of lack of jurisdiction the cause either does not "arise under" the Federal Constitution, laws or treaties (or fall within one of the three enumerated categories of Art. 3 § 2), or is not a "case or controversy" within the meaning of that section; or the cause is not one described by any jurisdictional statute. Our conclusion . . . that this cause presents no nonjusticiable "political

question" settles the only possible doubt that it is a case or controversy. Under present heading of "Jurisdiction of the Subject Matter" we hold only that the matter set forth in the complaint does arise under the Constitution and is within 28 U.S.C. § 1343.

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Nonjusticiability is an issue that is raised with some frequency in litigation involving the United States and the distinction between 12(b)(1) and 12(b)(6) in this area is helpful to keep in mind.[59] Another issue frequently raised in military litigation and related in some degree to nonjusticiability is whether the courts should defer to the military on peculiarly military issues. These issues of "nonreviewability" are also raised under 12(b)(6).[60] Both nonjusticiability and nonreviewability will be discussed again in greater detail in chapters 3 and 6.

Where exhaustion of administrative remedies is part of a statutory remedy, it is clearly jurisdictional. An example is the Federal Tort Claims Act which, pursuant to 28 U.S.C. § 2675, requires the filing of an administrative claim prior to bringing suit.[61] Similarly, statutes of limitation in favor of the United States may also be jurisdictional.[62]

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[59]See Powell v. McCormack, 395 U.S. 486 (1969); Johnsrud v. Carter, 620 F.2d 29 (3d Cir. 1980).

[60]See Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971). Cf. Dillard v. Brown, 652 F.2d 316 (3d Cir. 1981) (disapproves Mindes).

[61]See Bialowas v. United States, 443 F.2d 1047 (3d Cir. 1971); Jayson, Handling Federal Tort Claims § 135 (1984).

[62]E.g., June v. Sec'y of Navy, 557 F. Supp. 144 (M.D. Pa. 1982) (construing 28 U.S.C. § 2401).

Exhaustion that is not required as part of a statutory remedy may or may not be jurisdictional.[63] Exhaustion has been called a "long settled rule of judicial administration" by Justice Brandeis.[64] This suggests that it is nonjurisdictional and subject to a 12(b)(6) motion. Some courts apparently take that view.[65] Yet, even post-Darby, there is some authority for a special, military rule requiring exhaustion.[66] If exhaustion is viewed as an element of ripeness, then making it a 12(b)(1) issue makes sense. If it is a matter of judicial economy, however, that result is questionable. Courts often hedge the issue, dismissing for exhaustion without stating whether it is for lack of jurisdiction or for failure to state a claim, often categorizing exhaustion as an independent ground. Often

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[63]Bowen v. Massachusetts, 487 U.S. 879 (1988); Darby v. Cisneros, 509 U.S. 137 (1993) (Absent a statutory or regulatory provision requiring exhaustion, a district court may not require exhaustion of administrative remedies as a jurisdictional prerequisite in suits brought under the APA).

[64]Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50 (1938).

[65]E.g., Montgomery v. Rumsfeld, 572 F.2d 250 (9th Cir. 1978).

[66]SAAD v. Dalton, 846 F. Supp. 889 (S.D. Cal. 1994). For historical treatment of the issue, see Linfors v. United States, 673 F.2d 332 (11th Cir. 1982); Hodges v. Callaway, 499 F.2d 417 (5th Cir. 1974); Champagne v. Schlesinger, 506 F.2d 979 (7th Cir. 1974). See generally Wright, Miller & Cooper, Federal Practice and Procedure: Civil § 1350 (1969 & Supp. 1983); Sherman, Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement, 55 Va. L. Rev. 483 (1969); chapter 5 infra.

these dismissals are based on shotgun motions that allege 12(b)(1) and 12(b)(6) as grounds to dismiss.[67]

Two final issues that bear brief mention are sovereign immunity (discussed in chapter 4) and official immunity (discussed in chapter 9). Although sovereign immunity has been called an affirmative defense,[68] it is clearly jurisdictional.[69] Official immunity, the major defense of an individually-sued Government employee, does not deprive the court of jurisdiction but does bar recovery against the defendant. Because it is an affirmative defense, it should be raised in the answer and not in a motion to dismiss. The viability of the defense will be determined in a motion for judgment on the pleadings or for summary judgment.[70]

Whether the motion is brought under 12(b)(1) or 12(b)(6), the allegations of the complaint are assumed to be true for the purposes of the motion when it is first filed.[71] An attack on the face of the complaint thus favors the plaintiff:

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[67]See, e.g., Bard v. Seamans, 507 F.2d 765, 767 n. 2 (10th Cir. 1974).

[68]Green v. James, 473 F.2d 660, 661 (9th Cir. 1973).

[69]E.g., United States v. Testan, 424 U.S. 392, 399 (1976); Stanley v. Central Intelligence Agency, 639 F.2d 1146 (5th Cir. 1981).

[70]See In re Jackson Lockdown/MCO Cases, 568 F. Supp. 869 (E.D. Mich. 1983). But cf. Swift v. United States Border Patrol, 578 F. Supp. 35 (S.D. Tex. 1983), aff'd, 731 F.2d 886 (5th Cir. 1984) (where affirmative defense is inadvertently pleaded by plaintiff in complaint, motion to dismiss under Rule 12(b)(6) is appropriate).

[71]Warth v. Seldin, 422 U.S. 490 (1975).

> When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admission, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support claims. . . .
>
> [I]n passing on a motion of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegation of the complaint should be construed favorably to the plaintiff.[72]

In a 12(b)(1) motion, the defendant can prove lack of jurisdiction by extrinsic evidence.[73] In this instance, the motion becomes a "speaking" motion. The evidence is not weighted factually but collected to see if the record supports subject matter jurisdiction.[74] If extrinsic evidence is introduced in connection with a 12(b)(6) motion, the motion is converted to one for summary judgment under Rule 56, which is discussed in section 2.5 below.

Attempting to fashion a motion under either 12(b)(1) or 12(b)(6) has substantive importance. Dismissal under 12(b)(1) is not with prejudice. Even if extrinsic evidence is introduced on the 12(b)(1) motion, the disposition "is not on the merits and permits the plaintiff to pursue his claim in the same or in another

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[72]Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

[73]Menchaca v. Chrysler Credit Corp., 613 F.2d 507 (5th Cir. 1980), reh'g denied, 622 F.2d 1043 (5th Cir. 1980), cert. denied, 449 U.S. 953 (1980). But see Haase v. Sessions, 835 F.2d 902, 908 (D.C. Cir. 1987) (where only the court could elicit information outside the pleadings).

[74]Haase v. Sessions, 835 F.2d 902, 910 (D.C. Cir. 1987).

forum."[75] On the other hand, dismissal under 12(b)(6) may be with prejudice. If extrinsic evidence is introduced and the defendant wins the motion as one for summary judgment, then there has been a final adjudication on the merits which eliminates the possibility of future suit.[76] Even if the dismissal is ordered purely for failure to state a claim without conversion to summary judgment, some courts have held it to be a decision on the merits and applied res judicata to attempts to bring a similar action.[77] It is, therefore, to the defendant's advantage to seek dismissal under 12(b)(6) rather than 12(b)(1).

Where there is no subject matter jurisdiction, the court has a mandatory duty to dismiss. When determining whether there is subject matter jurisdiction, the court can assume that a cause of action is stated.[78] If the court finds a lack of jurisdiction, then it cannot reach the merits. Thus, where lack of jurisdiction is asserted along with a failure to state a claim, the

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[75]Hitt v. City of Pasadena, 561 F.2d 606, 608 (5th Cir. 1977). But cf. Czeremcha v. Machinists and Aerospace Workers, 724 F.2d 1552 (11th Cir. 1984) (although dismissal of complaint terminates right to amend, motion to amend complaint to cure jurisdictional defect should be liberally granted).

[76]See Stanley v. Central Intelligence Agency, 639 F.2d 1146, 1156-1160 (5th Cir. 1981) (reproduced in part in § 2.5 below).

[77]Rhodes v. Jones, 351 F.2d 884 (8th Cir. 1965) cert. denied 86 S.Ct. 914 (1965); Bartsch v. Chamberlin Co., 266 F.2d 357 (6th Cir. 1959). Contra Chase v. Rieve, 90 F. Supp. 184 (S.D.N.Y 1950).

[78]Burks v. Lasker, 441 U.S. 471, 476 n. 5 (1979).

court arguably is foreclosed from deciding the 12(b)(6) ground if the 12(b)(1) ground is meritorious.[79]

The Seventh Circuit noted the importance of distinguishing between 12(b)(1) and 12(b)(6) motions in a case brought by a veteran challenging the Veterans Administration decision to reduce his disability benefits:

WINSLOW v. WALTERS
815 F.2d 1114 (7th Cir. 1987)

> This case comes to us in an awkward procedural posture. The Veterans Administration sought dismissal on two distinct grounds: that the district court lacked subject matter jurisdiction and that the plaintiff had failed to state a claim on which relief could be granted. However, the VA combined both grounds in a Rule 56(b) motion for summary judgment. This was incorrect.
>
> A party may move to dismiss for failure to state a claim under either Rule 12(b)(6) or, where the movant asks the court to consider materials outside the pleadings, under Rule 56. However, a party may move to dismiss for lack of subject matter jurisdiction only under Rule 12(b)(1). There is good reason for requiring parties to plead these motions differently. A ruling that a party has failed to state a claim on which relief may be granted is a decision on the merits with full res judicata effect. A party may therefore seek

[79]Menchaca v. Chrysler Credit Corp., 613 F.2d 507, 513 (5th Cir. 1980), reh'g denied, 622 F.2d 1043 (5th Cir. 1980), cert. denied, 449 U.S. 953 (1980); Booth v. United States, 990 F.2d 617 (Fed. Cir. 1993). But see Wheeler v. Hurdman, 825 F.2d 257, 259-60 (10th Cir. 1987) (if the jurisdictional question is intertwined with the merits of the case, it should be resolved under 12(b)(6) and converted thereafter to a motion for summary judgment where extraneous evidence is introduced).

summary judgment, which is on the merits, on this issue. In contrast, a ruling granting a motion to dismiss for lack of subject matter jurisdiction is not on the merits; its res judicata effect is limited to the question of jurisdiction. See Baldwin v. Iowa State Traveling Men's Association, 283 U.S. 522, 51 S.Ct. 517, 75 L.Ed. 1244 (1931). Seeking summary judgment on a jurisdictional issue, therefore, is the equivalent of asking a court to hold that because it has no jurisdiction the plaintiff has lost on the merits. This is a nonsequitur. See generally Exchange National Bank v. Touche Ross, 544 F.2d 1126, 1330-31 (2d Cir. 1976) (discussing the relationship among Rules 12(b)(6), and 56).

In this case, summary judgment was incorrectly granted against the plaintiff on the issue of whether the court had jurisdiction. The error was compounded by the granting of summary judgment on the remainder of the VA's motion, including the question of whether Winslow had stated a claim on which relief could be granted, even though the court apparently did not consider this issue.

The VA should have moved for dismissal for want of jurisdiction under 12(b)(1) and, in the alternative, for failure to state a claim under 12(b)(6). See Fed.R.Civ.P. 12(g) (consolidation of defenses in a motion). The district court would then have first considered whether it had jurisdiction. Had the court found that it had jurisdiction, it would then have considered the VA's motion asserting that the plaintiff had failed to state a claim. If the court found that Winslow had not stated a claim, it could have granted summary judgment. For the purposes of our review, we will treat the VA's motion as if it had been properly pleaded and assess the two grounds for dismissal.

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b. Rule 12(b)(2), (4), (5): Personal Jurisdiction and Insufficiency of Process and Service.

Each of these grounds deal in some way with personal jurisdiction. Analysis begins with Rule 4 which provides for the form and manner of service of process.

Process consists of the summons and complaint. If the process does not contain all that is required under Rule 4(a) (such as who the plaintiff and defendant are, what the full title of the action is, etc.), then the process is improper and a motion under 12(b)(4) for improper process is arguably proper. However, 12(b)(4) motions are rare and disfavored. Courts are willing to overlook minor defects.[80] A motion under 12(b)(5) for failure to make effective service is likely to be more successful. If there is a defect in process or insufficiency of service, courts will generally allow amendment under Rule 4(a) and new service unless there has been "material prejudice to any substantial rights of the complaining defendant."[81]

A motion for insufficiency of service is appropriate where service is not executed in accordance with Rule 4(i). Rule 4(i) provides that service on the United States is accomplished by (1) delivering or mailing, by registered or certified mail, a copy of the

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[80]E.g., Roe v. Borup, 500 F. Supp. 127 (E.D. Wis. 1980); Smith v. Boyer, 442 F. Supp. 62 (W.D.N.Y. 1977); Vega Matta v. Alvarez, 440 F. Supp. 246 (D.P.R. 1977), aff'd, 577 F.2d 722 (1st Cir. 1978).

[81]Hawkins v. Department of Mental Health, 89 F.R.D. 127 (W.D. Mich. 1981).

summons and complaint to the U.S. attorney and (2) mailing, by registered or certified mail, a copy of the summons and complaint to the Attorney General. Serving the Attorney General but failing to serve the U.S. attorney (or vice-versa) is a ground for dismissal for lack of personal jurisdiction.[82] Where an officer (in his official capacity) or agency is sued, the defendant is served by registered or certified mail and the United States is served as though it were a party. Under 28 U.S.C. § 1391(e), service upon an officer or agency may be made by mail nationwide. Nationwide mail service on officials sued individually is not permitted under § 1391(e).[83] Service proceeds as it would against any individual defendant.[84]

Paragraph 1-7b(2), AR 27-40, says that commanders and other Army officials will not prevent or evade service of process in legal actions brought against the United States or themselves concerning their official duties. To avoid interference with duties, a commander or other official may designate a representative to

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[82]E.g., George v. United States Dep't of Labor, 788 F.2d 1115 (5th Cir. 1986) (failure to serve Attorney General). But cf. Jordan v. United States, 694 F.2d 833 (D.C. Cir. 1982) (failure to serve U.S. attorney not ground for dismissal where U.S. Marshal's Service erroneously failed to deliver process to U.S. Attorney).

[83]Stafford v. Briggs, 444 U.S. 527 (1980); Micklus v. Carlson, 632 F.2d 227, 240-241 (3d Cir. 1980).

[84]Id. See also Navy, Marshall & Gordon v. United States Inter. Dev. Coop. Agency, 557 F. Supp. 484, 489-490 (D.D.C. 1983). Cf. Lawrence v. Acree, 79 F.R.D. 669 (D.D.C. 1978), cited in Betlyon v. Shy, 573 F. Supp. 1402, 1405-1406 (D. Del. 1983).

accept service in his stead.[85] Paragraph 1-7b(3)(a), AR 27-40, allows installation commanders to impose reasonable restrictions upon persons who enter their installations to serve process.

Rule 4(e) permits service on individual defendants in the United States in one of three ways:

1. in any way permitted by the law of the state where the court is located;[86]

2. by delivery within the state to the defendant personally, to a person of suitable age and discretion at the defendant's home, or to an agent authorized to receive process for the defendant; or

3. by any way authorized by federal law (e.g., 15 U.S.C. §§ 77v(a) (1987)).

Other provisions in Rule 4, not very relevant here, deal with service on infants, incompetents, business organizations, states and municipalities, and service based on in-rem jurisdiction. Service is made by a nonparty who is 18 or older. Generally, U.S. marshals will make service for private parties only when ordered to do so by a court.

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[85]See, e.g., DOD Directive 5530.1, Service of Process in the Department of Defense (Aug. 22, 1983) (codified in 32 C.F.R. §§ 257.1-5) (1995) (delegating authority to accept service on behalf of the service secretaries and the Secretary of Defense).

[86]Service on defendants outside the district in which the court is located must be authorized by the state long arm statute. Omni Capital Inter. v. Rudolf Wolff & Co., 484 U.S. 97, 108 (1987).

The 1993 amendment to the Federal Rules of Civil Procedure added a waiver-of-service provision at Rule 4(d). This new provision provides that a plaintiff may notify a defendant in writing, dispatched through first class mail or other reliable means, of the commencement of the action and request that the defendant waive service of a summons. The plaintiff must use text prescribed in an official form promulgated pursuant to Rule 84 for this purpose. The defendant has a reasonable time, at least 30 days from the date the request is sent, to return the waiver. The defendant who waives service of process in this manner does not waive objections to venue or personal jurisdiction, and then has 60 days from the date the request was sent to serve an answer. The defendant who fails to comply with a request for waiver may be liable for subsequently incurred costs of service. Entry of a default judgment should not be a proper remedy for a defendant's failure to waive service.[87]

The waiver-of-service procedures in Rule 4(d) do not apply to the United States, federal agencies, or federal officials (in their official capacities) as defendants.[88]

The waiver-of-service provision added by the Act is separate from the independent authority to make service in accordance with state law. Once a litigant elects federal mail service and the request is refused, authority requires federally proscribed personal service and does not permit service under any available state

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[87]Armco, Inc. v. Penrod-Stauffer Bldg. Sys., Inc., 733 F.2d 1087, 1089 (4th Cir. 1984).

[88]Fed. R. Civ. P. 4(d)(2).

statute.[89] However, just as the state long arm jurisdiction makes the mailing of federal extraterritorial service of process possible, it sustains extraterritorial personal service.[90]

When a plaintiff opts out of using the federal methods, state procedures for in-state service and any long-arm statute of the state can be otherwise used to obtain personal jurisdiction. Both the manner of service provided for in the state statute and its substantive provisions that describe the minimum state contacts between the defendant and the state necessary to allow the statute to operate are incorporated. If the minimum contacts provided for by the statute are so tenuous as to deny due process,[91] then a motion to dismiss for lack of personal jurisdiction under 12(b)(2) is appropriate. It is essentially this situation alone which justifies a motion under 12(b)(2) since almost any other objection will go to the manner of service rather than the power to exercise jurisdiction.

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[89]Armco, Inc. v. Penrod-Stauffer Bldg. Sys., Inc., 733 F.2d 1087 (4th Cir. 1984); Billy v. Ashland Oil, Inc., 102 F.R.D. 230 (W.D. Pa. 1984). See generally D. Siegel, Practice Commentary on Amendment of Federal Rule 4 (Eff. Feb. 26, 1983) with Special Statute of Limitations Precautions, 96 F.R.D. 88, 96 (1983). Contra, Humana, Inc. v. Jacobson, 804 F.2d 1390 (5th Cir. 1986); Passalides v. Irwin Yacht Sales North, Inc., 118 F.R.D. 298, 301 (D. R.I. 1988).

[90]Southern Pride, Inc. v. Turbo Tek Enterprises, Inc., 117 F.R.D. 566, 571 (M.D.N.D. 1987); cf. Federal Deposit Ins. v. Mt. Vernon Ranch, Inc., 118 F.R.D. 496, 500 (W.D. Mo. 1988).

[91]See International Shoe Co. v. Washington, 326 U.S. 310 (1945); World--Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

To successfully contest application of a long-arm statute, the defendant must show insufficient minimal contacts and that the exercise of jurisdiction would violate "fair play."[92] Where service is based on a federal statute, due process is satisfied so long as the defendant has minimum contacts with the United States.[93]

While Rule 4 controls service of the complaint, Rule 5 provides that other pleadings beyond the complaint, such as motions and other papers, are served on the attorneys in the case. Service on a party is not allowed. The reason behind Rule 5 is that service on the attorney will speed the proceedings along.

c. Rule 12(b)(3): Venue.

Where there is improper venue, the court has the option of dismissing the action under 12(b)(3) or transferring it to any place where it could have been brought in accordance with 28 U.S.C. § 1404(a). The general venue provisions are applied without difficulty in most cases.

28 U.S.C. § 1391, whose provision concerning nationwide service on Government personnel was discussed above, is the general venue statute for actions against the United States, its agencies, and officers. It provides that suit in such cases may be brought where:

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[92]See Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982) (discussed below in section 2.6).

[93]FTC v. Jim Walter Corp., 651 F.2d 251, 256 (5th Cir. 1981). See also Clement v. Pehar, 575 F. Supp. 436 (N.D. Ga. 1983).

1. any defendant resides,

2. the cause of action arose,

3. any real property involved in the action is located, or

4. the plaintiff resides (if no property is involved).

Special venue rules are provided by 28 U.S.C. § 1402 for actions in district court for under $10,000 or based on the Federal Tort Claims Act. The former can only be brought by an individual plaintiff where he resides. The latter is brought where the plaintiff resides or where the act or omission complained of occurred.

Both § 1391 and § 1402 provide additional venue provisions for tax and property cases.

Under 28 U.S.C. § 1391, actions against private persons, such as Government personnel sued individually, whether based on diversity or federal question, may be brought where all defendants reside or where the claim arose, or, exclusively in diversity cases, where all plaintiffs reside.

d. Rule 12(b)(7): Indispensable Parties.

A motion to dismiss for want of an indispensable party is tied to Rule 19 which identifies a party as "needed for just adjudication" where (1) in his absence complete relief to the parties is not possible, or (2) he claims an interest whose protection will be impaired

or impeded by his absence, or (3) he claims an interest and his absence will cause the parties to incur greater obligations. Use of 12(b)(7) by the Government is very infrequent. The following case in the standards of conduct area demonstrates that no party other than the United States is generally necessary to obtain complete relief where governmental action is concerned. It also illustrates the applicability of some of the issues previously discussed in this section.

DUPLANTIER v. UNITED STATES
606 F.2d 654 (5th Cir. 1979)

AINSWORTH, Circuit Judge:

> At issue in this class action brought by federal judges is the complex legal question of whether an act of Congress--the Ethics in Government Act of 1978--insofar as its provisions require federal judges annually to file personal financial statements available for public inspection, is violative of the Constitution of the United States. . . . [W]e conclude that the Act is not unconstitutional.
>
> The Ethics in Government Act of 1978 was enacted to "preserve and promote the accountability and integrity of public officials. . . ." Title III is that part of the Act specially applicable to the federal judiciary and requires judges to file annually with the Judicial Ethics Committee a personal financial report. . . . In the original complaint plaintiffs named as sole defendant the United States of America. . . .
>
> On May 24, plaintiffs amended their complaint to name as defendants, in addition to the United States, Griffin B. Bell, individually and in his official capacity of Attorney General of the United States; Judge Edward Allen Tamm, individually and in his official capacity as the chairman of the Judicial Ethics Committee, and the Judicial Ethics Committee. . . .

On June 4, the district court issued its memorandum opinion denying plaintiffs' motion for a preliminary injunction. The court held that although it had subject matter jurisdiction of the case under 28 U.S.C. § 1331(a), it lacked in personam jurisdiction of the Judicial Ethics Committee, Judge Tamm, its chairman, and the clerks of court; therefore, adjudication on the merits as to these parties was precluded. Section 1391(e), which provides for nationwide service of process in "[a] civil action in which a defendant is an officer or employee of the United States or any agency thereof" and which was relied upon by plaintiff to establish personal jurisdiction over Judge Tamm and the Committee, was held to apply only to the executive branch of government. . . . The court found that it had both subject matter and in personam jurisdiction over the defendants United States of America and Griffin B. Bell. However, the court held that the provisions of the Act "relegate the responsibilities of the United States, and more specifically, the Attorney General, to a secondary status," and that any relief it could grant plaintiffs against the Attorney General and the United States would therefore be "premature and incomplete." Accordingly, the district court refused to pass upon the merits of the case or the constitutionality of the Act. . . .

[T]he district court was correct in concluding that it lacked personal jurisdiction over Judge Tamm and the Judicial Ethics Committee. . . . The court erred, however, when it held that it could not pass upon the merits of the plaintiffs' motion for a preliminary injunction and decide the constitutional question presented.

Judge Tamm and the Judicial Ethics Committee are not indispensable parties requiring dismissal of this suit under Rule 19, Fed.R.Civ.P. See English v. Seaboard Coast Line R.R. Co., 465 F.2d 43 (5th Cir. 1972); Haas v. Jefferson National Bank of Miami Beach, 442 F.2d 394 (5th Cir. 1971).

A judgment rendered in the absence of Judge Tamm and the Committee will not be prejudicial to their interests, and this court can render adequate relief to the parties before it.

The government argues that a judgment against the United States and the Attorney General will be inadequate as the Attorney General plays a secondary role in the enforcement of the Act since he merely brings suit for civil penalties against judges who fail to comply with the Act. The Judicial Ethics Committee and its chairman, Judge Tamm, the government argues, are charged with the primary responsibilities of developing the reporting forms, collecting the reports and disclosing them to the public.

The government's argument runs into difficulty when the question is not the enforcement but the constitutionality of the Act. A single Act of Congress creates the duties of the Attorney General, the Judicial Ethics Committee, and Judge Tamm. The Act is not divisible--it cannot be constitutional for one of these parties to enforce the Act's financial reporting provisions if another cannot, and vice versa. This court may properly consider the constitutionality of the roles assigned to the Attorney General and the United States by the Act, and either validate or invalidate the Act. Therefore, since plaintiffs seek a ruling as to the constitutionality of the Act, and the United States and the Attorney General, parties charged with responsibilities under the Act, are before the court, the court can render adequate relief.

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Rule 12(b)(7) might arise in an action for mandamus filed under 28 U.S.C. § 1361. However, it seems likely that a court would, like the court in

DuPlantier, avoid the issue on the ground that the United States can still accord complete relief.

## 2.5 Judgment on the Pleadings and Summary Judgment.

### a. Rule 12(c): Judgment on the Pleadings.

Rule 12(c) permits a motion for judgment on the pleadings to be filed after the pleadings are closed. Where a party fails to file a motion to dismiss under Rule 12(b) and instead answers, he may raise any defenses he preserved in his answer by a motion for judgment on the pleadings. A motion to dismiss, filed after answering, will be treated as a motion for judgment on the pleadings.[94]

By definition, judgment must be on the pleadings; nothing outside the pleadings can be considered. If outside matters are introduced, the motion can be converted to a motion for summary judgment just as a 12(b)(6) motion is converted when extrinsic evidence is offered to show failure to state a claim. Conversion to a summary judgment motion is mandatory even if extrinsic evidence could have been introduced in a motion to dismiss filed before answer without conversion to a motion for summary judgment (recall, for example, that extrinsic evidence can be considered in a motion to dismiss for lack of jurisdiction under 12(b)(1) without converting the motion to one for summary judgment). The court does have the option of rejecting extrinsic

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[94] E.g., Aldabe v. Aldabe, 616 F.2d 1089 (9th Cir. 1980); Beckham v. Grand Affair of N.C., Inc., 671 F. Supp. 415, 420 (W.D.N.C. 1987); United States v. City of Philadelphia, 482 F. Supp. 1274 (E.D. Pa. 1979), aff'd, 644 F.2d 187 (3d Cir. 1980).

evidence if the pleadings themselves demonstrate that there is no issue of material fact.[95]

Judgment on the pleadings will be granted on the same grounds as summary judgment; the court must find that there is no material issue of fact and that the movant is entitled to judgment as a matter of law. Again, the unique nature of judgment on the pleadings requires that the movant show that there is no material factual issue to be resolved, based only on the pleadings themselves.

Judgment on the pleadings serves at least two purposes. First, it can be used to raise one of the 12(b) defenses not raised before answer. In this respect, it is little more than a procedural device. Second, it can be used to obtain judgment on the merits in the rare case where the parties' pleadings agree on all the facts necessary for adjudication. In this way, judgment on the merits can be obtained easily and early in the proceedings.

b. Rule 56: Summary Judgment.

Pursuant to Rule 56(a), the defendant may move for summary judgment at any time.[96] However, a scheduling order entered pursuant to Rule 16 may limit the time for filing such motions. The defendant therefore has the option of declining to answer and may file a motion for summary judgment instead. The defendant can also answer and then file his motion.

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[95]Sage Inter., Ltd. v. Cadillac Gage Co., 556 F. Supp. 381 (E.D. Mich. 1982).

[96]Fed. R. Civ. P. 56(b).

The plaintiff can also move for summary judgment, the only qualification being that the motion cannot be filed until 20 days after the beginning of the action. If the defendant moves for summary judgment first, the plaintiff cannot file a cross motion until at least 20 days after the defendant's motion.

Either party is entitled to summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.[97] The burden to show the absence of a material fact is on the moving party.[98] Summary judgment is similar to a judgment on the pleadings, the only difference being that evidence outside the pleadings can be introduced in the motion for summary judgment. This evidence can be in the form of declarations,[99] affidavits, interrogatory responses, or virtually any other form of document. The declarations or affidavits must, of course, be based upon personal knowledge, must set forth admissible evidentiary facts, and must affirmatively show that the declarant is competent to testify to those facts.[100]

Rule 56 does not define material fact. The Supreme Court has defined it as a fact which "might

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[97]Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

[98]Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970).

[99]See 28 U.S.C. § 1746).

[100]Fed. R. Civ. P. 56(e); Sitts v. United States, 811 F.2d 736 (2d Cir. 1987); McNear v. Coughlin, 643 F. Supp. 566 (W.D.N.Y. 1986).

affect the outcome of the suit."[101] It is fairly clear that it refers to facts that are material to the specific issues framed by the motion rather than those framed by the complaint as a whole.[102] The pleadings may raise several issues, but if the motion would resolve the case based on only one, then a dispute as to the facts of other issues unrelated to the grounds for this motion is irrelevant.

Narez v. Wilson provides an example of how the summary judgment rule operates:

NAREZ V. WILSON
591 F.2d 459 (8th Cir. 1979)

STEPHENSON, Circuit Judge.

> Plaintiff-appellant Michael C. Narez appeals from the trial court's grant of summary judgment to the defendant--appellees, United States Marine Corps. Inasmuch as the record reveals yet to be resolved issues of material fact, we reverse and remand to the trial court for proceedings not inconsistent with this opinion.
>
> In stating the facts relevant to the appeal, we will adhere to the standards established for summary judgment:
>
> > "Where several possible inferences can be drawn from the facts contained in the affidavits, attached exhibits, pleadings, depositions, answers to interrogatories, and admissions on file, "[o]n summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the

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[101]Anderson v. Liberty Lobby, 477 U.S. 242 (1986).

[102]Id.

light most favorable to the party opposing the motion."

City Nat'l Bank v. Vanderboom, 422 F.2d 221, 223 (8th Cir.) cert. denied, 399 U.S. 905 (1970), quoting from United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

Narez enlisted in the Reserve Marine Corps on April 18, 1971, for a period of six years. When he enlisted, he signed an enlistment contract by which he acknowledged his obligation to attend weekend drills and annual active duty summer camp . . . . As a part of this agreement, Narez also assumed the responsibility of informing the military of his current address.

From the time of his enlistment until March 1975, Narez presumably satisfactorily fulfilled his military obligations. In the weekend drill of March 1975, however, the commanding officer of Narez' company, Captain Dudash, designated Narez as an "unsatisfactory" participant in each drill. The apparent reason for the unsatisfactory designation was that Narez' wig, although allegedly in compliance with Corps standards, did not conform to Dudash's grooming standards. The unsatisfactory rating continued even after Narez had twice cut the wig (between the Saturday morning and Saturday afternoon drills and prior to the Sunday morning drill) in an attempt to conform to Dudash's expectations. . . .

Narez appeared at the next regularly scheduled drill in April 1975; at that time Dudash allegedly told Narez that unless he got rid of the wig and cut his natural hair, Dudash would "activate" him to involuntary active duty. Narez's record shows that Narez did not appear for the next seven months of drills, nor did he appear for his required two weeks of active duty in July. In December 1975, Narez finally reappeared at drill. . . .

Narez appeared for the January 1976 drills, wearing a new wig which he contends conformed with Marine Corps standards. Dudash again marked Narez as an

"unsatisfactory" participant on the basis that--according to Narez--the wig did not meet "Dudash's standards." At that time, Narez decided not to attend any future drills, and he was not present for the February, March and April 1976 drills.

During the next few months, several letters were written by Marine officials and sent to Narez explaining what action the Corps was going to take against him. All but one of these letters failed to reach Narez, however, and the Corps maintains Narez was the cause of this failure inasmuch as he had not kept the Marines advised of his most current address. . . .

[O]n April 28, 1976, the Corps sent to Narez a notice of its intent to recommend that Narez be ordered to involuntary active duty . . . on June 4, 1976, sent to Narez a notice of intent to recommend that he be administratively reduced to the rank of private; and on September 8, 1976, sent to Narez a second letter of intent to recommend that he be recommended for involuntary active duty. None of these letters ever reached Narez, and they were returned, marked "Unclaimed" or "Moved".

On November 1, 1976, Narez' order of assignment to involuntary active duty, effective November 30, was issued. . . . On November 12, 1976, the Corps located Narez at his place of employment and informed him of the order. Narez said he wished to contest the order. . . . On November 29, Narez's orders to report were personally delivered to him at his place of work, and on November 30, Narez failed to report as ordered.

Narez raises three primary issues on appeal. The only one necessary for us to discuss here is his contention that the pleadings, affidavits and depositions of the parties raise a genuine issue of material fact as to whether Narez was ordered to involuntary active duty, directly or indirectly, as a result of his wearing a regulation wig to weekend drills.

In a summary judgment situation, the court may consider admissions and facts conclusively established but all reasonable doubts touching the existence of a genuine issue as to material fact must be resolved against the movant.

* * *

> "A summary judgment upon motion therefor by a defendant in an action should never be entered except where the defendant is entitled to its allowance beyond all doubt. To warrant its entry the facts conceded by the plaintiff, or demonstrated beyond reasonable question to exist, should show the right of the defendant to a judgment with such clarity as to leave no room for controversy, and they should show affirmatively that the plaintiff would not be entitled to recover under any discernible circumstance. . . . A summary judgment is an extreme remedy, and, under the rule, should be awarded only when the truth is quite clear. . . . And all reasonable doubts touching the existence of a genuine issue as to a material fact must be resolved against the party moving for summary judgment."

United States v. Farmers Mut. Ins., 288 F.2d 560, 562 (8th Cir. 1961), quoting from Traylor v. Black, Sivalls & Bryson, Inc., 189 F.2d 213, 216 (8th Cir. 1951). . . .

If, by reasonable inference from the facts, it could be concluded that by action of the Corps Narez was denied his constitutionally protected right to govern his personal appearance, directly or indirectly in violation of our decision in Miller v. Ackerman, supra, then the Corps, as the moving party, has failed to sustain its burden, and the order of summary judgment must be reversed.

This issue is a material one in that it goes to the heart of Narez' pleading; and a review of the record also discloses that

there are sufficient facts that give rise to the inference that Narez suggests: (1) Narez' claim that he was marked unsatisfactory because of his wig, when Narez contends his wig conformed to Corps requirements; (2) the allegations that Dudash told Narez to get rid of his wig or Narez would be activated; (3) the Corps' change of recommendation from discharge (of which there is a review of an administrative board) to involuntary active duty (for which review by an administrative board does not exist); (4) the fact that Narez claims he at least twice requested MAST, but did not receive it; and (5) the delay in the order to activate Narez (Narez was absent from drills in May, June, July, August, September, October and November, 1975, and yet the Corps' notification to Narez of discharge or involuntary active duty did not come about until after the further dispute Narez had with Dudash over Narez' wig in January 1976). We do not list these factors as a comment upon the strength or weakness of Narez' case; we only point to these facts to illustrate that a reasonable inference can be drawn from these facts favorably for Narez.

Thus, for the reason that a genuine issue as to a material fact exists in this case, we hold that this case is not an appropriate one for summary judgment. The purpose of summary judgment "is not to cut litigants off from their right of trial . . . if they really have evidence which they will offer on a trial[;] it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists." Whitaker v. Coleman, 115 F.2d 305, 307 (5th Cir. 1940).

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That summary judgment cannot be granted if there is an issue as to a material fact implies that there can be no contest as to the facts. This is not correct. In the typical case, the complaint makes an allegation of fact that the defendant wishes to contest. The

defendant moves for summary judgment and files a declaration, controverting the facts alleged in the complaint. It would appear at this point that there is an issue of fact. Once the defendant challenges the plaintiff's factual allegations with competent evidence to the contrary, however, the defendant is ordinarily entitled to judgment if the plaintiff fails to challenge the defendant's evidence with evidence of his own.[103]

Even when the movant's extrinsic evidence is unchallenged, the court must construe the motion in the most favorable light for the non-moving party.[104] Usually, however, the fact that his evidence is unchallenged will result in judgment for the defendant. To adequately counter the defendant's motion in these circumstances, the plaintiff must come forward with evidence equal in quality to the defendant's. Conclusory assertions of fact or generalized allegations are insufficient.[105]

Where the defendant has introduced evidence on a motion for summary judgment and the plaintiff is unable to rebut it, the court may either find in favor of the

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[103]E.g., Boulies v. Ricketts, 518 F. Supp. 687 (D. Colo. 1981) (uncontradicted prison officials' affidavits controverting prisoners' complaint entitled them to judgment).

[104]E.g., Fitzke v. Shappell, 468 F.2d 1072 (6th Cir. 1972).

[105]E.g., Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Rivanna Trawlers Unlimited v. Thompson Trawlers, 840 F.2d 236, 240 (4th Cir. 1988); Walter v. Fiorenzo, 840 F.2d 1427, 434 (7th Cir. 1988); St. Amant v. Benoit, 806 F.2d 1294 (5th Cir. 1987); Smith v. Mack Trucks, Inc., 505 F.2d 1248 (9th Cir. 1974); Lovable Co. v. Honeywell, Inc., 431 F.2d 668 (5th Cir. 1970).

defense, which is the more frequent result, or permit discovery to allow the party opposing the motion to obtain sufficient facts to counter it.[106] The result may depend on the nature of the parties. Pro se plaintiffs, for example, are given greater latitude. In such cases, the court will ensure that the plaintiffs' claims have had "fair and meaningful consideration."[107]

Courts are reluctant to grant summary judgment where there is a question of motive or intent, where facts necessary to resolution are in the movant's hands, or where different inferences can be drawn from undisputed facts.[108] Even where the affidavits on which a motion for summary judgment are based remain unopposed, summary judgment may be denied:

> When a moving party's affidavit raises subjective questions such as motive, intent or conscience, there may have to be a trial even where the non-moving party fails to present counter-affidavits since cross-examination is the best means of testing the credibility of this type of evidence.[109]

The Supreme Court has endorsed summary judgment as a means of disposing of cases in which immunity is raised in constitutional tort actions:

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[106]See Habib v. Raytheon Co., 616 F.2d 1204 (D.C. Cir. 1980).

[107]Madyun v. Thompson, 657 F.2d 868, 876-877 (7th Cir. 1981).

[108]Sherman Oaks Medical Arts Center v. Carpenter's Local Union 1936, 680 F.2d 594 (9th Cir. 1982).

[109]Williams v. Burns, 540 F. Supp. 1243, 1248 (D. Colo. 1982). See also Via v. City of Richmond, 543 F. Supp. 382 (E.D. Va. 1982).

> "[D]amages suits [against public officials] concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity. . . . In responding to such a motion, plaintiffs may not play dog in the manger and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits."[110]

Complete or partial summary judgment can be given. Summary judgment is a judgment on the merits and can be appealed (although denial of a motion for summary judgment generally cannot absent consent of the court). Because summary judgment is on the merits, some confusion is caused when the ground asserted as the basis for judgment is one which does not normally go to the merits, such as jurisdiction. Rule 12(h)(3) provides that whenever jurisdiction appears to be lacking, the action should be dismissed. Whether "judgment" is given or a dismissal is ordered is important because the former forecloses a new suit while the latter does not. Stanley v. Central Intelligence Agency, a Federal Tort Claims Act case involving Army LSD testing, demonstrates how the Fifth Circuit views this issue.

STANLEY v. CENTRAL INTELLIGENCE AGENCY
639 F.2d 1146 (5th Cir. 1981)

TUTTLE, Circuit Judge:

> Appellant James B. Stanley appeals from the district court's granting of summary judgment in favor of defendant. Appellant brought suit against the United States under

[110]Harlow v. Fitzgerald, 457 U.S. 800, 808 (1982), quoting Butz v. Economou, 438 U.S. 478, 508 (1978).

the Federal Tort Claims Act . . . to recover for injuries sustained allegedly as a result of defendant's negligent administration of a chemical warfare experimentation program in which Stanley was a participant. The district court found that Stanley's injuries arose out of activity incident to military service and held, therefore, that the claim was barred by the Feres doctrine. . . .

We find that the trial court correctly applied Feres and held the United States immune to all of Stanley's claims under the Federal Tort Claims Act, since all of his injuries arose while he was engaged in activity incident to his military service. However, we reverse the granting of summary judgment, as we find that, once having found the Feres doctrine applicable, the district court should have dismissed the case for lack of subject matter jurisdiction.

## I. FACTS

In February, 1958, appellant was a Master Sergeant . . . stationed with his wife and children at Fort Knox, Kentucky. Responding to a posted notice, appellant volunteered to . . . [go to] Edgewood Arsenal. . . . There, during the course of clinical testing, he was given Lysergic Acid Diethylamide . . . without his knowledge.

Appellant claims that the defendants were negligent . . . in their administration of LSD to human subjects, their failure to obtain his informed consent to participate in the experiment, and their failure to debrief and monitor him after the test. Appellant claims that he suffered, as a result of this negligence, severe physical and mental injuries which caused him continual problems in the performance of his military duties and ultimately disrupted his marriage.

## II. APPLICABILITY OF FERES

In Feres v. United States, 340 U.S. 135 (1950), the Supreme Court considered the claims of three servicemen for recovery under the Federal Tort Claims Act for

injuries sustained while they were on active duty. . . . The Court held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146. . . . Despite the apparent harshness of the application of Feres to the facts before us, we are compelled to conclude that the trial court correctly applied Feres and held the United States immune to Stanley's suit. . . .

IV. GRANTING OF SUMMARY JUDGMENT

Appellant contends that even if the trial court was correct in finding that Feres applied to the facts of this case, the court erred in disposing of the case by way of summary judgment rather than dismissal for lack of subject matter jurisdiction. This contention is based on the notion that if Feres applies, a district court lacks subject matter jurisdiction because the Feres doctrine is a judicially created exception to the waiver of sovereign immunity contained in the Federal Tort Claims Act and when the government has not consented to suit, the court has no subject matter jurisdiction to hear the claim. Appellant argues that once a court has determined that Feres applies, the court lacks subject matter jurisdiction, and, therefore, has no power to render a judgment on the merits of the case. Thus, he contends that the trial court in this case had no power to grant summary judgment, which acts as a final adjudication on the merits, but should have dismissed the case without prejudice. . . . See generally 6 Moore's Federal Practice, para. 56.03, para. 56.26.

Appellant points also to cases holding that summary judgment is an extreme remedy which is proper only if the claimant is not entitled to recovery under any circumstances. . . . He contends that he has a separate theory of recovery based on the Constitution and 28 U.S.C. § 1331. See Davis v. Passman, 442 U.S. 228 (1979); Bivens v. Six Unknown Named Agents of the

Federal Bureau of Narcotics, 403 U.S. 388 (1971). Appellant, therefore, asks this Court to reverse the granting of summary judgment and to remand with directions that the claim be dismissed for lack of subject matter jurisdiction and that the plaintiff be allowed to amend "to correct a defective allegation of jurisdiction," 28 U.S.C. § 1653. . . .

Courts have uniformly held that where conduct complained of falls within one of the statutory exceptions to the FTCA, the district court is without jurisdiction of the subject matter thereof. . . . We conclude that when a case under the Tort Claims Act falls within the bounds of Feres, a judicially created exception to the Act, the Court likewise has no jurisdiction to hear the case.

A federal district court is under a mandatory duty to dismiss a suit over which it has no jurisdiction. . . . When a court must dismiss a case for lack of jurisdiction, the court should not adjudicate the merits of the claim. . . . Since the granting of the summary judgment is a disposition on the merits of the case, a motion for summary judgment is not the appropriate procedure for raising the defense of lack of subject matter jurisdiction. See generally 10 Wright & Miller, Federal Practice and Procedure, § 2713, p. 402 et seq. Therefore, since a defense based on the Feres doctrine is premised on the notion that there is no jurisdiction to hear the claim as the United States has not waived sovereign immunity for that kind of suit, such defenses should be raised by a motion to dismiss for lack of subject matter jurisdiction rather than by a motion for summary judgment. . . . Accordingly, we conclude that the court below erred in granting summary judgment in favor of the United States and should have dismissed the case for lack of subject matter jurisdiction.

The government's arguments to the contrary are not persuasive. Appellees correctly state the rule that a district

court must treat a 12(b)(6) motion for failure to state a claim as a motion for summary judgment where the trial court considers matters outside the pleadings. . . . However, a 12(b)(1) motion for lack of jurisdiction over the subject matter is not so converted. . . . A dismissal for failure to state a claim is a disposition on the merits. Since appellant's allegations should not have survived the 12(b)(1) jurisdictional attack of Feres, the court had no jurisdiction to dispose of the case on the merits by reaching the 12(b)(6) motion of dismissal for failure to state a claim. . . . Therefore, the fact that the trial court in this case considered matters outside the pleadings fails to render his action in treating the Feres issue on a motion for summary judgment proper. . . .

The government also relies on several cases where the court affirmed the granting of summary judgment since subject matter jurisdiction was found lacking. See, e.g., Sherwood Medical Indust. v. Deknotel, 512 F.2d 724 (8th Cir. 1975); McDaniel v. Travelers Ins. Co., 494 F.2d 1189 (5th Cir. 1974) (per curiam). These cases, however, are not binding authority for the government's assertion that we should affirm the granting of summary judgment in this case. In the Sherwood case, the Eighth Circuit affirmed the granting of summary judgment because the court found there was no "actual controversy" as is required for a suit under the Declaratory Judgment Act. Summary judgment there was appropriate as the Declaratory Judgment Act does not of itself create jurisdiction so the court must have had another basis of jurisdiction in order to have reached the question of whether relief was available under the Declaratory Judgment Act. The McDaniel case was a suit brought within the admiralty jurisdiction of this Court. There, we affirmed per curiam the granting of summary judgment because the plaintiff had failed in his attempt to allege that a maritime contract existed or that defendants had breached it. The question of whether the trial court should have dismissed the case

for lack of jurisdiction rather than granting summary judgment was not raised.

> There are cases where courts have disposed of the Feres issue by way of summary judgments. . . . However, we have found no case which addresses the precise issue before this Court, or provides any reasoned explanation for why summary judgment can be an appropriate disposition of a case in which Feres applies. . . . There are numerous cases where the courts have granted motions to dismiss based on the Feres doctrine. . . . Moreover, in Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977), the Supreme Court found that the district court had properly dismissed the plaintiff's FTCA claims for lack of subject matter jurisdiction because Feres applied.
>
> We conclude, therefore, that the only correct disposition of a case based on Feres is dismissal for lack of subject matter jurisdiction. . . .
>
> While we approve the determination of the trial court that the plaintiff could not prevail on his complaint, we reverse the order granting summary judgment and remand for the consideration of the trial court of any amendment which the appellant may offer, seeking to cure the jurisdictional defect.

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Summary judgment is frequently sought and often given in government litigation. In military cases, litigation often arises from administrative proceedings in which there is a record that the court is asked to review for substantial evidence or arbitrariness. Because there is no factual dispute, summary judgment is an appropriate vehicle. Determination of some uniquely government issues such as official immunity or the reviewability of military decisions are particularly well suited for summary judgment. Constitutional

litigation, a major part of government practice, is also a candidate for summary judgment because the facts are often not in dispute or the parties are willing to stipulate a set of facts to get at the major issues.

When summary judgment is denied at the beginning of a case because the facts are disputed, the parties may go into discovery after which motions for summary judgment are frequently renewed.

**2.6 Discovery.**

a. Scope of Discovery.

Rules 26-37 govern discovery. Rule 26(a)(5) provides for the following discovery devices:

a. depositions (Rules 27, 28, 30-32),

b. interrogatories (Rule 33),

c. production of documents or things (Rule 34),

d. inspection or examination of persons or land or other property (Rules 34, 35), and

e. requests for admissions (Rule 36).

Generally, several discovery tools can be used in any sequence and the parties can discover one another simultaneously.[111]

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[111]Fed. R. Civ. P. 26(d).

The scope of discovery, contained in Rule 26(b)(1), is broad:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The two principal criteria of Rule 26(b)(1) that result in broad discovery are (1) that the matter be "relevant to the subject matter" of the action, and (2) that the information need not be admissible if it is reasonably calculated to lead to admissible evidence.

The party seeking discovery has the burden of demonstrating relevancy.[112] The standard for relevancy, however, is broader than that at trial.[113] Discoverable matter need only be relevant to the subject matter of the case and not to the specific legal issues or theories asserted in the pleadings.[114]

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[112]United States v. IBM, 66 F.R.D. 215 (S.D.N.Y. 1974).

[113]Kerr v. United States Dist. Court for the N. Dist. of Cal., 511 F.2d 192 (9th Cir. 1975), aff'd, 426 U.S. 394 (1976).

[114]E.g., Duplan Corp v. Deering Milliken, Inc. 397 F. Supp. 1146, 1187 (D.S.C. 1974).

One narrow exception to the broad scope of discovery may be in actions based upon an administrative record. In these cases, discovery may be limited to that necessary to determine if there is a complete record.[115]

In 1980, the Supreme Court declined a recommendation to change the rules to limit discovery to facts relevant to the pleadings. Two years previously in Oppenheimer Fund, Inc. v. Sanders,[116] the Court stated:

> [D]iscovery is not limited to issues raised by the pleadings for discovery itself is designed to help define and clarify the issues. . . . Nor is discovery limited to the merits of a case for a variety of fact oriented issues may arise during litigation that are not related to the merits.[117]

As Oppenheimer suggests, discovery helps to define the pleadings. The breadth of the discovery rules can only be understood fully when the linkage between the concept of notice pleading and discovery is appreciated:

> The relationship between the policy of pleading and that of discovery is obvious. The very purpose of permitting pleadings based upon good faith speculation must be to permit plaintiffs to employ the discovery provisions to determine whether a valid case in fact exists. If plaintiff had the resources and ability to ascertain all the facts without resort to the formal discovery process, there would be no need, of course,

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[115]Exxon Corp. v. Department of Energy, 91 F.R.D. 26 (N.D. Tex. 1981).

[116]437 U.S. 340, (1978).

[117]Id. at 351.

to permit any but the most specific allegations. Conversely, it would not matter that general pleadings sufficed if discovery could nevertheless be curtailed, thus preventing or hindering plaintiffs from ascertaining if, and on what facts, valid claims exist.

From a theoretical point of view, the current practice of allowing general pleading and extensive discovery cannot seriously be challenged. There seems to be little reason why litigants should be prevented from establishing legitimate claims in actions in which the admissible facts are to be found only in the files and minds of opposing parties. Similarly, the Supreme Court should not give into charges of abuse by lawyers who, rather transparently, are merely acting as lobbyists for their particular clientele. The practical problems, however, are not so easily treated. There are cases in which extensive discovery results in costs well out of proportion to the dispute. Nevertheless, lawyers push on with their inquiries---not so much to build their fees, as is sometimes suggested, but to ensure that after the case is completed the lawyers will not be subjected to malpractice claims following the sudden appearance of favorable, hitherto undiscovered documents or testimony. The fact that some clients can afford such extensive discovery does not alter the fact that it often wastes both time and money.

The inherent difficulty with proposals to limit the scope of discovery, however, is that they apply to every case, including those in which discovery will cover a broad base but will not necessarily be extensive and costly, those in which costly, time-consuming discovery is justifiable, and those in which limits should legitimately be imposed.[118]

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[118]J. Friedenthal, A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure, 69 Calif. L. Rev. 806, 816-817 (1981).

Critics of liberal discovery practice argue that the periodic changes to the discovery rules have been insufficient to cure perceived abuses inherent in the system. The relatively limited scope of changes in 1980 led to this dissent from the adoption of the 1980 amendments by Justice Powell, joined by Justices Stewart and Rehnquist:

> [T]he most recent report of the ABA Section of Litigation makes clear that the "serious and widespread abuse of discovery" will remain largely uncontrolled. There are wide differences of opinion within the profession as to the need for reform. The bench and the bar are familiar with the existing Rules, and it often is said that the bar has a vested interest in maintaining the status quo. I imply no criticism of the bar or the Standing Committee [of the U.S. Judicial Conference which reported the changes] when I suggest that the present recommendations reflect a compromise as well as the difficulty of framing satisfactory discovery Rules. . . . The Court's adoption of these inadequate changes could postpone effective reform for another decade.
>
> When the Federal Rules first appeared in 1938, the discovery provisions properly were viewed as a constructive improvement. But experience under the discovery Rules demonstrates that "not infrequently [they have been] exploited to the disadvantage of justice." Herbert v. Lando, 441 U.S. 153, 179 (1979) (POWELL, J., concurring). Properly limited and controlled discovery is necessary in most civil litigation. The present Rules, however, invite discovery of such scope and duration that district judges often cannot keep the practice within reasonable bounds. Even in a relatively simple case, discovery through depositions, interrogatories, and demands for documents may take weeks. In complex litigation, discovery can continue for years. One must doubt whether empirical evidence would demonstrate that untrammeled discovery actually contributes to the just resolution

> of disputes. If there is disagreement about that, there is none whatever about the effect of discovery practices upon the average citizen's ability to afford legal remedies.
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> Delay and excessive expense now characterize a large percentage of all civil litigation. The problems arise in significant part, as every judge and litigator knows, from abuse of the discovery procedures available under the Rules. Indeed, the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, led by THE CHIEF JUSTICE, identified "abuse in the use of discovery [as] a major concern" within our legal system. Lawyers devote an enormous number of "chargeable hours" to the practice of discovery. We may assume that discovery usually is conducted in good faith. Yet all too often, discovery practices enable the party with greater financial resources to prevail by exhausting the resources of a weaker opponent. The mere threat of delay or unbearable expense denies justice to many actual or prospective litigants. Persons or businesses of comparatively limited means settle unjust claims and relinquish just claims simply because they cannot afford to litigate. Litigation costs have become intolerable, and they cast a lengthening shadow over the basic fairness of our legal system. . . .
>
> The amendments to Rules 26, 33, 34 and 37 recommended by the Judicial Conference should be rejected, and the Conference should be directed to initiate a thorough re-examination of the discovery Rules that have become so central to the conduct of modern civil litigation.[119]

Advocates of liberal discovery contend that the system favors, rather than disadvantages, the small litigant and that narrowing the scope of discovery would

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[119]85 F.R.D. 521.

favor the large corporate defendant.[120] On the other hand, the existing discovery rules often disfavor the Government while permitting the plaintiff tremendous latitude. In litigation challenging military decisions and programs, discovery is often a one-way street because the Government is in possession of most of the discoverable facts. Limitless discovery demands tax limited military resources, especially since "the presumption is that the responding party must bear the expense of complying with discovery requests."[121]

b. Judicial Management of Discovery.

Although the rules give the parties some latitude, the court's power to manage discovery, already strong, is increasing. Under the 1993 amendments to the Federal Rules of Civil Procedure, unless otherwise stipulated or directed by order or local rule, certain information must now be disclosed without waiting for a discovery request.[122] This preliminary disclosure must include:

1. identification of witnesses and the subjects of which they are knowledgeable;

2. a copy of all relevant documents or a description of these and all tangible things relevant to

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[120]E.g., W.H. Erickson, The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty First Century, reported in 76 F.R.D. 277, 288 (1977).

[121]Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978).

[122]Fed. R. Civ. P. 26(a)(1).

"disputed facts alleged with particularity in the pleadings";

3. a computation of damages and nonprivileged factual material related to the nature and extent of injuries suffered; and

4. a copy of any insurance agreement under which an insurance business may be liable to satisfy and potential judgment.

These disclosures must be made within 10 days after the discovery planning meeting mandated by Rule 26(f). Additionally the new Rules now impose a continuing duty to supplement or correct disclosures made under Rule 26(a)(1) or in response to requests for discovery. The 1993 amendment to the Federal Rules of Civil Procedure provided for a mandatory discovery planning meeting.[123] This meeting should be held at least 14 days prior to the Rule 16(b) scheduling conference. Parties must meet to discuss the nature and basis of their claims and defenses, the possibilities of settlement, and the mandatory disclosures required under Rule 26(a)(1). The parties must submit to the court, within 10 days after the meeting, a written report outlining a discovery plan.

The power to limit discovery or to set discovery schedules is potent. Acceleration of discovery[124] or cutting off discovery where the court believes that the

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[123]Fed. R. Civ. P. 26(f).

[124]E.g., Transamerica Computer Co. v. IBM, 573 F.2d 646 (9th Cir. 1978).

parties have had sufficient time[125] can have dramatic impact on a party's ability to defend.

Moreover, discovery orders are not generally reviewable by mandamus or other means.[126] A party challenging a court's discovery decision has a heavy burden. "Matters of docket control and conduct of discovery are committed to the sound discretion of the district court."[127] A district court's decisions regarding case management will be reversed only on "the clearest showing that the procedures have resulted in actual and substantial prejudice to the complaining litigant."[128] The challenging party has "to demonstrate that the court's action made it impossible to obtain crucial evidence, and implicit in such a showing is proof that more diligent discovery was impossible."[129]

An undesirable but nevertheless available appeal route is by inviting a contempt judgment for refusing compliance with a discovery order. In Marrese v. American Academy of Orthopaedic Surgeons,[130] an antitrust

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[125]E.g., In re Knight, 614 F.2d 1162 (8th Cir. 1980), cert. denied, 449 U.S. 823 (1980).

[126]Barclaysamerican Corp. v. Kane, 746 F.2d 653 (10th Cir. 1984); Cleveland v. Krupansky, 619 F.2d 572 (6th Cir. 1980), cert. denied, 449 U.S. 834 (1980).

[127]In re Fine Paper Antitrust Litigation, 685 F.2d 810, 817 (3d Cir. 1982), cert. denied, 459 U.S. 1156 (1983).

[128]Eli Lilly & Co. v. Generix Drug Sales, Inc., 460 F.2d 1096, 1105 (5th Cir. 1972), cited in Id. at 817.

[129]Id. But cf. Howze v. Jones & Laughlin Steel Corp., 750 F.2d 1208, 1212-13 (3d Cir. 1984) (district court order limiting period of discovery to 60 days deemed an abuse of discretion).

[130]706 F.2d 1488 (7th Cir. 1983).

defendant obtained review of an order to turn over membership lists after being held in contempt for disobeying the order. In reviewing the contempt judgment and order, the court explained the competing interests at stake in deciding whether or not to permit discovery appeals:

> Such an order may impose heavy and irrevocable costs on a party; yet to make discovery orders appealable as of right would lead to unacceptable delays in federal litigation. Confining the right to get appellate review of discovery orders to cases where the party against whom the order was directed cared enough to incur a sanction for contempt is a crude but serviceable method of identifying the most burdensome discovery orders. . . .[131]

Although some authority suggests that the Government can appeal when it is a nonparty and must claim a governmental privilege, this position is not uniformly accepted.[132]

The 1983 Supreme Court amendments to the rules increase the court's power to control discovery, especially in cases where parties overuse discovery. The amendment to Rule 26(b) allows discovery to be limited by the court if:

1. it is unreasonably duplicative or cumulative,

2. it is obtainable from a more convenient, less burdensome, or less expensive source,

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[131]706 F.2d at 1493.

[132]Newton v. NBC, Inc., 726 F.2d 591 (9th Cir. 1984).

3. there has already been ample opportunity in the action to seek the information, or

4. discovery would be unduly burdensome or expensive.

This adds a new dimension to Rule 26(c) which previously allowed relief only from discovery that would cause annoyance, embarrassment, oppression, or undue burden or expense. The change to Rule 26(b) also sets standards for determining whether discovery is burdensome or expensive, requiring the balancing of the needs of the case, the amount in controversy, the resources of the parties, and the importance of the issues at stake. An additional tool to police discovery is Rule 26(g) which permits sanctions against attorneys or parties who sign discovery requests that do not comply with the rules. The 1983 change offers substantial opportunities for government litigants to limit plaintiffs' discovery by seeking protective orders when the circumstances described in Rule 26 arise.

c. Protective Orders, Orders to Compel, Sanctions.

A protective order may preclude, limit or modify the discovery sought.[133] Moreover, protective orders may apply not only to parties but to others with a connection to the suit, such as a party's expert witness.[134] Protective orders are disfavored.

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[133]Fed. R. Civ. P. 26(c).

[134]E.g., Quinter v. Volkswagen of America, 676 F.2d 969 (3d Cir., 1982).

Consequently, the party seeking the protective order bears a substantial burden of showing entitlement.[135] Under the amended Rule 26(c), the moving party must now certify that it has conferred or attempted to confer with other parties to resolve any dispute without court action.

In government litigation, undue burden or expense is the most frequent ground used to support a motion for a protective order. Once the party seeking discovery shows the relevance of the material sought, however, the costly or time consuming nature of the request becomes irrelevant.[136] When forced to respond to a burdensome or costly request, a party may move in the alternative for an order conditioning discovery on the requesting party's payment of the costs.[137]

Although a party seeking discovery is in a favored position generally, Herbert v. Lando,[138] suggests that there should be a limit to the indulgence paid to the discovering parties. There, Lieutenant Colonel Anthony Herbert sued CBS for slander based on a film account of his charges about Vietnam atrocities. Herbert attempted to compel answers to deposition questions which one of the defendants refused to answer on first amendment grounds. The district court issued a protective order

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[135]Kiblen v. Retail Credit Co., 76 F.R.D. 402 (E.D. Wash. 1977).

[136]Kozlowski v. Sears, Roebuck & Co., 73 F.R.D. 73 (D.Mass. 1976). Cf. Isaac v. Shell Oil Co., 83 F.R.D. 428 (E.D. Mich. 1979).

[137]Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978).

[138]441 U.S. 153 (1979).

precluding the questions. The Court upheld the protective order, stating:

> The Court has more than once declared that the deposition--discovery rules are to be accorded a broad and liberal treatment to effect their purpose of adequately informing the litigants in civil trials. Schlagenhauf v. Holder, 379 U.S. 104 (1964) 114-115. Hickman v. Taylor, 329 U.S. 495, 501, 507 (1947). But the discovery provisions, like all of the Federal Rules of Civil Procedure, are subject to the injunction of Rule 1 that they "be construed to secure the just, speedy, and inexpensive determination of every action." (Emphasis added). To this end, the requirement of Rule 26(b)(1) that the material sought in discovery be "relevant" should be firmly applied, and the district courts should not neglect their power to restrict discovery where "justice requires [protection for] a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . ." Rule 26(c). With this authority at hand, judges should not hesitate to exercise appropriate control over the discovery process.[139]

Typically, government agencies are reluctant to part with their records. When forced to do so in discovery, agencies often desire to limit access to discovered materials to opposing counsel. While access of opposing parties, as opposed to counsel, can be controlled, it cannot easily be blocked.[140] General public access to discovered material can be barred, but only if it is essential to shield a party from

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[139]441 U.S. at 177.

[140]Doe v. District of Columbia, 697 F.2d 1115 (D.C. Cir. 1983).

substantial and serious harm.[141] A protective order issued in these circumstances must be narrowly drawn and there can be no alternative means of protecting the public interest.

Orders to compel discovery, which follow a showing of entitlement to the information denied the requesting party, are supported by an array of sanctions in Rule 37 including:

1. an order establishing as fact the matters which were sought in discovery,

2. an order precluding introduction of matters by the nonresponding party or refusing to allow him to support or oppose claims or defenses,

3. an order striking all or part of pleadings,

4. a stay of further proceedings,

5. dismissal,

6. judgment of default, and/or

7. payment of reasonable expenses including attorney's fees.

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[141] In re Halkin, 598 F.2d 176 (D.C. Cir. 1979). See, e.g., In re Korean Air Lines Disaster, 597 F. Supp. 621 (D.D.C. 1984); In re Agent Orange Product Liability Litigation, 100 F.R.D. 735 (E.D.N.Y. 1983) (protective orders issued against release of documents to news media).

While Rule 37 permits the court to impose the full panoply of sanctions, including dismissal, for a party's failure to appear for his own deposition, or for his failure to answer interrogatories or requests for production, in practice sanctions are generally not imposed until an order compelling compliance with discovery requests has been made and disobeyed.[142] The amended Rule 37 now includes the requirement that the moving party have conferred or attempted to confer with the person against whom relief is sought. This rule also applies to sanctions imposed on a nonparty under Rule 45.[143]

One problem for corporate and government attorneys responding to discovery is that they must rely on others within their respective bureaucracies for information and support. When a failure to comply with a discovery order is "due to inability and not to bad faith, or any fault of" a party, sanctions are not appropriate.[144] In Potlatch Corp. v. United States,[145] the Government failed to provide an expert appraisal by a court--ordered discovery deadline. The court refused to allow introduction of the appraisal or the testimony of the expert. On appeal, the imposition of the sanction was

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[142]But see Alsup v. International Union of Bricklayers and Allied Craftsmen of Toledo, Ohio, Local Union No. 3, 679 F. Supp. 716, 721 (N.D. Ohio 1987) (court may impose sanctions prior to order compelling compliance where initial discovery request is clear).

[143]E.g., Pennwalt Corp. v. Durand-Wayland, Inc, 708 F.2d 492 (9th Cir. 1983).

[144]Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 212 (1958).

[145]679 F.2d 153 (9th Cir. 1982).

reversed. The court of appeals held that intragovernmental delays in getting Department of Justice approval to hire the expert should have been considered by the court: "[t]he facts of bureaucratic delay and red tape, which while certainly not to be encouraged, cannot be ignored."[146]

There are, however, limits to courts' willingness to excuse bureaucratic barriers:

BRADLEY v. U.S.
866 F.2d 120 (5th Cir. 1989)

Before KING, WILLIAMS, and SMITH, Circuit Judges.

PER CURIAM:

Plaintiffs Dirk and Cynthia Bradley appeal from a take-nothing judgment entered after a bench trial on their claim under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b) and 2671 et seq., against the United States for medical malpractice. We conclude that the government purposefully disregarded--indeed, had a policy of disregarding--its duties under the Federal Rules of Civil Procedure, the district court's own local rules, and the court's pretrial order seasonably to identify for the Bradleys the expert witnesses whose testimony it intended to present at trial. For that reason, we vacate and remand.

. . . .

II.

The Bradleys, after complying with the notice provisions of the FTCA by filing an administrative claim on March 29, 1981, filed the instant suit on March 5, 1984, alleging that the government's doctors negligently scheduled and performed Brad's

[146] Id.

delivery by cesarean section. On July 17, 1984, the Bradleys served upon the government interrogatories which requested, inter alia, that the government identify "each expert witness whose opinion the Defendant intends to present at []trial," and all of the articles, journals, books, or other sources which the government or its experts intended to assert as authoritative.

The government responded to the interrogatories on September 18, 1984. In answer to the Bradleys' request that it identify its expert witnesses, the government stated: "The Defendant has not selected an expert at this time." Similarly, in response to the Bradleys' request that it identify all authoritative secondary sources which it intended to use at trial, the government, after identifying a standard medical treatise on obstetrics, J. Pritchard & P. MacDonald, Williams Obstetrics (1976), stated that, because it "has not selected an expert at this time [] it has therefore not yet selected any articles, journals or other publications as authoritative." These answers were never subsequently altered or amended.

On January 17, 1985, the court ordered that, in accordance with local rules, the parties were to prepare and present to the court a pretrial order by June 10, 1985, and that the case be set for trial on June 24, 1985. The parties submitted a pretrial order to the court on June 10, 1985, in which the government, having been ordered to list all of the expert witnesses it intended to call at trial, again failed to identify any expert witnesses.

Although both parties appeared before the court on June 24, 1985, and announced their readiness to go to trial, the trial was postponed and rescheduled for March 24, 1986, with a joint pretrial order due on March 14, 1986. Neither party amended the joint pretrial order previously submitted to the court, and no new pretrial order was filed; on March 17, 1986, the trial was postponed a second time until July 21, 1986. Finally, on May 22, 1986, the trial was

postponed a third time until February 2, 1987, with a joint pretrial order due January 16, 1987.

At no time during these various postponements did either party seek to amend the pretrial order submitted on June 10, 1985, and no new pretrial order was filed prior to the February 2, 1987, trial date. On January 23, 1987, however, the government moved to designate two expert witnesses--a Dr. Alvin Brekken and a Dr. William R. Bernell--out of time. The Bradleys, while filing papers opposing the government's motion, quickly deposed the two witnesses.

On Monday, February 2, 1987, both parties appeared, ready for trial. Although they stated that under the circumstances they did not want the trial to be postponed yet a fourth time, the Bradleys continued to oppose the government's motion. Noting that the Bradleys already had deposed the two witnesses, however, the court granted the government's motion and allowed Brekken and Bernell to testify.

After the trial, the court rendered judgment for the United States. In its findings of fact and conclusions of law, the court concluded that the Bradleys had failed to prove both that the Air Force doctors were negligent in scheduling Brad's delivery and that the doctors' actions were the proximate cause of his handicaps. The Bradleys appeal, contending (1) that the court erred by granting the government's motion to designate the two expert witnesses and allowing them to testify, and (2) that the court's factual findings are clearly erroneous.

III.

> Under Fed.R.Civ.P. 26(e)(1), a party has a duty seasonably to supplement [its] response [to a request for discovery] with respect to any question directly addressed to . . . the identity of each person expected to be called as an expert witness at trial, the subject matter

> on which the person is expected to testify, and the substance of the person's testimony.

Even the government itself admits that, at least as to Bernell, it breached this rule; moreover, there is little question that the government failed to comply with both the local rules of the district in which the case was tried and the court's pretrial order, both of which required it to designate its expert witnesses within a certain period.

The breach having been established, the only question remaining is that of remedy. While the government moved to designate the two expert witnesses out of time, the Bradleys moved to exclude the witnesses under rules 16(f) and 26(e)(1). On the first day of trial, the court, after discussing the factual circumstances underlying the motions with counsel, ruled from the bench that the two experts would be allowed to testify. It is this ruling which the Bradleys contest.

Regardless of whether we treat the court's ruling as an amendment of the pretrial order under rule 16(e) or a refusal to impose sanctions upon the government for violating rule 26(e)(1), it is apparent that we must review the court's ruling under the "abuse of discretion" standard. The trial court's discretion, however, is to be guided by the consideration of four factors: (1) the importance of the witness's testimony; (2) the prejudice to the opposing party of allowing the witness to testify; (3) the possibility of curing such prejudice by granting a continuance; and (4) the explanation, if any, for the party's failure to identify the witness. See Murphy, 639 F.2d at 235. Based upon our analysis of these factors, we conclude that this is one of those rare cases in which we are compelled to hold that the trial court abused its discretion by allowing Brekken and Bernell to testify.

. . . .

According to the government, its failure to notify the Bradleys of its expert witnesses in accordance with the federal and local rules and the court's pretrial order was the result of budgetary constraints and bureaucratic policy. As the Assistant United States Attorney trying the case explained orally to the district court, and to this court in writing, each United States Attorney's Office is provided with litigation funds, which can be used, inter alia, to hire consultants to assist in the preparation of a case. In this case, both Brekken and Bernell were hired as consultants, with Brekken delivering a written report to the government in June 1984--well before the government responded to the Bradleys' interrogatories--and Bernell delivering a written report in June 1985, before the original pretrial order was failed in the district court.

Funds for the payment of expert witnesses, however, are maintained centrally at the Department of Justice. Once an Assistant United States Attorney who wishes to use an expert at trial obtains permission from the Department of Justice, funds for the payment of that witness are restricted in the expert witness account, and are no longer available for use by any other Assistant United States Attorney, even though the trial for which the expert is designated may not occur for some time. Assistant United States Attorneys therefore are encouraged not to "tie up" those funds until reasonably sure that the case in which the expert will testify is going to trial in the immediate future.

This policy of delaying the designation of expert witnesses, the government states, was particularly important during the time in which this case was pending. Because of severe budgetary problems, United States Attorneys' offices were instructed to forego a number of expense-generating activities; at the same time, district judges were instructed that, for a period of time, they could not proceed with any jury trials because funds were not available.

Thus, the government states, it did not supplement its responses to the Bradleys' interrogatories or designate Brekken and Bernell in the original pretrial order because it was Justice Department policy not to do so until trial was imminent. It does contend that it nonetheless informally notified the Bradleys in June 1985 of its intention to use Brekken as an expert witness, see supra; it offers no explanation, however, for its failure to inform them of its intention to use Bernell.

Even if we receive the government's explanation at face value, we simply cannot accept "bureaucratic necessity" as an excuse for purposefully disregarding the rules by which all parties must operate when appearing before federal district courts. All parties are expected to conform their conduct to these rules, or face sanctions for their failure to do so; this is even more true for the federal government, a party that regularly appears before the federal courts, knows the rules by which they operate, and is even at times a special beneficiary of those rules. Although we are sensitive to the conditions under which the various United States Attorneys' offices operate, these conditions do not and cannot justify policies that are predicated upon a disregard of the power of federal courts and the rights of opposing parties, both of which are embodied in the federal rules, the local rules, and court orders.

By allowing Brekken and Bernell to testify, the district court left the government's breach of its duties unsanctioned; moreover, its silence in the face of the government's conduct can be interpreted as an imprimatur. Indeed, the letter submitted by the United States Attorney to this court suggests that the government has interpreted the district court's silence as precisely that, insofar as the letter indicates that the same policies are still in effect.

We will not allow that imprimatur to exist any longer. We hold that, under the circumstances of this case, the district

court abused its discretion by allowing the government to designate Brekken and Bernell out of time and to offer their testimony. Moreover, we are hopeful that this decision will serve as a catalyst for appropriate changes in the above-described policies, to the extent that such policies still deter adherence to the applicable rules.

IV.

Having determined that the district court erred in allowing the government to present the testimony of Brekken and Bernell, we must now decide how the case should proceed.

. . .

[W]e think it best to put the parties into the position in which they would have been had the government complied with the rules and seasonably notified the Bradleys of its intention to call Brekken and Bernell. To do so, we first remand the case to the district court for a new trial on all issues, at which the government may present the testimony of Brekken and Bernell. Before the new trial is begun, of course, the district court should consider any further appropriate discovery and should allow the parties to prepare the presentation of their cases in light of the two experts' expected testimony.

Second, on remand the district court, pursuant to its inherent power to enforce its own rules, . . . should impose sanctions upon the government for the breach of its duties under the rules. In its discretion, the court may consider, for example, requiring the government to compensate the Bradleys and their counsel for their expenses attributable to the government's conduct. Sanctions are necessary not just to compensate the Bradleys, but to ensure that the government's conduct does not go unpunished, as it would if the case were remanded merely for a new trial. See Perkinson v. Gilbert/ Robinson, Inc., 821 F.2d 686, 689-90 (D.C. Cir. 1987) (affirming

> the imposition of monetary sanctions for violation of rule 26(e)(2)).
>
> We thus VACATE the judgment of the district court and REMAND for further proceedings consistent with this opinion. [footnotes omitted]

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Where a discovery order could have been obeyed, attorneys should be aware that sanctions can be imposed against them personally as well as against the client.[147] In Litton Systems, Inc. v. American Telephone and Telegraph,[148] relevant notes were found in the desk of in-house counsel and defendant in the antitrust case moved to dismiss. Noting that it is difficult to "visit upon the client the sins of counsel, absent the client's knowledge, condonation, compliance or causation," the court refused to impose the ultimate sanction of dismissal. Rather, plaintiff was not allowed to recover the attorney's fees incurred.

On the other hand, in Damiani v. Rhode Island Hospital,[149] which affirmed dismissal of an antitrust complaint as a sanction for noncompliance with discovery orders, despite the fact that plaintiff's counsel took full responsibility for failure to comply with the order to compel:

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[147]See Reygo Pacific Corp. v. Johnston Pump Co., 680 F.2d 647 (9th Cir. 1982); Hawkins v. Fulton County, 96 F.R.D. 416 (N.D. Ga. 1982) (order requiring attorney to pay opponent's costs connected with discovery order).

[148]700 F.2d 785 (2d Cir. 1983), cert. denied, 464 U.S. 1073 (1984).

[149]704 F.2d 12 (1st Cir. 1983).

> The day has long since passed when we can indulge lawyers the luxury of conducting lawsuits in a manner and at a pace that best suits their convenience. The processing of cases must proceed expeditiously if trials are to be held at all.
>
> * * *
>
> The argument that the sins of the attorney should not be visited on the client is a seductive one, but its siren call is overborne by the nature of the adversary system.
>
> > . . . Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is deemed to have "notice of all facts, notice of which can be charged upon the attorney." Smith v. Ayer, 101 U.S. 320, 326 [1879]. . . .
>
> Link v. Wabash Railroad Co., 370 U.S. 626, 633-34 (1920) (footnote omitted). As Justice Harlan points out. . . keeping a suit alive "merely because plaintiff should not be penalized for the omissions of his own attorney would be visiting the sins of the plaintiff's lawyer upon the defendant." Id. at 634 n. 10. . . .[150]

Of particular interest to government attorneys is United States v. Sumitomo Marine & Fire Ins. Co.[151] In this admiralty case, the court imposed a personal fine of $500 on the government's counsel and precluded the

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[150]Id. at 17 (emphasis added).

[151]617 F.2d 1365 (9th Cir. 1980).

United States from introducing evidence of its damages due to the repeated failure of the United States to meet court imposed discovery deadlines. The court was unimpressed with the government's argument that the failure to comply was more the result of serious understaffing than of bad faith and specifically stated that one purpose of the personal fine was "to deter government counsel from further disobedience of court orders."[152]

Application of sanctions, like all discovery matters, is within the discretion of the district court. Insurance Corporation of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,[153] was a diversity case in which jurisdiction was obtained through the Pennsylvania long arm statute. The defendant insurer sought summary judgment, claiming lack of personal jurisdiction on the ground that it had no contacts with the forum. The court ordered the defendant to comply with the plaintiff's demand for information concerning defendant's possible state contacts. Upon the defendant's failure to comply, the court applied Rule 37 and held that the facts of jurisdiction would be taken as established. The Supreme Court approved this result, concluding that discovery sanctions could go so far as to estop a defendant from claiming lack of personal jurisdiction. The Court also explained that "Rule 37 contains two standards -- one general and one specific. . . . First, any sanction must be 'just;' second, the sanction must be specifically related to the

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[152]Id. at 1371.

[153]456 U.S. 694 (1982).

particular claim which was at issue in the order to provide discovery."[154]

Sanctions serve not only to penalize, but to deter:

NATIONAL HOCKEY LEAGUE v. METROPOLITAN HOCKEY CLUB
427 U.S. 639 (1976)

Per Curiam.

> This case arises out of the dismissal, under Fed Rule Civ Proc 37, of respondents' antitrust action against petitioners for failure to timely answer written interrogatories as ordered by the District Court. The Court of Appeals for the Third Circuit reversed the judgment of dismissal, finding that the District Court had abused its discretion.
>
> The District Court . . . summarized the factual history of the discovery proceeding in these words:
>
> > "After seventeen months where crucial interrogatories remained substantially unanswered despite numerous extensions granted at the eleventh hour and, in many instances, beyond the eleventh hour, and notwithstanding several admonitions by the Court and promises and commitments by the plaintiffs, the Court must and does conclude that the conduct of the plaintiffs demonstrates the callous disregard of responsibilities counsel owe to the Court and to their opponents. The practices of the plaintiffs exemplify flagrant bad faith when after being expressly

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[154]456 U.S. at 707. See also Lew v. Kona Hospital, 754 F.2d 1420, 1425-27 (9th Cir. 1985); Shearson Loeb Rhoades, Inc. v. Quinard, 751 F.2d 1102 (9th Cir. 1985); Givens v. A. H. Robins Co., 751 F.2d 261 (8th Cir. 1984).

> directed to perform an act by a date certain, viz., June 14, 1974, they failed to perform and compounded that noncompliance by waiting until five days afterwards before they filed any motions. . . ."

The Court of Appeals did not question any of the findings of historical fact which had been made by the District Court, but simply concluded that there was in the record evidence of "extenuating factors." The Court of Appeals emphasized that none of the parties had really pressed discovery until after a consent decree was entered between petitioners and all of the other original plaintiffs. . . . It also noted that respondents' counsel took over the litigation, which previously had been managed by another attorney, after the entry of the consent decree, and that respondents' counsel encountered difficulties in obtaining some of the requested information. The Court of Appeals also referred to a colloquy during the oral argument on petitioners' motion to dismiss in which respondents' lead counsel assured the District Court that he would not knowingly and willfully disregard the final deadline. . . .

There is a natural tendency on the part of reviewing courts, properly employing the benefit of hindsight, to be heavily influenced by the severity of outright dismissal as a sanction for failure to comply with a discovery order. It is quite reasonable to conclude that a party who has been subjected to such an order will feel duly chastened, so that even though he succeeds in having the order reversed on appeal he will nonetheless comply promptly with future discovery orders of the District Court.

But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the District Court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who

> might be tempted to such conduct in the absence of such a deterrent. If the decision of the Court of Appeals remained undisturbed in this case, it might well be that these respondents would faithfully comply with all future discovery orders entered by the District Court in this case. But other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other District Courts. Under the circumstances of this case, we hold that the district judge did not abuse his discretion in finding bad faith on the part of these respondents. . . . Therefore, the petition for a writ of certiorari is granted and the judgment of the Court of Appeals is reversed.

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d. Privileges.

As noted above, the scope of discovery extends to "any matter, not privileged, which is relevant to the subject matter." Thus, a claim of privilege prevents disclosure of the information in question until the court resolves the issue. Privilege is an issue to be determined according to federal law under Fed. R. Evid. 501 where a federal claim is in issue.[155] Among the several traditional privileges, executive privilege is one of the most important. United States v. Nixon,[156] notwithstanding, the Supreme Court firmly recognizes the privilege with respect to military and state secrets:

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[155]Sirmans v. South Miami, 86 F.R.D. 492 (S.D. Fla. 1980).

[156]418 U.S. 683 (1974).

UNITED STATES v. REYNOLDS
345 U.S. 1 (1953)

Mr. Chief Justice Vinson delivered the opinion of the Court.

These suits under the Tort Claims Act arise from the death of three civilians in the crash of a B-29 aircraft. . . .

The aircraft had taken flight for the purpose of testing secret electronic equipment, with four civilian observers aboard. While aloft, fire broke out in one of the bomber's engines. Six of the nine crew members, and three of the four civilian observers were killed in the crash.

The widows of the three deceased civilian observers brought consolidated suits against the United States. In the pretrial stages the plaintiffs moved, under Rule 34 of the Federal Rules of Civil Procedure, for production of the Air Force's official accident investigation report and the statements of the three surviving crew members, taken in connection with the official investigation. The Government moved to quash the motion, claiming that these matters were privileged. . . . the Secretary of the Air Force filed a formal "Claim of Privilege." This document . . . stated that the Government further objected to production of the documents "for the reason that the aircraft in question, together with the personnel on board, were engaged in a highly secret mission of the Air Force." An affidavit of the Judge Advocate General, United States Air Force, was also filed with the court, which asserted that the demanded material could not be furnished "without seriously hampering national security, flying safety and the development of highly technical and secret military equipment." The same affidavit offered to produce the three surviving crew members, without cost, for examination by the plaintiffs. The witnesses would be allowed to refresh their memories from any statement made by them to the Air Force, and authorized to testify as

to all matters except those of a "classified nature."

The District Court ordered the Government to produce the documents in order that the court might determine whether they contained privileged matter. The Government declined, so the court entered an order, under Rule 37(b)(i), that the facts on the issue of negligence would be taken as established in plaintiffs' favor. After a hearing to determine damages, final judgment was entered for the plaintiffs. . . .

The judgment in this case imposed liability upon the Government by operation of Rule 37, for refusal to produce documents under Rule 34. Since Rule 34 compels production only of matters "nonprivileged," the essential question is whether there was a valid claim of privilege under the Rule. We hold that there was. . . .

We think it should be clear that the term "not privileged" as used in Rule 34, refers to "privileges" as that term is understood in the law of evidence. When the Secretary of the Air Force lodged his formal "Claim of Privilege," he attempted therein to invoke the privilege against revealing military secrets, a privilege which is well established in the law of evidence. . . .

Judicial experience with the privilege which protects military and state secrets has been limited in this country. English experience has been more extensive, but still relatively slight compared with other evidentiary privileges. Nevertheless, the principles which control the application of the privilege emerge quite clearly from the available precedents. The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. The court itself must determine whether the circumstances are appropriate for the claim of privilege, and

yet do so without forcing a disclosure of the very thing the privilege is designed to protect. . . .

Regardless of how it is articulated, some like formula of compromise must be applied here. Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers. . . .

In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake. . . .

The decision of the Court of Appeals is reversed. . . .

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Discovery litigation often involves protecting classified information. Classified information is governed by Executive Order 12958, which contains a detailed definition of classified information as well as other provisions dealing with classification authority

and procedures for handling classified information.[157] The state secrets privilege described in United States v. Reynolds (discussed supra in subsection d), has long been recognized at common law, and encompasses matters whose disclosure reasonably could be expected to cause damage to the national security, such as military or foreign affairs secrets. Although the Reynolds court expressly relied on the common law, part of that opinion, and other cases as well, suggest that the privilege has a constitutional basis founded on the President's duties in the areas of national security and foreign affairs.[158]

Even when state secrets are relevant to a litigant's case, the litigant's need must give way to the Government's desire for secrecy. To successfully invoke the privilege, the Government need only satisfy the court that there is a reasonable danger that production of the desired evidence would expose matters which, in the interest of national security, should not be divulged. Once it is established that state secrets are involved, the privilege is absolute. The litigant's need is relevant only to establish how closely the court will examine the validity of the assertion of privilege.[159]

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[157]Exec. Order 12,356, 3 C.F.R. 166 (1983), reprinted in 50 U.S.C.A. § 401 at 68-74 (West Supp. 1988).

[158]See United States v. Reynolds, 345 U.S. 1, 6 n. 9 (1953); United States v. Nixon, 418 U.S. 683, 708 (1974); Black v. Sheraton Corp. of America, 564 F.2d 531, 541 (D.C. Cir. 1977); J. Weinstein & M. Berger, 2 Weinstein's Evidence para. 509 (1985).

[159]See § 2.6d, supra. See also Jabara v. Kelley, 75 F.R.D. 475 (E.D. Mich. 1977).

In Halkin v. Helms,[160] plaintiffs sought damages from several Government officials alleging that the officials had illegally intercepted plaintiffs' international communications. The court of appeals upheld the district court's order dismissing the case, holding that to require defendants to admit or deny whether plaintiffs' communications had been intercepted would reveal the Government's capability to collect foreign intelligence, information which constituted a state secret.

The assertion of a state secrets privilege must be made by a formal claim in an affidavit (or declaration under 28 U.S.C. § 1746) by the head of the department that has control over the information (the originating department, under E.O. 12356) after actual, personal consideration of the information by the head.[161]

The case of United States ex rel. Touhy v. Ragen,[162] established the rule that as long as a subordinate employee of an Executive branch department is directed by a superior, under procedures or regulations promulgated by the department, not to provide testimony, then no contempt charges could be brought against the employee. Regulations promulgated pursuant to the rule are termed Touhy regulations and may be invoked when classified information is sought from a present or former employee of a department not party to the litigation. Touhy regulations have been promulgated for

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[160]Halkin v. Helms, 598 F.2d 1 (D.C. Cir. 1979).

[161]United States v. Reynolds, 345 U.S. 1, 8 (1953).

[162]340 U.S. 462 (1951).

the Department of Defense[163] and the Department of Justice.[164] Of course, in order for the department to ultimately withhold the employee's testimony, a valid claim of privilege must be made at some point.[165]

A successfully established claim of privilege will lead to dismissal if the plaintiff cannot prove a prima facie case without the privileged material,[166] or if the risk of inadvertent disclosure of the material during the litigation is too great.[167]

Unlike criminal litigation, to which the Classified Information Procedures Act (CIPA) applies,[168] there is no comprehensive set of statutory rules for the handling of classified information in civil cases. The Department of Justice does have regulations that deal with physical security of classified information at

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[163]32 C.F.R. §§ 97.1-.6 (1986).

[164]28 C.F.R. §§ 16.21-.29 (1987).

[165]NLRB v. Capitol Fish Co., 294 F.2d 868, 873 (5th Cir. 1961).

[166]Halkin v. Helms, 690 F.2d 977 (D.C. Cir. 1982).

[167]Farnsworth-Cannon v. Grimes, 635 F.2d 268 (4th Cir. 1980) (en banc). See Weinberger v. Catholic Action of Hawaii/Peace Education Project, 454 U.S. 139 (1981), citing Totten v. United States, 92 U.S. 105 (1875) (public policy requires dismissal of any case whose trial would disclose military secrets). Accord Halkin v. Helms ("Halkin I"), 598 F.2d 1 (D.C. Cir. 1978); Halkin v. Helms ("Halkin II"), 690 F.2d 977 (D.C. Cir. 1982); Jabara v. Kelly, 476 F. Supp. 561, 578 (E.D. Mich. 1979); Kinoy v. Mitchell, 67 F.R.D. 1 (S.D.N.Y. 1975). But see Ellsberg v. Mitchell, 709 F.2d 51 (D.C. Cir. 1983).

[168]18 U.S.C. app. (1982).

issue in a lawsuit.[169] Also, protective orders, pre-trial evidentiary hearings, and in camera and ex parte reviews of classified information by the court may be available under regular civil procedure rules.[170]

The Freedom of Information Act (FOIA)[171] is frequently used as a discovery device in litigation against the federal government. There is a specific exemption, however, from disclosure under FOIA of classified information.[172]

In addition to military and state secrets, "confidential intra-agency advisory opinions . . . are privileged" in order to support a "policy of frank discussion between subordinate and chief concerning administrative action."[173] The major problem in day-to-day litigation in this area is the requirement that the privilege be asserted personally by the head of the agency, as indicated by this representative case:

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[169]28 C.F.R. § 270 (1987).

[170]See § 2.6c. supra.

[171]5 U.S.C. § 552 (1982 & Supp. IV 1986).

[172]5 U.S.C. § 552(b)(1) (1982 & Supp. IV. 1986). See, e.g.; Military Audit Project v. Casey, 656 F.2d 724 (D.C. Cir. 1981); Halperin v. CIA, 629 F.2d 144 (D.C. Cir. 1980). See also Taylor v. Department of the Army, 684 F.2d 99 (D.C. Cir. 1982).

[173]Kaiser Aluminum and Chemical Corp. v. United States, 157 F. Supp. 939, 946, 141 Ct. Cl. 38, 48-89 (1958), cited in Environmental Protection Agency v. Mink, 410 U.S. 73, 86-87 (1973). See also Kerr v. United States District Court for the Northern District of California, 426 U.S. 394 (1976). See also Molerio v. F.B.I., 749 F.2d 815, 820-22 (D.C. Cir. 1984).

COASTAL CORPORATION v. DUNCAN
86 F.R.D. 514 (D. Del. 1980)

MURRAY M. SCHWARTZ, District Judge.

This Court is once again faced with determining whether a department of the Federal Government has properly invoked its claims of privilege. In this case, the Secretary of the Department of Energy ("DOE") has purported to properly assert the executive privileges pertaining to "pre--decisional" and "investigatory" information, and the attorney-client and work product privileges, with respect to approximately 600 documents requested by plaintiffs, Coastal Corporation and Cities Service Company ("plaintiffs") in interrogatories and requests for production of documents. . . .

On February 19, 1979, plaintiffs' first set of interrogatories and requests for production were served on DOE. . . . Defendant's time for response was extended until April 19, 1979, at its request. However, on the day the responses were due, the government filed a motion to stay discovery. On April 23, plaintiffs filed a motion for sanctions. Following a status conference on May 2, in which counsel for the government was advised that it lacked the power to grant itself a stay, the government still failed to file any response to discovery prior to the hearing on plaintiffs' motion for sanctions on July 17, 1979. Finally, on July 23, 1979 . . . the government filed its responses that are the subject of this motion to compel. . . . Included with the July 23 responses was the affidavit of F. Scott Bush, Acting Assistant Administrator for Regulations and Emergency Planning of the Economic Regulatory Administration ("ERA") of the Department of Energy. In this affidavit, Bush asserted, on behalf of the DOE, the "government's privilege protecting pre-decisional, internal documents of a recommendatory or deliberative nature." . . .

The starting point for determining whether executive privilege has been properly invoked is the Supreme Court's decision in United States v. Reynolds, 345 U.S. 1 (1953). . . .

Although Reynolds only discussed the executive privilege for military and state secrets, the courts have consistently applied these requirements to all claims of executive privilege, including those asserted here by the DOE. . . .

While not disputing that the claim of executive privilege must be invoked by an affidavit of the head of the department with control over the matters in question . . . DOE contends that this responsibility may be delegated by the agency head to a subordinate. In the instant case, David Bardin, Administrator, ERA, entered a . . . delegation order . . . giving the Assistant Administrator for Regulations and Emergency Planning of ERA (Bush) the authority "to assert evidentiary privilege . . ." This order further provided, "[t]he authority delegated to the Assistant Administrator for Regulations and Emergency Planning may be further delegated, in whole or in part, as may be appropriate." Id. On July 19, Bardin also instructed Bush that the review of the documents was to be in accordance with guidelines requiring, inter alia, personal and careful consideration as to each document, segregation of portions of documents which could be released and consistency of action among various civil actions. DOE contends that Mr. Bardin, as Administrator of ERA, was himself given the authority to assert privilege on behalf of the ERA by . . . 10 C.F.R. 1001.1, Appendix, in which the Secretary delegated to the ERA Administrator the authority to "adopt rules, issue orders . . . and take such other action as may be necessary and appropriate to administer" the functions of the ERA. . . .

The DOE . . . points to language in . . . Amoco Production Co. v. DOE, 1 (CCH) Energy Management 9752 (D.Del. 1979). Judge Stapleton stated that one of the "formal

requirements" which an agency must meet when it asserts executive privilege [is] the privilege must be claimed by the head of the agency after personal consideration." Id. at 9930. The Court then added the following footnote:

> This does not necessarily mean that the Secretary must personally inspect each document as to which executive privilege is claimed, so long as he establishes guidelines of sufficient specificity. . . .

[T]his language does not support DOE's assertion of privilege in this case. The Secretary has not merely failed to personally examine all of the documents claimed to be privileged; he has not looked at any of the documents. Moreover, the Secretary has not established any guidelines dealing with the assertion of privilege; his general delegation order referred to above makes no mention of privilege. Under the terms of Bardin's delegation order, Bush was given authority only to assert privilege when documents were requested of the ERA and not on the behalf of the entire Department of Energy. . . . Thus, it cannot be said there has been an assertion of privilege on behalf of the DOE pursuant to any guidelines established by the Secretary. Finally, and perhaps most important the DOE's mechanism for asserting privilege fails to comport with the policy interests behind the requirement that the agency head assert the privilege after personal consideration. These interests . . . include the need for consistency and careful consideration in the assertion of privilege, an exception to the usually broad scope of discovery. "To permit any government attorney to assert the privilege would derogate both of those interests. It would be extremely difficult to develop a consistent policy of claiming the privilege." Pierson v. United States, 428 F. Supp. at 395.

The actions of the DOE and its attorneys in this case amount to a claiming of the pre-decisional executive privilege by the DOE's attorneys. Following Mr. Bush's

assertion of privilege, DOE attorneys reviewed the documents claimed to be privileged and determined, without participation by Mr. Bush, that a number of these documents were not privileged. Thus, Bush's decision was in effect overruled by DOE attorneys. Requiring the agency head to claim the privilege assures the Court, which must make the ultimate decision, that executive privilege has not been lightly invoked by the agency, United States v. Reynolds, supra, and that in the considered judgment of the individual with an overall responsibility for the administration of the agency, the documents withheld are indeed thought to be privileged. . . .

In addition to failing to satisfy the requirement that executive privilege be raised by the head of the agency, the DOE has failed to comply with two other requirements. First, a claim of executive privilege must specifically designate and describe the documents. . . . The DOE has provided little information in both document indices submitted concerning the contents of each document claimed to be privileged. Second, the DOE has failed to proffer "precise and certain" reasons for preserving the confidentiality of the requested documents. . . . While Mr. Bush's affidavit states several conclusory reasons for withholding all the documents marked "PD" on the indices, no effort has been made to indicate why particular documents must be kept confidential. The DOE's failure to comply with these two requirements prevents the Court from assessing the harm resulting from disclosure against plaintiffs' need for the information. . . .

For all the reasons stated above, it is held that the executive privilege for pre-decisional documents was improperly invoked by the DOE. . . .

Having found that the DOE has improperly invoked executive privilege . . . the Court must determine whether to compel the immediate production of these documents or to accept the DOE's offer to "further substantiate" its claims of privilege. . . .

> I conclude that immediate production of documents is required. . . .[174]

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Material gathered in anticipation of litigation--the work product privilege--is explicitly recognized in Rule 26. Any consideration of the work product privilege must begin with a discussion of Hickman v. Taylor.[175] On February 7, 1943, the tugboat "John M. Taylor" sank, killing five of the nine crewmen, including Norman Hickman. Three days after the sinking and before any claim or lawsuit had been filed, the owners of the tug hired a lawyer to defend whatever litigation might eventually arise. The attorney interviewed the survivors of the tug's crew and obtained signed statements from them. Additionally, he interviewed other potential witnesses and prepared memoranda of the substance of some of these interviews. Seven months after the tug sank and some four to five months after the attorney had interviewed the witnesses, Norman Hickman's administrator brought suit against the owners of the tugboat and another party.

During discovery attorneys for the plaintiff sought copies of the statements taken by Taylor's lawyer in the course of his pre-suit investigation. The defendant objected to the discovery request and ultimately the matter was argued in the Supreme Court.

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[174]Compare Coastal Corp. v. Duncan, 86 F.R.D. 514 (D. Del. 1980) with Department of Energy v. Brett, 659 F.2d 154 (Em. App. 1981), cert. denied, 456 U.S. 936 (1982), which decided that executive privilege need be claimed only by officials with personal knowledge about the documents at issue--not necessarily the agency head.

[175]329 U.S. 495 (1947).

In a unanimous opinion, the Supreme Court denied discovery and articulated what has become known as the "attorney work product privilege."

> Writing for the court, Mr. Justice Murphy observed that,
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> Here is simply an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties. . . . Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.[176]

In his concurring opinion, Mr. Justice Jackson noted more bluntly, "[d]iscovery was hardly intended to enable a learned profession to perform its functions either without wits or on the wits borrowed from the adversary."[177]

In denying plaintiff discovery of the witness statements and memoranda, the Court did not fashion a rule of absolute privilege. The Hickman decision noted that relevant and privileged facts were discoverable when the facts were essential to the preparation of the case.[178] The Court added, however, that the burden of making a showing of necessity was on the party seeking discovery. Noting that the plaintiff already had the facts he needed, the Court found an insufficient showing of necessity had been made and refused to order the documents produced.

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[176] Id. at 510.

[177] Id. at 516.

[178] 329 U.S. at 511.

Several facets of the Hickman decision need to be emphasized. Initially, note that the documents sought by the plaintiff were generated by a factual investigation conducted by defendant's attorney. Additionally, the investigation was conducted well before any lawsuit was filed. Moreover, even the signed statement of the witnesses were exempt from production absent a showing of substantial need. Thus, the Court announced a qualified immunity for a lawyer's work product and permitted discovery of such materials only upon a substantial showing of necessity.

The Hickman decision did not resolve all issues concerning the scope and applicability of the work product privilege and subsequent lower court decisions were not consistent.[179] Against this backdrop the Advisory Committee on Civil Rules and the Standing Committee on Rules of Practice and Procedure undertook to revise the Federal Rules of Civil Procedure to eliminate much of the confusion surrounding this aspect of discovery. After several drafts and proposals, Rule 26(b)(3) was adopted by the Supreme Court in 1970.

Essentially, the 1970 amendments to the Federal Rules eliminated the requirement to seek a court order to compel production of documents generally. In order to preserve the special protection afforded work product materials, however, Rule 26(b)(3) permitted such discovery "only upon a showing that the party seeking discovery has a substantial need of the materials in the

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[179]See, e.g., 8 Wright & Miller, Federal Practice and Procedure: Civil § 2022 (1970) (hereinafter, "Wright & Miller").

preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." The rule also clarified that the work product privilege encompasses documents and materials prepared by the party himself or by his agent as well as those items prepared by his attorney.

Thus, under Rule 26(b)(3), three tests must be satisfied in order to assert the work product privilege. Material sought must be: (1) documents and tangible things; (2) prepared in anticipation of litigation or for trial; and (3) by or for another party or by or for that other party's agent, attorney, or representative. The first and third elements of the test are relatively straightforward. Little difficulty is encountered in determining whether a particular item of information is a "document or tangible thing" within the meaning of Rule 26(b)(3). Despite the express language of the rule, courts have recognized that "[w]ork product consists of the tangible and intangible material which reflects an attorney's efforts at investigating, assembling of information, determination of the relevant facts, preparation of legal theories, planning of strategy, and recording mental impressions."[180] The "extension" of the protection to intangible materials no doubt stems from the admonition in Rule 26(b)(3) for the court to "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party" when the required showing has been made and privileged documents are ordered disclosed.

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[180]In Re Grand Jury Subpoena dated November 8, 1979, 622 F.2d 933, 935 (6th Cir. 1980) (emphasis supplied). See also Shelton V. American Motors, Corp., 805 F.2d 1323 (8th Cir. 1986).

While the Hickman decision dealt solely with information developed by an attorney investigating an incident on behalf of his client, the 1970 amendments to Rule 26(b)(3) clearly extended the work product protection to individuals other than attorneys. In commenting on this aspect of the Rule, the Advisory Committee noted,

> Subdivision (b)(3) reflects the trend of the cases by requiring a special showing, not merely as to materials prepared by an attorney, but also as to materials prepared in anticipation of litigation or preparation for trial by or for a party or any representative acting on his behalf.[181]

Thus, the fact that an investigation was conducted and information developed by non-lawyers does not remove it from the protection of the work product doctrine.[182]

The aspect of the work product privilege that has spawned the most litigation is whether the documents sought were prepared "in anticipation of litigation or for trial." Rule 26(b)(3) unequivocably provides that only documents prepared in anticipation of litigation or for trial are entitled to the work product protection. The question of whether a given document was prepared in

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[181]48 F.R.D at 502.

[182]See, e.g., Carver v. Allstate Ins. Co., 94 F.R.D. 131, 133 (S.D. Ga. 1982) (Rule 26(b)(3), "notably expands the [work product] doctrine by extending discovery protection to the work product of a party or his agents and representatives, as well as [to] the party's attorney"); Westhemco Ltd. v. New Hampshire Ins. Co., 82 F.R.D. 702 (S.D.N.Y. 1979) ("work product protection, if applicable here, lies in favor of the party, its lawyer and agents").

anticipation of litigation is one of fact. One court has framed the issue as, "whether in the light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained because of the prospect of litigation."[183] Thus, documents prepared in the ordinary course of a party's business are not entitled to work product protection.[184] The absence of a pending lawsuit at the time the documents were prepared will not preclude the application of the work product privilege if some specific claim has arisen that makes the anticipation of litigation reasonable.[185] Indeed, the Hickman case itself dealt with witness statements that were taken well before a lawsuit was filed.

The party asserting the work product privilege has the burden of establishing the existence of the privilege. Once the applicability of the privilege to the documents in question has been established, the party seeking discovery can obtain disclosure only by showing that he "has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent . . . by other means."[186] Mere allegations of hardship are insufficient to overcome the privilege; the hardship must be demonstrated by the submission of

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[183]Galambus v. Consolidated Freightways Corp., 64 F.R.D. 468, 472 (N.D. Ind. 1974).

[184]Advisory Committee Note to Rule 26(b)(3), 48 F.R.D. 501.

[185]United States v. Exxon, 87 F.R.D. 624, 638 (D.D.C. 1980).

[186]Fed. R. Civ. P. 26(b)(3).

evidence.[187] As the Third Circuit has explained in an oft quoted passage:

> [i]n other words he must show that there are special circumstances in his particular case which make it essential to the preparation of his case and in the interest of justice that the statements be produced for his inspection or copying. His counsel's natural desire to learn the details of his adversary's preparation for trial, to take advantage of his adversary's industry in seeking out and interviewing prospective witnesses or to make sure that he has overlooked nothing are certainly not such special circumstances since they are present in every case. As Justice Jackson aptly said in his concurring opinion in the Hickman case, 329 U.S. at page 516, 67 S.Ct. at page 396, 91 L.Ed. 451, in commenting on the petitioner's argument that the Rules were intended to do away with the old situation where a law suit developed into a battle of wits between counsel, 'a common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary.'[188]

The attorney-client privilege is also available in government litigation. While it is often functionally related to the work product privilege, it differs in several respects. It is stronger because it cannot be overcome by a showing of substantial need. It is weaker because disclosure of the otherwise privileged data to

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[187]In Re LTV Securities Litigation, 89 F.R.D. 595 (N.D. Tex. 1981).

[188]Alltmont v. United States, 177 F.2d 971, 978 (3rd Cir. 1950), cert. denied, 339 U.S. 967 (1950); see also Hauger v. Chicago, Rock Island & Pacific R.R. Co., 216 F.2d 501, 506-508 (7th Cir. 1954), First Wis. Mortgage Trust v. First Wis. Corp., 86 F.R.D. 160, 166 (E.D. Wis. 1980).

a person outside the attorney-client relationship waives the privilege. Disclosure of work product to third parties does not automatically waive that privilege.[189] Use of the protected documents to refresh a witness' recollection before a deposition, however, may be found to waive the privilege.[190]

Either privilege can be overcome where the material at issue was prepared to commit a crime or tort, such as fraud.[191] Related to this is the recognition by some courts that counsel's unprofessional conduct may waive at least the work product privilege even where the conduct was legal.[192]

The attorney-client privilege applies in the government setting to communications between administrative personnel and government attorneys and to communications between agency attorneys and Department of Justice Attorneys.[193] The attorney-client privilege

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[189]Transamerica Computer Comp., Inc. v. IBM, 573 F.2d 646, 647 n.1 (9th Cir. 1978); GAF v. Eastman Kodak Co., 85 F.R.D. 46, 51-52 (S.D.N.Y. 1979).

[190]Spivey v. Zant, 683 F.2d 881 (5th Cir. 1982); see also Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613 (S.D.N.Y. 1977).

[191]See In re Grand Jury Subpoenas, 561 F. Supp. 1247, 1251, 1258 (E.D.N.Y. 1982).

[192]Moody v. IRS, 654 F.2d 795, 799-801 (D.C. Cir. 1981) and 682 F.2d 266, 268 (D.C. Cir. 1982) (on second appeal after remand); Parrott v. Wilson, 707 F.2d 1262, 1270-72 (11th Cir. 1983).

[193]See Green v. IRS, 556 F. Supp. 79, 85 (N.D. Ind. 1982). See also Upjohn Co. v. United States, 449 U.S. 383 (1981) (discussing the limits of the attorney-client privilege when applied to corporate employees below the corporate management level).

requires that the communication be in connection with a legal opinion or the obtaining of legal services. Consequently, nonlegal communications, such as those that often pass between commanders and their judge advocates, may not be protected.[194]

In addition to these privileges, materials can also be protected where release would compromise constitutional rights.[195]

e. Discovery Devices.

Having discussed the practice rules that govern discovery generally, we can examine the particular features of each method individually.

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[194]See United States v. Loften, 518 F. Supp. 839, 846-47 (S.D.N.Y. 1981); SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 517-18 (D. Conn. 1976), appeal dismissed, 534 F.2d 1031 (2d Cir. 1976); Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 37-40 (D. Md. 1974) (documents which discuss business matters rather than legal issues are not protected). See generally Gaydos, The SJA as the Commander's Lawyer: A Realistic Proposal, The Army Lawyer, Aug. 1983, at 14; Note, The Applicability and Scope of the Attorney-Client Privilege in the Executive Branch of the Federal Government, 62 B.U.L. Rev. 1003 (1982).

[195]E.g., International Union, U.A.W. v. National Right to Work Legal Defense and Educ. Found., Inc., 559 F. Supp. 569 (D.D.C. 1983) (first amendment); Pillsbury Co. v. Conboy, 450 U.S. 918 (1981) (fifth amendment).

(1) Depositions.

Depositions may be taken before the action to perpetuate testimony.[196] After the action begins, they may be taken of any person, including a party.[197]

To take a deposition a party gives reasonable notice to the other parties.[198] Once a deposition has been "noticed," it can only be blocked by an order of the court. The party opposing the deposition cannot delay it by merely filing a motion for a protective order.[199] The amended Rules 30 and 31 limit the number of depositions that can be taken in a case. Leave of the court or agreement is required before all plaintiffs or all defendants may take more than 10 depositions. Notice is all that is required to depose a party to the case. While notice to counsel is required for the deposition of a non-party, the witness must be subpoenaed to compel his attendance. A deposition can be taken anywhere a witness can be found. Deposition subpoenas can be obtained under Rule 45(a)(2) in the district where the deposition will be taken. Witnesses can only be examined where they reside, within 100 miles from where they reside, or the state in which the trial is held.[200] At least one case, however, required a

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[196]Fed. R. Civ. P. 27.

[197]Fed. R. Civ. P. 30(a).

[198]Fed. R. Civ. P. 30(b)(1).

[199]FAA v. Landy, 705 F.2d 624, 634-635 (2d Cir. 1983).

[200]Fed. R. Civ. P. 45(c)(3)(A).

corporate defendant to produce its employees in England for depositions to be held there.[201]

The deposition is taken under oath before an officer authorized to administer oaths and is recorded stenographically or by other means agreed upon by the parties, such as by videotape.[202] Local court rules will determine whether transcripts of depositions are filed with the court.

The Federal Rules of Evidence apply at depositions and evidence objected to is taken subject to the objections made.[203] The party seeking the deposition may be present and examine the deponent orally or the party can submit written questions to the officer taking the deposition who will read the questions to the deponent and record his responses.[204] If the deponent is a party, he can be required under Rule 34 to produce documents at the deposition.[205] Pursuant to a 1991 amendment, Rule 45(a)(1) authorizes the issuance of a subpoena to compel a non-party to produce evidence independent of any deposition. Under Rule 32, depositions can be used in court against a party who was present or had reasonable notice:

1. to contradict or impeach the deponent,

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[201]Tietz v. Textron, Inc., 94 F.R.D. 638 (E.D. Wis. 1982).

[202]Fed. R. Civ. P. 30(b)(4).

[203]Fed. R. Civ. P. 30(c).

[204]Fed. R. Civ. P. 31.

[205]Fed. R. Civ. P. 30(b)(5).

2. for any purpose permitted by the Federal Rules of Evidence.

3. for any purpose where the deposition was of a party or a representative of a government agency (when the deponent was sent as the agency representative),

4. for any purpose if the witness is dead, more than 100 miles from the trial, incapacitated, or where the party cannot obtain the witness by subpoena, or

5. for other reasons in the interest of justice.

(2) Interrogatories.

Interrogatories are served only on parties. Answers, which are to be made within 30 days, are signed by the person making them and objections are signed by the attorney. It has not been a ground for objection that the information sought is already known to the requestor or that it is a matter of public record.[206] The 1993 amendment to Rule 33 limits to 25, the number of written interrogatories that may be served upon any other party without leave of the court or written stipulation.

Responses to interrogatories cannot be delayed until a complete answer is available if a partial answer

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[206]Erone Corp. v. Skouras Theatres Corp., 22 F.R.D. 494 (S.D.N.Y. 1958); Weiss v. Chrysler Motors Corp., 515 F.2d 449 (2d Cir. 1975).

is possible.[207] Moreover, answers must be supplemented with regard to any question about persons knowing discoverable matters or the identity and expected testimony of expert witnesses.[208] Supplemental responses are also necessary where a previous response was incorrect when made or is no longer true.[209]

Under Rule 33(c), the party has the option to permit the requestor to inspect and copy business records if they contain the answers sought. This option assumes that both parties would have an equal burden in finding the answer. Further, the producing party has an obligation to specify in sufficient detail where the information can be found.

(3) Production of Documents.

Like interrogatories, a demand for the production of documents under Rule 34 can only be served on another party. Documents in the possession of nonparties can be reached by a subpoena under Rule 45(a)(1). In order to keep a party that has many documents, like the Government, from hiding the needle in the haystack, one of the 1980 amendments to the rules requires the producing party to produce documents "as they are kept in the usual course of business or . . . organize and label them to correspond with the categories in the request."[210] The rule does not permit a search of

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[207]Barker v. Bledsoe, 85 F.R.D. 545 (W.D. Okla. 1979).

[208]Smith v. Ford Motor Co., 626 F.2d 784 (10th Cir. 1980).

[209]See Fed. R. Civ. P. 26(e).

[210]Fed. R. Civ. P. 34(b).

government documents that is excessively broad and general.[211]

(4) Other Discovery Tools.

Physical and mental examinations must be ordered by the court. Examination may be of any party or person whose condition is in controversy.[212] The remaining discovery device is a request for admissions in which a party is asked to admit to the truth (in the pending action only) of statements or opinions of fact or the application of law to fact, to include the genuineness of documents.[213] When a request for admission is made, the responding party must answer in 30 days or the matter is deemed admitted. A motion to stay the request may suspend the 30 day period until the court decides the motion.[214]

The obligation to respond to discovery does not always stop with the initial response to the opposition. Although Rule 26(e) does not generally require supplementation of a discovery response if it was complete when made, supplementation is required where a party (1) knows that the response was either incorrect at the time or has since become incorrect, or (2) the party has decided to call additional expert witnesses at

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[211]United Presbyterian Church v. Reagan, 557 F. Supp. 61, 63-4 (D.D.C. 1982), aff'd, 738 F.2d 1373 (D.C. Cir. 1984).

[212]Fed. R. Civ. P. 35.

[213]Fed. R. Civ. P. 36.

[214]Graham v. Three or More Members of Six Member Army Reserve General Officer Selection Board, 556 F. Supp. 669, 672 (S.D. Tex. 1983).

trial or has learned of persons with knowledge of discoverable matters not previously disclosed (whether or not they will testify). Where a party is unaware that previously discovered information has changed, new and different evidence should be admissible despite an earlier innocent failure to disclose.[215] Of course, the parties may agree to supplement beyond the relatively limited requirements of Rule 26(e).

## 2.7 Habeas Corpus Procedure.

Under 28 U.S.C. § 2241, habeas corpus is available to a "prisoner" who is:

1. in custody under or by color of the authority of the United States,

2. committed for trial in a United States Court, or

3. in custody in violation of the Constitution or federal law.

There are a number of procedural routes for military personnel to challenge allegedly unlawful retention in service or unlawful prosecution or sentence of a court-martial. Habeas corpus is one device that is available in such cases. The nature of habeas corpus jurisdiction and the standard of review applied by the courts will be further discussed in chapters 4 and 8.

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[215] E.g., Bunch v. United States, 680 F.2d 1271 (9th Cir. 1982) (motion to strike in-court testimony of Air Force decisionmakers denied although it differed from telephone depositions because there was no knowing concealment).

The purpose of this section is to introduce the procedural aspects of the habeas corpus remedy so that it can be distinguished from the civil action that may be brought in its stead to enjoin or require government action.

The essential prerequisite for a petition for habeas corpus (as opposed to complaint) is that the petitioner (as opposed to plaintiff) be in custody or committed for trial. Servicemembers claiming unlawful retention are clearly in custody for the purposes of 28 U.S.C. § 2241,[216] as are accused in courts-martial.[217] A military prisoner on probation is also in custody.[218] The issue of custody becomes of greater significance in determining whether the court has jurisdiction over the habeas petition.

Jurisdiction exists wherever the petitioner is in custody and the petitioner's custodian is located. Whether the petitioner is in custody in the district is less important than if the custodian is present.[219] In order for the writ to be effective, the custodian must be subject to the jurisdiction of the court; otherwise,

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[216]Parisi v. Davidson, 405 U.S. 34 (1972).

[217]E.g., Bowman v. Wilson, 514 F. Supp. 403 (E.D. Pa. 1981), rev'd on other grounds, 672 F.2d 1145 (3d Cir. 1982) (pretrial confinement in E.D. Pa., trial to be held at Ft. Dix in D.N.J.); Allen v. VanCantfort, 436 F.2d 625 (1st Cir.), cert. denied, 402 U.S. 1008 (1971) (prisoner awaiting trial); Betonie v. Sizemore, 496 F.2d 1001 (5th Cir. 1974) (prisoners sentenced by summary courts-martial).

[218]Small v. Commanding General, 320 F. Supp. 1044 (S.D. Cal. 1970), aff'd, 448 F.2d 1397 (9th Cir. 1971).

[219]See generally Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973).

the custodian is arguably free to ignore the court's order.[220]

Who and where the custodian is located is problematic in unlawful retention cases. Being on temporary duty in a state in which one's commanding officer is not located deprives the court of jurisdiction.[221] Similarly, a soldier cannot file a petition in a district through which he passes during a permanent change of station.[222] The petition can be filed anywhere someone in the petitioner's chain of command is located. Therefore, the District of Columbia is an appropriate forum for military personnel generally and especially for personnel stationed overseas, since the Secretary of the Army is viewed, at least judicially, as being in the chain of command.[223]

Generally, if an individual is subject to military control in a specific place, his assignment on paper to another command or officer, such as a reserve control group or the service chief of personnel, may be ignored and the district where he is physically located will exercise jurisdiction on the theory that there is a custodian within the jurisdiction.[224] In cases involving reservists, a "significant contacts" test is applied.

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[220]See Scott v. United States, 586 F. Supp. 66 (E.D. Va. 1984).

[221]Schlanger v. Seamans, 401 U.S. 487 (1971).

[222]Piland v. Eidson, 477 F.2d 1148 (9th Cir. 1973).

[223]Ex parte Hayes, 414 U.S. 1327 (1973) (order of Justice Douglas transferring case to D.D.C. because Secretary of the Army and DCSPER located in the district).

[224]E.g., Miller v. Chafee, 462 F.2d 335 (9th Cir. 1972).

Hence, the petition can be filed in the district where he receives official mail from the Army and where he resides.[225] Once jurisdiction attaches, it continues even if the servicemember departs.[226]

The application or petition for a writ of habeas corpus is verified by the petitioner or counsel. In addition to stating the facts concerning custody, it must identify the person, as opposed to the entity, who has custody.[227]

Once the petition is filed, the court has the option of either granting it immediately or issuing an order to the custodian to show cause why it should not be granted.[228] The court is not required to issue the order to show cause within any particular time period. Once issued, however, the respondent must make a return to the petition and answer to the order to show cause within three days. The statute allows for the return date to be extended up to twenty days.

The return to the order to show cause is supposed to demonstrate the reason why the petitioner is in custody. The facts averred in the return and answer are taken as true in the absence of a traverse (reply of the petitioner) or exception of the court.[229] Especially in

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[225]Strait v. Laird, 406 U.S. 341 (1972).

[226]Gregory v. Laird, 326 F. Supp. 704 (S.D. Cal. 1971); United States ex rel. Bailey v. Commanding Officer, 496 F.2d 324 (1st Cir. 1974).

[227]28 U.S.C. § 2242.

[228]28 U.S.C. § 2243.

[229]28 U.S.C. § 2248.

court-martial cases, success or failure will on turn the record that underlies the return and answer.[230] A hearing follows the return, ostensibly within five days. The petitioner may file a traverse to the respondent's return. Denial of any of the facts in the return must be under oath (or under penalty of perjury, if the traverse relies upon a declaration under 28 U.S.C. § 1746).

Petitioners may file multiple petitions although the court may decline to entertain subsequent petitions if it appears that the legality of the petitioner's detention has previously been determined by a federal court and no new ground is raised.[231] If a previous court held an evidentiary hearing, petitioner has the added burden to show that the new ground underlying his petition was not deliberately withheld previously.[232]

Under 28 U.S.C. § 2242, the rule relating to amendment of pleadings apply to the petition. Otherwise, the Rules are applicable to habeas corpus only to the extent (1) "that the practice in such proceedings is not set forth in statutes of the United States," and (2) "that the practice in habeas proceedings has, up to the time of the adoption of the Fed. R. Civ. P. . . . conformed to the practice in civil actions."[233] When considering a habeas petition, the

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[230]See Blackledge v. Allison, 431 U.S. 63, 83-84 (1977) (Powell, J., dissenting).

[231]28 U.S.C. § 2244(a).

[232]28 U.S.C. § 2244(b).

[233]Fed. R. Civ. P. 81(a)(2). Compare Rule 11, Rules Governing Section 2254 cases in the United States (continued...)

inapplicability of some of the rules should be considered. For example, the discovery rules have been held inapplicable to habeas proceedings,[234] although 28 U.S.C. § 2246 allows the petitioner to serve interrogatories to affiants in habeas actions. On the other hand, rules pertaining to time limits for appeal from certain court decisions contained in the rules do apply in habeas actions.[235] Practically, the court hearing the petition has the discretion to apply any of the rules as appropriate.

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[233](...continued)
District Court (rule applicable to habeas cases involving state convictions unless inconsistent with the § 2254 rules).

[234]Harris v. Nelson, 394 U.S. 286 (1969).

[235]Browder v. Director, Dept. of Correction, 434 U.S. 257, 269-272 (1978).

# CHAPTER 3

# FEDERAL JURISDICTION

## 3.1 Introduction.

a. The next seven chapters will deal with some of the issues raised when a military department or one of its officials is sued as a defendant in the federal courts. As you study these issues, you should begin to recognize three themes common to litigation involving the armed forces:

(1) The suits are almost exclusively in the federal courts. Unlike the state courts, which usually are courts of general jurisdiction, the federal courts are courts of only limited jurisdiction.[1] Their jurisdiction is confined to that entrusted them by Congress as limited by the Constitution.[2]

(2) Federal agencies or their officials are defendants in the lawsuits. The defenses available to federal agencies and their officials differ in both character and degree from those available to private litigants. For example, before the federal courts can award a particular remedy against the Government, the United States must have waived its sovereign immunity so

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[1]Turner v. Bank of North-America, 4 U.S. (4 Dall.) 8, 11 (1799).

[2]Mayor of Nashville v. Cooper, 73 U.S. (6 Wall.) 247, 252-53 (1867).

as to permit such relief.[3] Moreover, standard affirmative defenses, such as the statute of limitations, may become jurisdictional in character when the United States is party to the lawsuit.[4]

(3) Military departments and their officials are involved in the litigation. The federal courts historically have treated the military services differently than other federal agencies. Because military decisionmaking is constitutionally committed to the political branches of the Government, the courts generally are more deferential to governmental determinations involving the military.[5]

b. Any determination of whether a federal court should review a particular military decision or action and, if so, to what degree it should substitute its judgment for the military's entails an analysis of five principal issues. First, does the federal court have the power to decide the particular case? In other words, is there a congressional grant of jurisdiction, does the lawsuit present a "case" or "controversy" within the meaning of article III of the Constitution, and are there prudential concerns that militate in favor of judicial abstention? Second, is the particular remedy sought by

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[3]See generally United States v. Mitchell, 445 U.S. 535, 538 (1980); United States v. Testan, 424 U.S. 392 (1976); United States v. Sherwood, 312 U.S. 584, 586 (1941).

[4]See United States v. Kubrick, 444 U.S. 111 (1979); Soriano v. United States, 352 U.S. 270 (1957); Finn v. United States, 123 U.S. 227 (1887); but see Irwin v. Veterans Administration, 498 U.S. 89 (1990).

[5]See, e.g., Burns v. Wilson, 346 U.S. 137 (1953); Orloff v. Willoughby, 345 U.S. 83 (1953); Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971).

the plaintiff available from the federal courts? Third, must the plaintiff exhaust military administrative or judicial remedies before seeking relief from the federal courts? Fourth, are the particular issues raised by the plaintiff reviewable either under the Administrative Procedure Act or under the special doctrines of reviewability established in military administrative and criminal cases? Finally, assuming the court has the power to review the particular case, what is the proper scope of the court's review; that is, to what extent should the court substitute its judgment for the military's?

Chapters 3 through 8 will discuss these issues. Chapter 9 will examine the questions raised when military officials are sued personally for damages.

## 3.2 Federal Judicial Power Under Article III.

a. The judicial power of the United States is confined to the limits imposed by article III of the Constitution.[6] Article III limits the scope of federal judicial power in two ways:

(1) First, the Constitution limits the jurisdiction of the federal courts to cases that either raise certain subjects or involve certain parties.[7]

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[6]Hodgson & Thompson v. Bowerbank, 9 U.S. (5 Cranch) 303, 304 (1809); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). But cf. National Mutual Ins. Co. v. Tide-Water Transfer Co., 337 U.S. 582 (1949) (plurality opinion) (Congress can confer jurisdiction on federal courts beyond limits of Article III).

[7]Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 378 (1821); Blong v. Secretary of the Army, 877 F. Supp. 1494 (D. (continued...)

The scope of this constitutionally-derived judicial power is found in section 2 of article III, which provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority--to all Cases affecting Ambassadors, other public Ministers, and Consuls--to all Cases of admiralty and maritime Jurisdiction--to Controversies to which the United States shall be a Party; to controversies between two or more States--between a State and Citizens of another State--between Citizens of different States--between Citizens of the same State claiming lands under grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects.

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Except for the Supreme Court's original jurisdiction,[8] federal judicial power under article III is not self-executing. Absent a jurisdictional statute, the federal courts cannot act even though the Constitution may authorize jurisdiction.[9] Article III prescribes the outer limits of federal judicial power; it gives

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[7](...continued)
Kan. 1995) (dismissing Adjutant General of the Air National Guard and hiring officers as defendants in a sex discrimination action brought by a rejected applicant.

[8]U.S. Const. art. III, § 2, cl. 2 ("In all Cases affecting Ambassadors, other public Ministers and Counsuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction").

[9]Stevenson v. Fain, 195 U.S. 165, 167 (1904); M'Intire v. Wood, 11 U.S. (7 Cranch) 504, 506 (1813); United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 33 (1812).

Congress discretion to decide how much of that power the federal courts will actually exercise.[10] And while Congress may afford a narrower scope of jurisdiction than the Constitution,[11] it may not empower the federal judiciary to act beyond the confines of article III.[12]

(2) The Constitution also limits the jurisdiction of the courts to "cases" and "controversies." "The Supreme Court has derived from these two words a substantial body of doctrine describing the circumstances in which federal courts may

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[10]Kline v. Burke Constr. Co., 260 U.S. 226 233-34 (1922); Mayor of Nashville v. Cooper, 73 U.S. (6 Wall.) 247, 252 (1867). See infra § 3.3.

[11]Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850). For nearly two centuries, jurists and commentators have debated whether constitutionally-prescribed jurisdiction is mandatorily "vested" in the federal courts. In other words, whether the Constitution requires that Congress grant the federal courts the full scope of article III jurisdiction, and whether once granted, Congress can circumscribe the jurisdiction of the courts. See, e.g., United States v. Klein, 80 U.S. (13 Wall.) 128 (1871); Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 328-30 (1816) (Story, J.); Clinton, A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan, 86 Colum. L. Rev. 1515 (1986); Clinton, A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III, 132 U. Pa. L. Rev. 741 (1984). The conventional wisdom, and the rule uniformly followed by the federal courts, is that Congress has plenary authority to delimit the jurisdiction of the federal courts. See P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 12-13 n.46, 313-15 (3rd ed. 1988) [hereinafter Hart & Wechsler's Federal Courts]; C. Wright, The Law of Federal Courts 45-46 (5th ed. 1994).

[12]Hodgson & Thompson v. Bowerbank, 9 U.S. (5 Cranch) 303, 304 (1809); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

or may not exercise their subject matter jurisdiction."[13] The terms, which are referred to as justiciability, embody two separate concepts:

> In part the words limit the business of federal courts to questions presented in an adversary context viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power designed to assure that the federal courts will not intrude into areas committed to the other branches of government.[14]

In its adversarial context, justiciability includes the prohibition against advisory opinions, the proscription against deciding moot cases, and the requirements of ripeness and standing.[15] In its role of assigning judicial power in a tripartite system of government, justiciability encompasses the political question doctrine.[16]

## 3.3 Congressional Grants of Jurisdiction.

a. Introduction. As noted above, the federal courts are courts of limited, as opposed to general, jurisdiction. "They are empowered to hear only such cases as are within the judicial power of the United States, as defined in the Constitution, and have been entrusted to them by a jurisdictional grant by

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[13]L. Tribe, American Constitutional Law 67 (2d ed. 1988).

[14]Flast v. Cohen, 392 U.S. 83, 94-95 (1968). See infra § 3.4.

[15]See infra § 3.4b.

[16]See infra § 3.4c.

Congress."[17] There are many congressional grants of jurisdiction to the federal courts.[18] Some are related to particular types of litigation, such as admiralty, bankruptcy, patents, anti-trust, and civil rights, while others are related to certain remedies codified by Congress such as habeas corpus and mandamus. In most military cases, a plaintiff will have little difficulty in finding a jurisdictional basis for federal court review of his case. Six statutory grants of jurisdiction have supported the bulk of challenges to military decisions and actions: federal question jurisdiction, 28 U.S.C. § 1331 (1982); the Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491 (1982); the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2761-2780 (1982); mandamus, 28 U.S.C. § 1361 (1982); habeas corpus, 28 U.S.C. § 2241 (1982); and civil rights jurisdiction, 28 U.S.C. § 1343 (1982).

b. Federal Question Jurisdiction.

(1) General. Jurisdiction in most lawsuits against the military is predicated at least in part on the federal question jurisdiction statute, 28 U.S.C. § 1331. The statute provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."[19]

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[17]C. Wright, supra note 11, at 27.

[18]See, e.g., 28 U.S.C. §§ 1331-1364.

[19]Until 1976, the district courts' federal question jurisdiction was available only if the plaintiff could establish that his lawsuit involved an "amount in controversy" exceeding $10,000. Earlier editions of this textbook contained a chapter devoted largely to a (continued...)

(2) Historical Origins. The Constitution affords the federal judiciary potential original jurisdiction to adjudicate cases arising under federal law.[20] Indeed, the protection of federal rights was a primary purpose for the creation of the federal courts.[21] The First Judiciary Act, however, failed to furnish the federal courts with original jurisdiction to hear cases

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[19](...continued)
discussion of the amount in controversy requirement in military cases. The question was critical in cases involving challenges to the constitutionality of military policies, which arguably could not be valued in dollars and cents and, hence, were not in excess of $10,000. In 1976, Congress eliminated the "amount in controversy" requirement in actions "against the United States, any agency thereof, or any officer or employee thereof in his official capacity." Act of Oct. 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721. In 1980, Congress eliminated the $10,000 "amount in controversy" requirement for all cases under § 1331. Federal Question Jurisdictional Amendments of 1980, Pub. L. No. 94-486, 94 Stat. 2369.

Though gone as a prerequisite in lawsuits against the federal government for over a decade, the "amount in controversy" requirement holds more than mere historical interest. Some plaintiffs' counsel, apparently unaware of the amendments to § 1331, continue to assert that their lawsuits involve an amount in excess of $10,000. Standing alone this error is harmless. But when these same plaintiffs assert claims under the Tucker Act, which limits district courts to claims under $10,000 (see infra § 3.3c), the "amount in controversy" allegation can be fatal to the district courts' continued cognizance over the lawsuits. But cf. Hahn v. United States, 757 F.2d 581, 586 (3d Cir. 1985) (amount in controversy under § 1331 not necessarily the same as the amount of a Tucker Act claim).

[20]Article III, section 2, clause 1, of the Constitution provides: "The judicial power shall extend to all Cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ."

[21]Hart & Wechsler's Federal Courts, supra note 11, at 844; C. Wright, supra note 11, at 100.

arising under federal law;[22] instead, "private litigants [had to look] to the state tribunals in the first instance for vindication of federal claims, subject to limited review by the Supreme Court."[23]

With one exception,[24] from 1789 to 1875, Congress "sparingly" granted federal courts original jurisdiction over federal questions, usually only when dictated by

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[22]Judiciary Act of 1789, 1 Stat. 73.

[23]Hart & Wechsler's Federal Courts, supra note 11, at 844. Some commentators suggest that the First Judiciary Act constituted a compromise measure between Federalist and anti-Federalist members of Congress. Federalists sacrificed original jurisdiction over federal questions in favor of federal diversity jurisdiction. Apparently, the Federalists were principally concerned with the potential for state court discrimination against nonresidents, which necessarily would undermine commercial intercourse between states. By contrast, federal questions were more likely to be issues of law and more easily corrected by the appellate review of the Supreme Court. Chadbourn & Levin, Original Jurisdiction of Federal Questions, 90 U. Pa. L. Rev. 639, 641-42 (1942); Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49, 78-81 (1923). See generally Clinton, A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan, 86 Colum. L. Rev. 1515, 1541-43 (1986).

[24]In the closing days of the Adams Administration, the outgoing Congress enacted the so-called Law of Midnight Judges (Act of Feb. 13, 1801, § 11, 2 Stat. 89), which, among other things, vested the federal courts with original jurisdiction over federal questions. The Act, however, served as a means by which the Federalist party, beaten at the polls, could seek "refuge in the judicial branch." Hart & Wechsler's Federal Courts, supra note 11, at 845. See also id. at 37, quoting Frankfurter & Landis, The Business of the Supreme Court 25 (1928) (the Act "combined thoughtful concern for the federal judiciary with selfish concern for the Federalist party"). Congress repealed the Act a little more than a year later. Act of March 8, 1802, 2 Stat. 132.

peculiar federal concerns or by political exigencies.[25] In 1875, influenced by the wave of nationalism produced by the Civil War,[26] Congress at last gave the federal courts original jurisdiction "of all suits of a civil nature, at common law or in equity . . . arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority. . . ."[27]

(3) The Meaning of "Arising Under" Federal Law.

(a) Introduction. The key phrase in § 1331, and the one critical to determining the scope of the original federal question jurisdiction of the federal courts, is "arising under."[28] Unfortunately, the Supreme Court, in construing the phrase, has issued unclear and sometimes inconsistent pronouncements, making the definition of "arising under" a "puzzle to judge and scholar alike."[29] To further complicate matters, the statutory interpretation of "arising under"

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[25]Hart & Wechsler's Federal Courts, supra note 11, at 845. For example, early congresses afforded federal courts jurisdiction over federal criminal cases, patent suits, and certain state court litigation involving federal officers. Id.

[26]Chadbourn & Levin, supra note 23, at 644-45; Hart & Wechsler's Federal Courts, supra note 11, at 846-47.

[27]Act of March 3, 1875, 18 Stat. 470.

[28]See, e.g., Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 470 (1957) (Frankfurter, J., dissenting); C. Wright, supra note 11, at 101.

[29]Cohen, The Broken Compass: The Requirement that a Case Arise "Directly" under Federal Law, 115 U. Pa. L. Rev. 890 (1967) (footnotes omitted). See also Chadbourn & Levin, supra note 23, at 671.

has been more circumscribed than the construction given to the terms under the Constitution, even though the statutory and constitutional provisions are virtually identical.[30] If there is one consolation to the military litigator, it is that cases against the United States armed forces nearly always arise under federal law. Difficulties in the construction of the statute usually encompass cases involving both federal and state law.[31]

(b) Constitutional Meaning of "Arising Under." "Though the phrase 'arising under' is hardly self-explanatory, the framers of the Constitution provided little clarification of its meaning. . . ."[32] James Madison, the originator of the phrase, cryptically described the reach of "arising under" jurisdiction as including cases that arise under the Constitution and, "[w]ith respect to the laws of the Union, it is . . . necessary and expedient that the judicial power should correspond to the legislative . . . ."[33] At least one authority has suggested that those favoring adoption of the new Constitution intended ambiguity to head off opposition to federal judicial power:

> Ambiguity is nearly synonymous with breadth, particularly if the construers are friendly. Perhaps Madison and his associates preferred

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[30]See infra notes 43-46 and accompanying text.

[31]See Note, The Outer Limits of "Arising Under", 54 N.Y.U.L. Rev. 978, 981-82 (1979) [hereinafter Note, The Outer Limits of "Arising Under"].

[32]M. Redish, supra note 11, at 54.

[33]3 Elliot, Debates in the Several State Conventions on the Adoption of the Federal Constitution 532 (2d ed. 1836), quoted in Forrester, The Nature of a "Federal Question", 16 Tul. L. Rev. 362, 366 (1942).

> ambiguity. Surely they were capable of drafting a precise definition. But a precise definition might have led to opposition which might have limited the scope of federal judicial power. Thus, an ambiguity--satisfactory as a compromise to an uncertain opposition--may have been chosen intentionally with the anticipation that it would be resolved eventually to the advantage of the federal government in a system in which the federal courts would have the last words on such questions.[34]

When given the opportunity to construe the constitutional reach of the original jurisdiction of the federal courts under the "arising under" clause,[35] the Supreme Court defined it broadly. The leading case interpreting the scope of the constitutional provision is Osborn v. Bank of the United States.[36] In Osborn, the Bank of the United States sued the Auditor of Ohio (Osborn) to enjoin the enforcement of a tax imposed by the state against the bank. The federal statute creating the bank empowered it to sue, but Osborn challenged the constitutional authority of Congress to give the federal courts jurisdiction of all suits brought by the bank since some of the cases might not arise under the Constitution. Writing for the majority,

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[34]Forrester, supra note 33, at 367.

[35]In Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821), the Supreme Court construed the scope of its appellate jurisdiction under the "arising under" clause of article III. Holding that the clause gave it jurisdiction to review state court judgments in criminal cases, id. at 392-94, the Court gave the clause the following construction: "A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the constitution or law of the United States, whenever its correct decision depends upon the construction of either." Id. at 379.

[36]22 U.S. (9 Wheat.) 738 (1824).

Chief Justice Marshall found that the bank statute gave the federal courts jurisdiction over all suits to which the bank was a party and that this jurisdictional grant was consistent with article III. Marshall stated:

> We think . . . that when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of the Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.[37]

In Osborn, the bank's claim was based on federal supremacy and arose under federal law even using a conservative construction of the "arising under" clause. To illustrate the broad reach of the clause, however, Marshall offered a hypothetical case, actually presented in the companion decision of Bank of the United States v. Planters' Bank,[38] of the bank suing on a contract. Although the contract claim itself would be dependent upon state law, Marshall found that the first question presented in the case (and every case involving the bank) is the right of the bank to sue--a question of federal law. And regardless of whether this underlying question is definitively settled by the Court, the question is still an ingredient of every cause involving the bank. Once this federal ingredient is recognized, the lawsuit arises under federal law even though all other issues may be predicated on state law:

> When the Bank sues, the first question which presents itself, and which lies at the

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[37] Id. at 823.

[38] 22 U.S. (9 Wheat.) 904 (1824).

> foundation of the case is, has this legal entity a right to sue? Has it a right to come, not into this Court particularly, but into any Court? This depends on a law of the United States. The next question is, has this being a right to make this particular contract? If this question be decided in the negative, the cause is determined against the plaintiff; and this question, too, depends entirely on a law of the United States. These are important questions and they exist in every possible case. The right to sue, if decided once, is decided for ever; but the power of Congress was exercised antecedently to the first decision on that right, and if it was constitutional then, it cannot cease to be so, because the particular question is decided. It may be revived at the will of the party, and most probably would be renewed, were the tribunal to be changed. But the question respecting the right to make a particular contract, or to acquire a particular property, or to sue on account of a particular injury, belongs to every particular case, and may be renewed in every case. The question forms an original ingredient in every cause. Whether it be in fact relied on or not, in the defence, it is still a part of the cause, and may be relied on. The right of the plaintiff to sue, cannot depend on the defence which the defendant may choose to set up. His right to sue is anterior to that defence, and must depend on the state of things when the action is brought. The questions which the case involves, then, must determine its character, whether those questions be made in the cause or not.[39]

Under Marshall's construction of "arising under," the Constitution permits federal courts to take cognizance of cases if the mere possibility exists that they may contain an issue of federal law, even though in

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[39]Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) at 823-24.

actuality their outcome will be governed solely by state law.[40]

Earlier in his opinion, Marshall used more restrictive language in defining the scope of "arising under" jurisdiction, which was adopted by federal courts construing the reach of the federal question jurisdiction statute.[41] Marshall stated:

> If it be a sufficient foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all other questions must be decided as incidental to this, which gives that jurisdiction.[42]

In dissent, Justice Johnson believed the permissible scope of federal question jurisdiction to be much more circumscribed. Unless a suit actually presented for adjudication a federal question, Johnson felt that the federal courts lacked constitutional competence to consider the case: "[U]ntil a question involving the construction or administration of the laws of the United States did actually arise, the casus federis was not presented, on which the constitution authorized the

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[40]See Chadbourn & Levin, supra note 23, at 648-49; Forrester, supra note 33, at 370-71; M. Redish, supra note 11, at 55-56; Shapiro, Jurisdiction and Discretion, 60 N.Y.U.L. Rev. 543, 567 (1980); Note, The Outer Limits of "Arising Under", supra note 31 at 987-88.

[41]C. Wright, supra note 11, at 102.

[42]Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 822 (1824).

government to take to itself the jurisdiction of the cause."[43]

(c) The Statutory Meaning of "Arising Under." By the Judiciary Act of 1875, Congress gave the federal courts original jurisdiction to hear cases "arising under" federal law.[44] Although sparse, the act's legislative history and contemporary commentary all assumed that Congress conferred upon the federal judiciary a federal question jurisdiction as broad as the Constitution allowed.[45] Moreover, the wording of the statute is almost identical to its constitutional counterpart in article III.[46] With few exceptions,[47] however, the Supreme Court has construed the federal question jurisdiction statute more narrowly than it did

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[43]Id. at 885. Under Justice Johnson's construction, a case does not arise under federal law until an actual controversy over a federal issue exists. Thus, no case could be brought initially in the federal courts under the "arising under" clause since no case would present a federal question until a dispute over federal law was actually joined. That the plaintiff might plead matters of federal law would be of no moment since the defendant might never dispute them. Chadbourn & Levin, supra note 23, at 648; Cohen, supra note 29 at 892.

[44]Act of March 3, 1875, § 1, 18 Stat. 470.

[45]Chadbourn & Levin, supra note 23, at 649-50; Forrester, supra note 33, at 374-77.

[46]The only significant difference between the 1875 statute and article III was that the statute used the word "suits" and article III used the word "cases." Only one Supreme Court justice has found the distinction a critical one. New Orleans M. & T. R.R. v. State of Mississippi, 102 U.S. 135, 143-44 (1880) (Miller, J., dissenting). See Hart & Wechsler's Federal Courts, supra note 11, at 870 n.1.

[47]See Pacific Railroad Removal Cases, 115 U.S. 1 (1885).

the constitutional provision in Osborn.[48] Although in early decisions it paid lip service to Osborn,[49] the Court has taken a more restrictive view of when a case "arises under" federal law.

Modern scholars generally defend the Supreme Court's limited interpretation of the federal question statute (although few find merit in the particular formulations of "arising under" enunciated by the Court).[50] Most recognize that unflinching embracement of the Osborn rule in determining the scope of federal question jurisdiction could flood the federal courts with cases totally unrelated to federal law.[51] At the

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[48]Chadbourn & Levin, supra note 23, at 650; Cohen, supra note 29, at 891; Forrester, supra note 33, at 377; Mishkin, The Federal "Question" in the District Courts, 53 Colum. L. Rev. 157, 160 (1953); Shapiro, supra note 40, at 568; C. Wright, supra note 11, at 103. Nor has the Court adopted Justice Johnson's opinion in Osborn. Cohen, supra note 29, at 892. But see Shulthis v. McDougal, 225 U.S. 561, 569 (1912) ("A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such law, upon the determination of which the result depends") (emphasis added).

[49]See, e.g., State of Tennessee v. Union & Planters' Bank, 152 U.S. 454, 459 (1894); Starin v. New York, 115 U.S. 248, 257 (1885); Little York Gold-Washing & Water Co. v. Keyes, 96 U.S. 199, 201 (1877); Chadbourn & Levin, supra note 23, at 651-56, 62; C. Wright, supra note 11, at 102.

[50]See, e.g., Cohen, supra note 29, at 891; Forrester, supra note 33, at 385; Mishkin, supra note 46 at 162-63; M. Redish, supra note 11, at 64. But cf. Note, The Outer Limits of "Arising Under", supra note 31, at 989-90.

[51]Cohen, supra note 29, at 891; Mishkin, supra note 46, at 1162-63.

same time, these commentators justify the need for a broad construction of the constitutional provision to give Congress leeway to meet unanticipated problems it may encounter in the future.[52] In the last several years, the Supreme Court has explicitly recognized that the scope of the federal question jurisdiction statute is considerably more circumscribed than its constitutional antecedent.[53]

When does a case "arise under" federal law for the purpose of § 1331 jurisdiction? As a general rule, "an action arises under federal law . . . if in order for the plaintiff to secure the relief sought he will be obliged to establish both the correctness and the applicability to his case of a proposition of federal law--whether that proposition is independently

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[52]M. Redish, supra note 11, at 64.

[53]See Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804 (1986) ("Although the constitutional meaning of 'arising under' may extend to all cases in which a federal question is 'an ingredient' of the cause of action . . . we have long construed the statutory grant of federal-question jurisdiction as conferring more limited power"); Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 9 n.8 (1983) ("[W]e have only recently reaffirmed what has long been recognized--that 'Art. III "arising under" jurisdiction is broader than federal-question jurisdiction under § 1331' "); Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 495 (1983) ("[T]he many limitations placed on jurisdiction under § 1331 are not limitations on the constitutional power of Congress to confer jurisdiction on the federal courts"); Romero v. International Terminal Operating Co., 358 U.S. 354, 379 (1959) ("The Act of 1875 is broadly phrased, but it has been continuously construed and limited in the light of the history that produced it, the demands of reason and coherence, and the dictates of sound judicial policy which have emerged from the Act's function as a provision in the mosaic of federal judiciary legislation. It is a statute, not a Constitution, we are expounding").

applicable or becomes so only by reference from state law."[54] Under this formulation of federal question jurisdiction, a case will "arise under" federal law under one of two circumstances: (1) when federal law creates the cause of action on which the plaintiff is suing, and (2) where the vindication of a right under state law necessarily turns on some construction of federal law.[55]

i. Federal Causes of Action. "[T]he vast majority of cases brought under the general federal-question jurisdiction of the federal courts are those in which federal law creates the cause of action."[56] The most famous expression of this test for federal question jurisdiction is Justice Holmes' opinion in American Well Works Co. v. Layne & Bowler Co.: "A suit arises under the law that creates the cause of action."[57] Although Holmes intended the rule to be one of exclusion (non-federal causes of action do not arise under federal law), courts now recognize Holmes' formula

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[54]Hart & Wechsler's Federal Courts, supra note 11, at 889, quoted in Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 9 (1983).

[55]See Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804 (1986); Seinfield v. Austen, 39 F.3d 761 (7th Cir. 1994); cert. denied, 115 S. Ct. 1998 (1995); Virgin Islands Housing Authority v. Coastal General Construction Services Corporation, 27 F.3d 911 (3d Cir. 1994).

[56]Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804 (1986).

[57]241 U.S. 257, 260 (1916).

to be a useful test for which cases are to be included under § 1331.[58]

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[58]T.B. Harms Co. v. Eliscu, 339 F.2d 823, 827 (2d Cir. 1964) (Friendly, J.). See also Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 9 (1983). Not all causes of action created by federal law, however, necessarily fall within federal question jurisdiction. For example, in Shoshone Mining Co. v. Rutter, 177 U.S. 505 (1900), Congress established a scheme by which miners holding federal patents could settle adverse claims over their mines. The statute authorized the miners to sue in any court of competent jurisdiction, and that the right of possession would be determined by "local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States. . . ." Id. at 508. Even though the federal statute gave the miners the right to sue, the Court held that a miner's suit to adjudicate an adverse claim did not "arise under" federal law for the purpose of the federal question jurisdiction statute. The Court held that the resolution of the claims would normally turn on questions of state law:

> Inasmuch . . . as the "adverse suit" to determine the right of possession may not involve any question as to the construction or effect of the Constitution or laws of the United States, but may present simply a question of fact as to the time of discovery of mineral, the location of the claim on the ground, or a determination of the meaning and effect of certain local rules and customs prescribed by the miners of the district, or the effect of state statutes, it would seem to follow that it is not one which necessarily arises under the Constitution or the laws of the United States.

Id. at 509. Compare Feibelman v. Packard, 109 U.S. 421 (1883) (suit on U.S. marshall's bond arises under federal law). See Cohen, supra note 29, at 902-03; M. Redish, supra note 11, at 69. Conversely, even where a plaintiff attempts to assert a claim wholly based on state law, if federal law preempts the particular field, the plaintiff's claim arises under federal law. See, e.g., Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987). See also infra notes 95-97 and accompanying text.

To arise under federal law for purposes of the federal question jurisdiction statute, a plaintiff need not have a valid federal cause of action. Provided the plaintiff's federal claim is neither frivolous nor clearly untenable, it "arises under" federal law.[59] In other words, a defendant's challenge to the merits of a plaintiff's federal claim does not go to the jurisdiction of the court to hear the claim.

To support federal question jurisdiction, the plaintiff may not rely on an anticipated federal defense if the claim is otherwise predicated on state law. The courts will not permit a plaintiff to artfully convert a state claim into a federal one merely by pleading federal issues likely to be raised by the defendant.[60]

Most litigation involving the military is likely to be predicated on a federally-created cause of action. Common examples include lawsuits seeking review of

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[59]Bell v. Hood, 327 U.S. 678 (1946); The Fair v. Kohler Die & Specialty Co., 228 U.S. 22 (1913). But cf. Leonard v. Orr, 590 F. Supp. 474 (S.D. Ohio 1984) (apparently basing dismissal for want of jurisdiction under § 1331 on plaintiff's failure to state a meritorious federal claim). See generally Mishkin, supra note 46, at 166.

[60]Taylor v. Anderson, 234 U.S. 74 (1914); Boston & Montana Consol. Copper & Silver Mining Co. v. Montana Ore Purchasing Co., 188 U.S. 632 (1903). See generally Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804 (1986); Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 10, 13-14 (1983); Gully v. First Nat'l Bank, 299 U.S. 109, 113 (1936); State of Tennessee v. Union and Planters' Bank, 152 U.S. 454, 459 (1894). See also infra notes 81-100 and accompanying text.

agency actions under the Administrative Procedure Act[61] and constitutional tort suits against individual federal officers.[62]

ii. State Cause of Action Necessarily Turning on Construction of Federal Law. The second circumstance under which a case will "arise under" federal law is when a cause of action, although created by state law, necessarily turns on the construction of a substantial federal question.[63] This formulation of federal question jurisdiction is problematic. No clear standard exists by which courts can determine "the degree to which federal law must be in the forefront of the case and not collateral, peripheral or remote."[64]

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[61]5 U.S.C. §§ 701-06 (1982).

[62]See Bivens v. Six Unknown Agents, 403 U.S. 388 (1971). See generally infra chapter 9. Regardless of the state or federal character of a plaintiff's action, where federal officials are named as parties, they have a statutory right to remove the case to federal court. 28 U.S.C. §§ 1442, 1442a (1982). See, e.g., Privette v. Dep't of Air Force, ___ F.3d ___, 1995 WL 294460 (Fed. Cir. May 15, 1995) (affirming the decision to remove an Air Force civilian police officer on appeal from the Merit Systems Protection Board).

[63]See Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804 (1986); Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 9, 13 (1983); see also Platzer v. Sloan-Kettering Institute for Cancer Research, 787 F. Supp. 360 (S.D.N.Y. 1992), aff'd, 983 F.2d 1086 (Fed. Cir.), cert. denied, 113 S. Ct. 1648 (1993).

[64]Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 470 (1957) (Frankfurter, J., dissenting); Seinfeld v. Austen, 39 F.3d 761 (7th Cir. 1994), cert. denied, 115 S. Ct. 1998 (1995). This particular test for federal question jurisdiction has also received most of the commentators' attention. See, e.g., 13B C. Wright, A. (continued...)

The key case is Smith v. Kansas City Title & Trust Co.[65] In Smith, a shareholder in the defendant corporation sued in federal court to enjoin the defendant from investing funds in bonds issued under the Federal Farm Loan Act. The plaintiff claimed that the bonds were issued in violation of the United States Constitution and, therefore, the investment was illegal under state law. Although the plaintiff's cause of action was grounded in state law (and under Holmes' formulation did not "arise under" federal law),[66] the Court held that the claim fell within the federal question jurisdiction of the district court. Finding that the plaintiff's claim turned entirely on a federal constitutional question, the Court reasoned that the case arose under federal law:

> In the instant case the averments of the bill show that the directors were proceeding to make the investments in view of the act authorizing the bonds about to be purchased, maintaining that the act authorizing them was constitutional and the bonds valid and desirable investments. The objecting shareholder avers in the bill that the securities were issued under an unconstitutional law, and hence of no validity. It is, therefore, apparent that the controversy concerns the constitutional validity of an act of Congress which is

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[64](...continued)
Miller & E. Cooper, Federal Practice & Procedure 17-48 (1984) [hereinafter Wright, Miller & Cooper]; Note, The Outer Limits of "Arising Under", supra note 31.

[65]255 U.S. 180 (1921)

[66]Id. at 213-15 (Holmes, J., dissenting).

> directly drawn in question. The decision depends upon the determination of this issue.[67]

The extent to which federal law must play a role in the state action is unclear, and the Supreme Court's decisions have not been entirely consistent.[68] Moreover, in two recent cases, the Court, while reaffirming the Kansas City Title formulation for federal question jurisdiction,[69] significantly curtailed its reach. In Franchise Tax Board v. Construction Laborers Vacation Trust,[70] the tax enforcement agency of California brought a state court suit against a trust created under the Employment Retirement Income Security Act of 1974

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[67]Id. at 201. See also Flournoy v. Wiener, 321 U.S. 253, 270-72 (1944); Standard Oil Co. v. Johnson, 316 U.S. 481, 483 (1942) (appellate jurisdiction of Supreme Court). Compare Miller's Ex'rs v. Swann, 150 U.S. 132 (1893).

[68]Compare Moore v. Chesapeake & Ohio Ry. Co., 291 U.S. 205 (1934), with Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921). See M. Redish, supra note 11, at 67. But cf. Cohen, supra note 29, at 912; Note, The Outer Limits of "Arising Under", supra note 31, at 1003-04 n.161. One oft-cited statement about the requisite degree of federal law a complaint must contain to support federal question jurisdiction appears in Gully v. First National Bank, 299 U.S. 109, 112 (1936): "To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." See also Note, The Outer Limits of "Arising Under", supra note 31, at 1004 (advocating the following standard: "a lawsuit arises under federal law if, at the time the federal judicial power is invoked, the claim for relief substantially relies on a proposition of federal law"). Some commentators have argued for a pragmatic approach, based upon the nature of the federal interest at stake, to determine whether a claim "arises under" federal law. See, e.g., Cohen, supra note 29, at 916.

[69]See generally Wright, Miller & Cooper, supra note 64, at 41-44.

[70]463 U.S. 1 (1983).

(ERISA) for income taxes owed by beneficiaries of the trust. The defendant removed the case to the federal district court. The key issue in the case, and one pleaded by the plaintiff in its complaint, was whether ERISA preempted state law and barred enforcement of the tax levy. The Court implied that the claim was not completely preempted by ERISA thereby removing it from within the federal court's original jurisdiction.[71] The Court held expressly that the ERISA issue was one of defense and that the plaintiff's claim did not "necessarily depend on resolution" of the question.[72]

In Merrell Dow Pharmaceuticals, Inc. v. Thompson,[73] the plaintiffs sued in Ohio state court the manufacturers and distributors of the drug Bendectin, claiming it caused birth defects. In part, the plaintiffs alleged that the drug was "misbranded" under the Federal Food, Drug, and Cosmetics Act (FDCA)[74] because its labeling did not adequately warn of its potential dangers. This misbranding, the plaintiffs contended, constituted a rebuttable presumption of negligence under state law. The defendants removed the case to federal court, asserting that the plaintiffs' claim turned on the question of whether Bendectin was mislabelled under federal law.[75]

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[71] Id. at 21-22; see also Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987) (Congress can completely preempt an area such that state law claims within it are always converted to federal claims).

[72] Id. at 28.

[73] 478 U.S. 804 (1986).

[74] 21 U.S.C. §§ 301-392 (1982).

[75] Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804 (1986).

A narrowly-divided Supreme Court found that a complaint alleging the violation of a federal statute as an element of a state cause of action does not "arise under" federal law unless Congress has determined that the plaintiff could bring a "private, federal cause of action for the violation" of the statute.[76] Finding that the FDCA did not create a privately-enforceable federal cause of action,[77] the Court concluded that the plaintiffs' complaint could not support federal question jurisdiction.[78]

The Kansas City Title formulation of federal question jurisdiction is likely to arise in military litigation when the armed forces have only a tangential interest in the case, usually as a mere stakeholder. For example, in Smith v. Grimm,[79] the plaintiff, an attorney (Smith), had successfully represented the defendant (Grimm) in a back pay claim against the Air Force. Smith's attorneys fee was contingent upon success in the back pay claim; Smith was to get 50% of any recovery. When Grimm refused to pay Smith, Smith sued Grimm and the Air Force in federal district court,

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[76]Id. at 3237.

[77]Id. at 3234. See Canon v. University of Chicago, 441 U.S. 677 (1979); Cort v. Ash, 422 U.S. 66 (1975).

[78]An analogous issue decided by the Supreme Court precludes parents subject to conflicting state child-custody decrees from asking the federal courts to determine which state decree is valid and enforceable under the Parental Kidnapping Prevention Act of 1980. 28 U.S.C. § 1738A (1982). Instead the parents must use state appellate review. Thompson v. Thompson, 484 U.S. 174 (1988).

[79]534 F.2d 1346 (9th Cir.), cert. denied, 429 U.S. 980 (1976).

seeking an equitable lien on Grimm's Air Force pay. The Court of Appeals for the Ninth Circuit ruled that the district court lacked jurisdiction to hear Smith's claim under § 1331, because the claim "arose under" state, not federal, law. In essence, Smith had a state-law contract claim against Grimm, and his right to an equitable lien arising out of the contract action was similarly predicated on state law. The Air Force's only role was as Grimm's former employer and present debtor.[80]

(4) The "Well-Pleaded Complaint" Rule. As a general principle, courts determine their jurisdiction at the time lawsuits are filed. Drawing on this principle, the Supreme Court has firmly established the rule that whether plaintiffs' claims "arise under" federal law must be ascertained from the well-pleaded allegations of their complaints. And as a corollary to the rule, the federal question cannot be based on some anticipated defense likely to be raised by the defendant:

> [W]hether a case is one arising under the Constitution or a law or treaty of the United States, in the sense of that jurisdictional statute . . . must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose.[81]

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[80] Id. at 1350-51. See also Morrison v. Morrison, 408 F. Supp. 315 (N.D. Tex. 1976) (action seeking garnishment of military retired pay arises under state, not federal, law).

[81] Taylor v. Anderson, 234 U.S. 74, 75-76 (1914). See also Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, (1986); Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 10 (1983); Gully v.First Nat'l Bank, 299 U.S. 109, 113 (1936); (continued...)

A famous application of the rule is Louisville and Nashville Railroad Co. v. Mottley.[82] In 1871, the Mottleys received lifetime passes on the defendant railroad in consideration for their release of claims against the railroad for injuries they had suffered as the result of a train collision. In 1907, the railroad refused to renew their passes, relying on a 1906 federal statute forbidding railroads from issuing free passes or free transportation. The Mottleys sued the railroad in federal court, alleging that it had breached their agreement, and that the federal statute on which the railroad relied in refusing to renew the passes was both inapplicable and unconstitutional.

Even though the only probable issue to be decided in the case was the federal question--whether the statute was applicable and constitutional--the Court held that the Mottleys had failed to state a claim under federal law. Instead, their cause of action was simply a state-based contract claim, and the federal question was simply a matter of anticipated defense:

> It is settled interpretation of ["arising under"], as used in this statute, conferring

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[81](...continued)
Boston & Montana Consol. Cooper & Silver Mining Co. v. Montana Ore Purchasing Co., 188 U.S. 632, 640 (1903); State of Tennessee v. Union & Planters' Bank, 152 U.S. 454, 464 (1894); Metcalf v. State of Watertown, 128 U.S. 586, 589 (1888). See generally Doernberg, There's No Reason for It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction, 38 Hastings L.J. 597 (1987) (traces development of "well-pleaded complaint" rule).

[82]211 U.S. 149 (1908).

> jurisdiction, that a suit arises under the Constitution and law of the United States only when a plaintiff's statement of his own cause of action shows that it is based upon those laws or the Constitution. It is not enough that the plaintiff alleges some anticipated defense to his cause of action and asserts that the defense is invalidated by some provision to the Constitution of the United States. Although such allegations show very likely, in the course of the litigation, a question under the Constitution would arise, they do not show that the suit, that is, the plaintiff's original cause of action, arises under the Constitution.[83]

The "well-pleaded complaint" rule is strictly construed. It prevents plaintiffs from asserting extraneous factual or legal matters in their complaints to create a federal question. In other words, it limits plaintiffs to the bare allegations necessary to state a cause of action.[84] Moreover, by focusing on the four-corners of the plaintiff's complaint, the rule applies equally to the removal jurisdiction of the federal courts.[85]

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[83]Id. at 152. The Mottleys later sued the railroad in the state courts. When the case reached the Supreme Court on appeal, the Court ruled in favor of the defendant on the federal issues. Louisville & Nashville R.R. Co. v. Mottley, 219 U.S. 467 (1911).

[84]Taylor v. Anderson, 234 U.S. 74 (1914); Joy v. St. Louis, 201 U.S. 332 (1906); Elf Aquitaine, Inc. v. Placid Oil Co., 624 F. Supp. 994 (D. Del. 1985). See also Mishkin, supra note 46, at 164; Wright, Miller & Cooper, supra note 64, at 87-90 ("[A] plaintiff cannot win admission to federal court by allegations to support his own case that are not required by nice pleading rules").

[85]Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 10 n.9 (1983). The American Law Institute [ALI] has recommended that removal jurisdiction be available when "'a substantial defense arising under (continued...)

The "well-pleaded complaint" rule has also limited the scope of actions available under the Declaratory Judgment Act.[86] Declaratory judgment actions have traditionally served as a means by which prospective defendants can use their defenses as swords. Rather than waiting for the other party to sue, the prospective defendant can seek a judicial adjudication of the rights of the parties based on the question he would have raised as a defense had he waited to be sued.

Thus, a classic declaratory judgment action is in many respects a mirror image of an eventual suit: the plaintiff in the declaratory judgment action is the party whose conduct is likely to be ultimately challenged. In other words, he would be, absent use of the declaratory judgment device, the eventual defendant. Instead, he seeks a judicial declaration that the activity he has performed or will undertake is proper. In such a situation, the plaintiff's complaint must anticipate the eventual defense, or it would be effectively saying nothing.[87]

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[85](...continued)
the Constitution, laws, or treaties of the United States is properly asserted that, if sustained, would be dispositive of the action.'" ALI, Study of the Division of Jurisdiction Between State and Federal Courts 25-26 (1969) [hereinafter ALI Study], quoted in M. Redish, supra note 11, at 73 n.135. Congress has not adopted the proposal. Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. at 11 n.9. See also International Primate Protection League v. Administrators of Tulane Educ. Fund, 500 U.S. 72 (1991).

[86]28 U.S.C. §§ 2201-02 (1982).

[87]M. Redish, supra note 11, at 75 (emphasis in the original).

Under the "well-pleaded complaint" rule, however, the focus is on "whether federal substantive law forms an essential element of the cause of action itself, as distinguished from possible defenses thereto, respecting which federal jurisdiction is invoked."[88] The Declaratory Judgment Act, which is procedural only and cannot enlarge the jurisdiction of the federal courts,[89] does not change the "well-pleaded complaint" rule. Consequently, the act does not confer jurisdiction to decide issues of federal law that would (without the Act) only be pleaded defensively in the conventional lawsuit.[90]

In Skelly Oil Co. v. Phillips Petroleum Co.,[91] Skelly Oil and Phillips contracted for the sale of natural gas. The contract entitled Skelly, the seller, to terminate the contract any time after December 1, 1946, if the Federal Power Commission did not issue a certificate of convenience and necessity to a pipeline company to which Phillips intended to resell the gas. While the Federal Power Commission told the pipeline company on November 30, 1946, that it would issue a conditional certificate, it did not make its order public until December 2. Skelly Oil notified Phillips

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[88]Lowe v. Ingalls Shipbuilding, 723 F.2d 1173, 1179 (5th Cir. 1984). See also Platzer v. Sloan-Kettering Institute for Cancer Research, 787 F. Supp. 360 (S.D.N.Y. 1992), aff'd, 983 F.2d 1086 (Fed. Cir.), cert. denied, 113 S. Ct. 1648 (1993).

[89]Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240 (1937).

[90]Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 15-16 (1983); Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671-72 (1950).

[91]339 U.S. 667 (1950).

that it had terminated the contract. Phillips sued Skelly, seeking a declaratory judgment that the contract was still in effect. The Supreme Court held, however, that Phillip's suit did not "arise under" federal law:

> "[T]he operation of the Declaratory Judgment Act is procedural only." . . . Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction. When concerned as we are with the power of the inferior federal courts to entertain litigation within the restricted area to which the Constitution and Acts of Congress confine them, "jurisdiction" means the kinds of issues which give right of entrance in the federal courts. Jurisdiction in this sense was not altered by the Declaratory Judgment Act. Prior to that Act, a federal court would entertain a suit on a contract only if the plaintiff asked for an immediately enforceable remedy like money damages or an injunction, but such relief could only be given if the requisites of jurisdiction, in the sense of a federal right or diversity, provided foundation for resort to the federal courts. The Declaratory Judgment Act allowed relief to be given by way of recognizing the plaintiff's right even though no immediate enforcement of it was asked. But the requirements of jurisdiction--the limited subject matters which alone Congress had authorized the District Courts to adjudicate--were not impliedly repealed or modified.[92]

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[92] Id. at 671-72. See also Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 14-22 (1983) (California tax enforcement agency's state court declaratory judgment suit to establish that ERISA did not bar state from levying on trust for back income taxes of beneficiaries does not fall within the federal question jurisdiction of the district court); Public Serv. Comm'n v. Wycoff Co., 344 U.S. 237, 248 (1952) (dictum). Compare Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96 n.14 (1983) (ERISA trust can seek declaratory relief in federal court to enjoin enforcement of state statute that is allegedly preempted by ERISA).

Under Skelly Oil, "'if, but for the availability of the declaratory judgment procedure, the federal claim would arise only as a defense to a state created action, jurisdiction is lacking.'"[93]

Consequently, in determining whether a declaratory judgment suit "arises under" federal law, courts must look beyond the declaratory judgment allegations. A declaratory judgment suit will support federal question jurisdiction under two circumstances. First, a declaratory judgment action "arises under" federal law if a substantial federal question arises from the declaratory judgment defendant's threatened lawsuit:

> Federal courts have regularly taken original jurisdiction over declaratory judgment suits in which, if the declaratory judgment defendant brought a coercive action to enforce

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[93]Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 16 (1983), quoting 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure 744-45 (2d ed. 1983). See also Commercial Union Insurance Co. v. Walbrook Insurance Co., 41 F.3d 764 (1st Cir. 1994); S. Jackson and Son v. Coffee, Sugar and Cocoa Exchange Inc., 24 F.3d 427 (2d Cir. 1994). The Court's narrow construction of the Declaratory Judgment Act has been the subject of intense academic criticism. See, e.g., Cohen, supra note 29, at 894-95 n.26, 915-16; Doernberg, supra note 81, at 640-46; Mishkin, supra note 48, at 177-84; M. Redish, supra note 11, at 73-77; Wright, Miller & Cooper, supra note 64, at 89-90. The American Law Institute has recommended abandonment of the strict rule of Skelly; instead, federal question jurisdiction should exist in declaratory judgment actions where the initial pleadings set forth a substantial claim under federal law. ALI Study 170-72, cited in Hart & Wechsler's Federal Courts, supra note 11, at 897.

its rights, that suit would necessarily present a federal question.[94]

Second, a declaratory judgment action arises under federal law if the complaint raises a federal question when viewed as a coercive action apart from the defendant's anticipated suit. Under this formulation, courts "identify the substantive theory upon which the plaintiffs could have brought their cause of action to determine whether the federal issue would arise under a 'well-pleaded' complaint."[95] Thus, if the plaintiff's substantive allegations of federal law support an action for coercive relief (e.g., an injunction), they "arise under" federal law.[96]

Under the "well-pleaded complaint" rule, the plaintiffs are normally masters of their claims: they alone determine whether to assert a claim arising under

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[94]Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 19 (1983). See also Yoken v. Mafnas, 973 F.2d 803 (9th Cir. 1992); West 14th Street Commercial Corp. v. 5 West 14th Street Owners Corp., 815 F.2d 188, 194 (2d Cir. 1987); "For instance, federal courts have consistently adjudicated suits by alleged patent infringers to declare a patent invalid, on the theory that an infringement suit by the declaratory judgment defendant would raise a federal question over which the federal courts have exclusive jurisdiction." Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. at 19 n.19. See E. Edelmann & Co. v. Triple-A Specialty Co., 88 F.2d 852, 854 (7th Cir. 1937).

[95]West 14th Street Commercial Corp. v. 5 West 14th Street Owners Corp., 815 F.2d 188, 195 (2d Cir. 1987).

[96]Id. at 195-96. See also Shaw v. Delta Air Lines, Inc. 463 U.S. 85, 96 n.14 (1983); Hart & Wechsler's Federal Courts, supra note 11, at 897.

federal law.[97] One exception to the "well-pleaded complaint" rule is the "artful pleading" doctrine. Under the doctrine, a "plaintiff cannot defeat removal by masking or 'artfully pleading' a federal claim as a state claim."[98] The "artful pleading" doctrine traditionally is applied to permit removal of claims that, although purportedly arising under state law, involve subject-matters that have been entirely preempted by federal law. "Congress may so completely preempt a particular area, that any civil complaint raising this select group of claims is necessarily federal in character."[99]

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[97]The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25 (1913).

[98]Sullivan v. First Affiliated Securities, Inc., 813 F.2d 1368, 1372 (9th Cir. 1987). See also Doe v. Allied Signal Inc., 985 F.2d 908 (7th Cir. 1993).

[99]Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987). See also Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 22-27 (1983); Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557 (1968); United Jersey Banks v. Parell, 783 F.2d 360 (3d Cir.), cert. denied, 476 U.S. 1170 (1986); Bailey v. Marsh, 655 F. Supp. 1250 (D. Colo. 1987). See generally Segriti, Vesting the Whole "Arising Under" Power of the District Courts in Federal Preemption Cases, 37 Okla. L. Rev. 539 (1984); Twitchell, Characterizing Federal Claims: Preemption, Removal, and the Arising-Under Jurisdiction of the Federal Courts, 54 Geo. Wash. L. Rev. 812 (1986). But cf. Catepillar, Inc. v. Williams, 482 U.S. 386 (1987) (if an area of state law has not been completely pre-empted, the defense of preemption is insufficient grounds for removal). The courts have also extended the artful pleading rule to permit removal of putatively state claims precluded by the res judicata effect of a prior federal judgment. Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394 (1981); Sullivan v. First Affiliated Securities, Inc., 813 F.2d 1368, 1375-76 (9th Cir. 1987); Travelers Indemnity Co. v. Sarkisian, 794 F.2d 754, 759-61 (2d Cir. 1986).

The "well-pleaded complaint" rule is likely to arise only peripherally in litigation involving the armed forces. Most commonly, the rule has precluded federal jurisdiction in lawsuits by retired military personnel seeking federal judicial invalidation of state court decrees awarding their spouses a share of their military retirement pay. The armed services are often named in the suits because they are the subject of a state court garnishment order.[100]

(5) What Constitutes Federal Law? The federal question jurisdiction statute serves as a basis for jurisdiction whenever a case arises under the Constitution, laws, or treaties of the United States. Courts have interpreted the term "laws" to include both federal common law[101] and most regulations promulgated under federal statute.[102] Before a treaty can form the basis for federal question jurisdiction, it must provide a private right of action.[103] Whether "customary

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[100]See, e.g., Williams v. State of Washington, 894 F.2d 321 (9th Cir. 1990); Fern v. Turman, 736 F.2d 1367 (9th Cir. 1984), cert. denied, 469 U.S. 1210 (1985).

[101]Illinois v. City of Milwaukee, 406 U.S. 91, 99-100 (1972); Lesal Interiors Inc. v. Echotree Associates, 47 F.3d 607 (3d Cir. 1995; Grumman Ohio Corp. v. Dole, 776 F.2d 338, 344 (D.C. Cir. 1985).

[102]Chasse v. Chasen, 595 F.2d 59 (1st Cir. 1979). See also Wellife Products v. Shalala, 52 F.3d 357 (2d Cir. 1995); Katz v. Cisneros, 16 F.3d 1204 (Fed. Cir. 1994); Wright, Miller & Cooper, supra note 64, at 51.

[103]Princz. v. Federal Republic of Germany, 26 F.3d 1166 (D.C.Cir. 1994), cert, denied, 115 S. Ct. 923 (1995); Goldstar (Panama) S.A. v. United States, 967 F.2d 965 (4th Cir. 1992), cert. denied, 113 S. Ct. 411 (1992); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring); Hyosung (America), Inc. v. Japan Air Lines Co., 624 F. Supp. 727, 730 (continued...)

international law" constitutes federal law for the purpose of jurisdiction under § 1331 is unclear.[104]

(6) Federal Question Jurisdiction and Sovereign Immunity. Finally, even though 28 U.S.C. § 1331 is a jurisdictional basis for most suits against the federal government, it does not waive the sovereign immunity of the United States.[105] A separate statutory waiver of the immunity must be found, or the claim must fall within one of the so-called exceptions to the doctrine.[106] The Administrative Procedure Act [APA], 5 U.S.C. § 702, however, is a waiver of the Government's sovereign immunity from claims for nonmonetary relief. When the APA is combined with the federal question jurisdiction statute, a jurisdictional basis for equitable relief against the United States usually exists.[107]

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[103](...continued)
(S.D.N.Y. 1985); Handel v. Artukovic, 601 F. Supp. 1421, 1425 (C.D. Cal. 1985).

[104]Compare Princz v. Federal Republic of Germany, 26 F.3d 1166 (D.C. Cir. 1994), cert. denied, 115 S. Ct. 923 (1995); Handel v. Artukovic, 601 F. Supp. 1421, 1426-28 (C.D. Cal. 1985), with Wright, Miller & Cooper, supra note 64, at 62-63.

[105]See, e.g., Charles v. Rice, 28 F.3d 1312 (1st Cir. 1994); Whittle v. United States, 7 F.3d 1259 (6th Cir. 1993); Sibley v. Ball, 924 F.2d 25 (1st Cir. 1991); aff'd, 944 F.2d 913 (Fed. Cir. 1991); Gochnour v. Marsh, 754 F.2d 1137 (5th Cir.), cert. denied, 471 U.S. 1057 (1985).

[106]See generally Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 689-90 (1949).

[107]Guerrero v. Stone, 970 F.2d 626 (9th Cir. 1992); Beller v. Middendorf, 632 F.2d 788, 796-97 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981); Jaffee v. United States, 592 F.2d 712, 718-19 (3d Cir.), cert.
(continued...)

c. The Tucker Act.

(1) General. The Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491, is a jurisdictional basis for nontort monetary claims against the United States based on a contract, or upon a constitutional, statutory, or regulatory provision that grants a plaintiff a right to monetary relief. 28 U.S.C. § 1346(a)(2) which affords the district courts limited jurisdiction to award nontort money damages against the United States, provides in relevant part:

> (a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:
> . . . .
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics

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[107](...continued)
denied, 441 U.S. 961 (1979); Helton v. United States, 532 F. Supp. 813, 822 (S.D. Ga. 1982). But see Ward v. Brown, 22 F.3d 516 (2d Cir. 1994).

and Space Administration shall be considered an express or implied contract with the United States.

Claims for nontort money damages in excess of $10,000 must be brought in the claims court. 28 U.S.C. § 1491 is the jurisdictional statute for the United States Court of Federal Claims. It states:

> (a)(1) The United States Court of Federal Claims shall have 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, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.
>
> (2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration of office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Court of Federal Claims shall have jurisdiction to render judgments upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978.
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> (3) To afford complete relief on any contract claim brought before the contract is awarded,

> the court shall have exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief. In exercising this jurisdiction, the court shall give due regard to the interests of national defense and national security.

(2) Historical Origins. Before 1855, the doctrine of sovereign immunity barred judicial resolution of money claims against the United States.[108] While Congress from time-to-time entrusted the factual adjudication of such claims to various executive officials and specially-created commissions,[109] Congress reserved the decision whether to pay claims against the

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[108]W. Cowen, P. Nichols & M. Bennett, The United States Court of Claims--A History (Part II: Origins, Development & Jurisdiction; 1855-1976) 1-13 (1978) [hereinafter The United States Court of Claims--A History]; Hart & Wechsler's Federal Courts, supra note 11, at 98; Richardson, History, Jurisdiction, and Practice of the Court of Claims of the United States, 17 Ct. Cl. 3 (1882).

[109]Under the Articles of Confederation, Congress retained the power to adjudicate claims against the central government. The United States Court of Claims--A History, supra note 108, at 2-4. After the adoption of the Constitution, Congress empowered the Treasury Department to hear claims, although Congress retained final approval responsibility. Act of Sept. 2, 1789, ch. 12, § 5, 1 Stat. 66; The United States Court of Claims--A History, supra note 108, at 7-8, 11-13. Congress assigned to the federal circuit courts the authority to resolve disability claims brought by Revolutionary War soldiers, subject to the approval of the Secretary of War and Congress. Act of March 23, 1792, 1 Stat. 242. Most of the circuit courts (which, at the time, were comprised of two Supreme Court justices and a district judge), refused to consider the claims. They reasoned that, without the ability to render final judgments, their adjudications amounted to advisory opinions proscribed by the "case or controversy" requirement of article III. Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792).

government.[110] Indeed, the most common form of recourse available to claimants was from Congress through private relief bills.[111]

Congressional adjudication of claims proved unsuccessful. The system put tremendous burdens on Congress, and was inequitable, slow, and cumbersome.[112] To rectify these problems, in 1855, Congress passed the Court of Claims Act, establishing the Court of Claims.[113] The Act empowered the court to hear money claims against the United States and to make findings on the claims; however, the Act required congressional ratification of all favorable adjudications through private bills.[114]

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[110]Congress was reluctant to completely delegate its power to approve claims because it believed that such a delegation was unconstitutional under article I, section 9, which provides: "No money shall be drawn from the Treasury, but in consequence of appropriations made by law." The United States Court of Claims--A History, supra note 108, at 5. Congress took a more liberal view of article I, section 9 in the 1850's. Id. at 6.

[111]Id. at 8. See also Hart & Wechsler's Federal Courts, supra note 11, at 98; Richardson, supra note 108, at 3; United States v. Mitchell, 463 U.S. 206, 212 (1983). Congressional consideration of claims against the government is based on the first amendment's guarantee of the right of the people to petition the Government for the redress of grievances. The United States Court of Claims--A History, supra note 108, at 4; Richardson, supra note 108, at 3. Both the House and Senate had special standing committees to hear claims against the United States. The United States Court of Claims--A History, supra note 108, at 8.

[112]For a description of the problems, see id. at 8-11, 12-13; Richardson, supra note 108, at 4.

[113]Act of Feb. 24, 1855, ch. 122, 10 Stat. 612.

[114]The United States Court of Claims--A History, supra note 108, at 17-18; Richardson, supra note 108, at 8; 14 C. Wright, A. Miller & E. Cooper, Federal Practice & (continued...)

"Since the Congressional committees were willing to re-examine claims de novo and to receive fresh evidence on either side, this procedure succeeded only in erecting an additional hurdle for proper claimants to surmount."[115]

In 1861, President Lincoln urged Congress to permit the Court of Claims to render final judgments.[116] In March, 1863, influenced by Lincoln's recommendation to reform the court's jurisdiction, and spurred by the pressure of Civil War claims, Congress enlarged the court and authorized it to render final judgments subject to appellate review by the Supreme Court.[117] The new statute provided, however, that no money could be paid out of the Treasury on any claim adjudicated by the court until "after an appropriation therefor shall be estimated by the Secretary of the Treasury."[118] This provision proved to be a stumbling block to Supreme Court review because decisions rendered under the statute were subject to revision by the executive branch and, consequently, were potentially advisory in

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[114](...continued)
Procedure 213 (1976) [hereinafter 14 Wright, Miller & Cooper].

[115]Hart & Wechsler's Federal Courts, supra note 11, at 99. See also The United States Court of Claims--A History, supra note 108, at 18; Richardson, supra note 108, at 8-9.

[116]The United States Court of Claims--A History, supra note 108, at 20-21.

[117]Act of March 3, 1863, ch. 93, 12 Stat. 765. See The United States Court of Claims--A History, supra note 108, at 21; Hart & Wechsler's Federal Courts, supra note 11, at 99.

[118]Act of March 3, 1863, ch. 93, § 14, 12 Stat. 765.

character.[119] Congress eliminated the offensive provision in 1866, opening the door to Supreme Court review of the final judgments of the Court of Claims.[120]

Many valid claims against the United States remained without a forum even after the creation of the Court of Claims "either because they did not fall within [its] express jurisdictional categories . . . , or because the claimants simply could not get to the [court] in Washington. As a result, Congress continued to be plagued with private bills and petitions for relief."[121] In 1886, Representative Randolph Tucker of Virginia introduced a bill rectifying the deficiencies in the earlier acts.[122] The following year, Congress passed the Tucker Act, which extended the jurisdiction of the Court of Claims and gave the district and circuit courts concurrent jurisdiction over claims not exceeding $1,000 and $10,000, respectively.[123]

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[119]Gordon v. United States, 69 U.S. (2 Wall.) 561 (1864). For the story behind the Gordon decision, see The United States Court of Claims--A History, supra note 108, at 24 n.77.

[120]Act of March 17, 1866, ch. 19, 14 Stat. 9. See United States v. Jones, 119 U.S. 477 (1886).

[121]14 Wright, Miller & Cooper, supra note 114, at 213. The Court of Claims did employ commissioners, living throughout the country, to take evidence. The United States Court of Claims--A History, supra note 108, at 33.

[122]Id. at 39-40.

[123]Act of March 3, 1887, ch. 359, 24 Stat. 505. Congress abolished the circuit courts (not to be confused with the courts of appeals) in 1911. The district courts generally assumed their original jurisdiction. Act of March 3, 1911, 36 Stat. 1087.

In 1982, Congress enacted the Federal Courts Improvement Act.[124] The Act merged the Court of Claims and the Court of Customs and Patent Appeals to form the United States Court of Appeals for the Federal Circuit.[125] In addition, Congress created a new article I court--the United States Claims Court--to assume the trial jurisdiction of the "old" Court of Claims. The United States Claims Court is now the United States Court of Federal Claims.[126]

(3) Overlapping Jurisdiction of the District Courts and the Court of Federal Claims.

(a) Concurrent and Exclusive Jurisdiction. Both the district courts and the Court of Federal Claims have concurrent jurisdiction over Tucker Act claims not exceeding $10,000.[127] The Court of Federal Claims has exclusive jurisdiction over nontort money claims against the United States that exceed $10,000.[128]

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[124]Pub. L. No. 97-164, 96 Stat. 25.

[125]Unlike the regional courts of appeals, the Federal Circuit's appellate jurisdiction is based on subject matter rather than geography. 28 U.S.C. § 1295. For example, the court has appellate jurisdiction over appeals from the Claims Court; the Merit Systems Protection Board; the boards of contract appeals; and district court decisions, where the district court's jurisdiction was based, in whole or in part, on the Tucker Act.

[126]Pub. L. No. 102-572, 106 Stat. 4516.

[127]28 U.S.C. §§ 1346(a)(2), 1491.

[128]Id. See, e.g., Mitchell v. United States, 930 F.2d 898 (Fed. Cir. 1991); Simanonok v. Simanonok, 918 F.2d 947 (Fed. Cir. 1990); Amoco Prod. Co. v. Hodel, 815 F.2d 352, 358 (5th Cir. 1987); Matthews v. United States, 810 F.2d 109, 111 (6th Cir. 1987); Weeks Constr., Inc. v. Oglala (continued...)

(b) Determining the Amount in Controversy. For jurisdictional purposes, the good-faith allegations of a plaintiff's complaint establishes the amount of the plaintiff's claim. The courts generally will accept such allegations without looking at the merits of the plaintiff's lawsuit.[129] The amount of a Tucker Act claim is not the amount of money accrued at the time the lawsuit is filed; rather, it is the amount of money the plaintiff ultimately stands to recover in the case. In other words, the claim includes money damages that will accrue during the pendency of the litigation.[130] Thus, for example, if a plaintiff who has been involuntarily separated from the Army brings suit to be reinstated and demands the pay lost as the

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[128](...continued)
Sioux Hsg. Auth., 797 F.2d 668, 675 (8th Cir. 1986); Chabal v. Reagan, 822 F.2d 349 (3d Cir. 1987); State of New Mexico v. Regan, 745 F.2d 1318, 1322-23 (10th Cir. 1984), cert. denied, 471 U.S. 1065 (1985); Goble v. Marsh, 684 F.2d 12, 15 (D.C. Cir. 1982); Keller v. MSPB, 679 F.2d 220, 222 (11th Cir. 1982). But cf. ; Pacificorp v. FERC, 795 F.2d 816, 826 (9th Cir. 1986) (Wallace, J., concurring); Bor-Son Bldg. Corp. v. Heller, 572 F.2d 174, 182 n.14 (8th Cir. 1978) (Claims Court jurisdiction not exclusive where other statutes provide jurisdiction and waive sovereign immunity). Steffan v. Cheney, 733 F. Supp. 115 (D.D.C. 1989); see generally Commonwealth of Mass. v. Departmental Grant Appeals Bd., 815 F.2d 778, 785 n.4 (1st Cir. 1987). See also Maryland Dep't of Human Resources v. Department of Health & Human Serv., 763 F.2d 1441 (D.C. Cir. 1985) (APA permits specific money relief against United States when Tucker Act doesn't apply).

[129]Zumerling v. Devine, 769 F.2d 745, 748 (Fed. Cir. 1985); Hahn v. United States, 757 F.2d 581, 587 (3d Cir. 1985).

[130]Chabal v. Reagan, 822 F.2d 349 (3d Cir. 1987); Shaw v. Gwatney, 795 F.2d 1351, 1354-56 (8th Cir. 1986); Smith v. Orr, 855 F.2d 1544 (Fed. Cir. 1988).

result of the separation, the amount of the pay claim is the total pay the plaintiff anticipates recovering in the case. By its very nature, the plaintiff's pay claim will grow after the complaint is filed: the plaintiff will continue to accrue pay throughout the litigation. The jurisdictional allegations of the complaint must estimate this accrual. If the plaintiff brings his pay claim in the district court, he guarantees his estimate by waiving back pay in excess of $10,000.[131] Tucker Act claims include attorneys fees, at least where the statute conferring the substantive right to relief provides for attorneys fees over and above the amount of damages.[132]

(c) Determining What Constitutes a Tucker Act Claim. No questions involving the Tucker Act are more perplexing than what constitutes a claim under the Act and under what circumstances district courts may consider demands for nonmonetary relief that are joined with Tucker Act claims. For example, if a plaintiff sues the United States seeking a declaratory judgment that will establish his right to receive money from the government in excess of $10,000, has the plaintiff stated a claim under the Tucker Act that is within the exclusive jurisdiction of the Court of Federal Claims? And must a plaintiff, who challenges as unlawful an involuntary separation from government service and seeks both reinstatement and back pay in excess of $10,000,

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[131]Chabal v. Reagan, 822 F.2d 349 (3d Cir. 1987); Shaw v. Gwatney, 795 F.2d 1351, 1356 (8th Cir. 1986). Prospective post-judgment monetary benefits do not form a part of the plaintiff's claim and need not be included in the anticipated recovery. Goble v. Marsh, 684 F.2d 12, 16 n.6 (D.C. Cir. 1982).

[132]Graham v. Henegar, 640 F.2d 732 (5th Cir. 1981).

bring his entire case before the Court of Federal Claims or may a district court hear the reinstatement claim? The Supreme Court has not directly spoken on either issue, and the decisions of the courts of appeals are hopelessly inconsistent.

As a general rule, a plaintiff invokes the Tucker Act when he or she seeks money from the United States and the action is founded upon the Constitution, federal statute, executive regulation, or government contract.[133] The nature of the cause of action does not determine whether a plaintiff's claim falls under the Tucker Act; instead, the nature of the relief requested governs the jurisdictional basis of the lawsuit. The federal courts will look beyond the facial allegations of the complaint to determine what the plaintiff hopes to acquire from the lawsuit.[134] Thus, a plaintiff cannot avoid the jurisdictional limits of the Tucker Act simply by

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[133]28 U.S.C. §§ 1346(a)(2), 1491. See also United States v. Mitchell, 463 U.S. 206, 216-17 (1983); Amoco Prod. Co. v. Hodel, 815 F.2d 352, 359 (5th Cir. 1987); Maryland Dep't of Human Resources v. Department of Health & Human Serv., 763 F.2d 1441, 1448 (D.C. Cir. 1985); Van Drasek v. Lehman, 762 F.2d 1065, 1068 (D.C. Cir. 1985); State of Tenn. ex rel. Leech v. Dole, 749 F.2d 331, 334-35 (6th Cir. 1984).

[134]See, e.g., Amoco Prod. Co. v. Hodel, 815 F.2d 352, 361 (5th Cir. 1987); Matthews v. United States, 810 F.2d 109, 111 (6th Cir. 1987); Weeks Constr., Inc. v. Oglala Sioux Hsg. Auth., 797 F.2d 668, 675 (8th Cir. 1986); Hahn v. United States, 757 F.2d 581, 586 (3d Cir. 1985); Megapulse, Inc. v. Lewis, 672 F.2d 959, 967 (D.C. Cir. 1982); Sellers v. Brown, 633 F.2d 106, 108 (8th Cir. 1980); Estate of Watson v. Blumenthal, 586 F.2d 925, 934 (2d Cir. 1978); District of Columbia Retirement Bd. v. United States, 657 F. Supp. 428, 432 (D.D.C. 1987). But see Gower v. Lehman, 799 F.2d 925 (4th Cir. 1986) (court looked to nature of plaintiff's cause of action rather than the relief he sought in finding Tucker Act inapposite).

characterizing his action as equitable in character when the result would be the equivalent of obtaining money damages. In other words, claims for monetary relief based upon equitable theories also fall within the purview of the Tucker Act, and a plaintiff may not transform a money claim into an equitable action simply by asking for injunctive, mandamus, or declaratory relief that orders the payment of money.[135]

Conversely, a claim for equitable or declaratory relief does not necessarily fall under the Tucker Act simply because it may later become the basis for a money judgment.[136] Where the equitable relief serves a significant purpose, independent of the recovery of money damages, it is not governed by the jurisdictional limitations of the Tucker Act.[137]

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[135]See, e.g., Mitchell v. United States, 930 F.2d 893 (Fed. Cir. 1991); Matthews v. United States, 810 F.2d 109 (6th Cir. 1987); Commonwealth of Mass. v. Departmental Grant Appeals Bd., 815 F.2d 778, 788 (1st Cir. 1987); Amoco Prod. Co. v. Hodel, 815 F.2d 352, 361 (5th Cir. 1987); State of New Mexico v. Regan, 745 F.2d 1318, 1322 (10th Cir. 1984), cert. denied, 471 U.S. 1065 (1985); Amalgamated Sugar Co. v. Bergland, 664 F.2d 818, 824 (8th Cir. 1981); Cape Fox Corp. v. United States, 646 F.2d 399 (9th Cir. 1981); Polos v. United States, 556 F.2d 903 (8th Cir. 1977); but see Wolfe v. Marsh, 846 F.2d 782 (D.C. Cir. 1988); Vietnam Veterans of America v. Secretary of the Navy, 843 F.2d 528 (D.C. Cir. 1988).

[136]Duke Power Co. v. Carolina Envt'l Study Group, 438 U.S. 59, 71 n.15 (1978); Vietnam Veterans of America v. Secretary of the Navy, 843 F.2d 528 (D.C. Cir. 1988); City of Sarasota v. EPA, 799 F.2d 674 (11th Cir. 1986); State of Tenn. ex rel. Leech v. Dole, 749 F.2d 331, 336 (6th Cir. 1984); State of Minn. v. Heckler, 718 F.2d 852, 858 (8th Cir. 1983).

[137]Hahn v. United States, 757 F.2d 581, 590 (3d Cir. 1985); State of Minn. v. Heckler, 718 F.2d 852, 859 (8th Cir. 1983); Giordano v. Roudebush, 617 F.2d 511 (8th Cir.
(continued...)

Federal courts have little difficulty resolving cases at the ends of the spectrum: those in which the plaintiff obviously seeks only money and those in which the plaintiff simply demands equitable relief. For example, in Polos v. United States,[138] a former civilian technician employed by the Arkansas Air National Guard challenged his termination, seeking both reinstatement and back pay in excess of $79,000. He asserted jurisdiction under the federal question statute and the Administrative Procedure Act. Because the National Guard had also separated Polos from his military status (which he did not contest), even if the court reinstated Polos to his civilian position, the National Guard would have discharged him again within 30 days. Consequently, Polos' claim was one for money--the only relief of substance he could expect from the lawsuit.[139]

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[137](...continued)
1980); Steffan v. Cheney, 733 F. Supp. 115 (D.D.C. 1989); District of Columbia Retirement Bd. v. United States, 657 F. Supp. 428, 432 (D.D.C. 1987).

[138]556 F.2d 903 (8th Cir. 1977).

[139]For later proceedings in Polos in the Court of Claims, see Polos v. United States, 621 F.2d 385 (Ct. Cl. 1980). Compare Stanford v. United States, 32 Fed. Cl. 363 (1994) (discharged military reservist failed to state a claim for back pay). See also Weeks Constr., Inc. v. Oglala Sioux Hsg. Auth., 797 F.2d 668 (8th Cir. 1986) (breach of contract claim for money damages); Portsmouth Redev. & Hsg. Auth. v. Pierce, 706 F.2d 471 (4th Cir. 1983) (suit to recover federal subsidies); Schulthess v. United States, 694 F.2d 175 (9th Cir. 1982) (suit to readjust civil service retirement annuity); Amalgamated Sugar Co. v. Bergland, 664 F.2d 818 (10th Cir. 1981) (suit to recover grain storage charges); Sellers v. Brown, 633 F.2d 106 (8th Cir. 1980) (suit for CHAMPUS benefits); Lee v. Blumenthal, 588 F.2d 1281 (9th Cir. 1979) (suit for redemption of federal bonds); Estate of Watson v. Blumenthal, 586 F.2d 925 (2d Cir. 1978) (same); Warner v. (continued...)

By contrast, in Blassingame v. Secretary of the Navy,[140] a veteran sought judicial review of a corrections board's refusal to upgrade his discharge. Blassingame sought only equitable relief. Significantly, even if ordered by the district court, such relief would have no monetary consequences. Similarly, in Sarasota v. Environmental Protection Agency,[141] the City of Sarasota contested the Environmental Protection Agency's [EPA] denial of its federal grant application. Sarasota contended that the regulations under which EPA had acted were unlawful. The court found that, while Sarasota ultimately wanted money from the grant process, the lawsuit would not entitle the city to such relief. A favorable decision on Sarasota's claim would only remand the case to the EPA to reconsider the city's grant application. Thus, Sarasota's claim was not one for money, even though it could later serve as the basis for monetary relief.[142]

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[139](...continued)
Cox, 487 F.2d 1301 (5th Cir. 1974) (suit to require Navy to continue paying vouchers under contract); District of Columbia Retirement Bd. v. United States, 657 F. Supp. 428 (D.D.C. 1987) (suit to require federal contribution to retirement fund).

[140]811 F.2d 65 (2d Cir. 1987).

[141]799 F.2d 674 (11th Cir. 1986).

[142]See also Fairview Township v. United States EPA, 773 F.2d 517 (3d Cir. 1985) (suit contesting denial of EPA grant); State of Tenn. ex rel. Leech v. Dole, 749 F.2d 331 (6th Cir. 1984) (suit to prevent federal government from sharing in damages recovered by state from "bid riggers" on federally-funded highway); Laguna Hermosa Corp. v. Martin, 643 F.2d 1376 (9th Cir. 1981) (suit to enforce extended lease agreement with the federal government); Megapulse, Inc. v. Lewis, 672 F.2d 959 (D.C. Cir. 1982) (suit to enjoin alleged violation of the Trade Secrets Act).

Federal courts have difficulty in divining the boundaries of the Tucker Act when the precise nature of a plaintiff's claim are unclear. In such cases, most federal courts attempt to determine the prime objective of the plaintiff's suit; that is, what will the plaintiff get if he or she is successful in the litigation? If the object of the plaintiff's success is money, the Tucker Act limits should apply.

A number of courts have considered various aspects of this vexing problem of jurisdiction over a suit brought to review agency action when that action allegedly resulted in the wrongful denial of federal funds. Concerned about the integrity of the Tucker Act, the courts have developed what may be called the "prime objective" doctrine of Court of Federal Claims jurisdiction: if victory for the plaintiff in the suit would be tantamount to a release of funds in excess of $10,000, then the Court of Federal Claims has exclusive jurisdiction over the suit, even if the action is styled as one for injunctive relief.[143]

Even using this general formulation, courts have been unable to agree about what constitutes a money

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[143]Fairview Township v. United States EPA, 773 F.2d 517, 528 (3d Cir. 1985). See also Amoco Prod. Co. v. Hodel, 815 F.2d 352, 362 (5th Cir. 1987); Hahn v. United States, 757 F.2d 581, 590 (3d Cir. 1985); Weeks Constr., Inc. v. Oglala Sioux Hsg. Auth., 797 F.2d 668, 675 (8th Cir. 1986); United States v. City of Kansas City, 761 F.2d 605, 608-09 (8th Cir. 1985); State of New Mexico v. Regan, 745 F.2d 1318, 1322 (10th Cir. 1984), cert. denied, 471 U.S. 1065 (1985); Portsmouth Redev. & Hsg. Auth. v. Pierce, 706 F.2d 471, 475 (4th Cir. 1983); District of Columbia Retirement Bd. v. United States 675 F. Supp. 428, 432 (D.D.C. 1987); Powell v. Marsh, 560 F. Supp. 636, 639 (D.D.C. 1983).

claim under the Tucker Act. For example, the federal courts have sharply diverged over whether a challenge to the government's decision to withhold grants is a claim for monetary or equitable relief.[144]

In Bowen v. Massachusetts,[145] the Supreme Court held that a district court could review a state's challenge of alleged wrongful withholding of Medicaid reimbursements by the Secretary of Health and Human Services. The Bowen court held that the district court had jurisdiction under the federal question statute and that section 702 of the APA[146] waived sovereign immunity for this claim for specific relief. The Court reasoned that the monetary aspects of this disallowance decision would not constitute damages in the sense that damages compensate for a loss, whereas the state of Massachusetts was seeking reimbursement that it was allegedly entitled to by statute. Bowen v. Massachusetts has served to further confuse the boundaries of the Tucker Act. However, claims for back pay arising in wrongful discharge cases have generally

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[144]Compare Commonwealth of Mass. v. Departmental Grant Appeals Bd., 815 F.2d 778 (1st Cir. 1987); United States v. City of Kansas City, 761 F.2d 605 (10th Cir. 1985); State of New Mexico v. Regan, 745 F.2d 1318 (10th Cir. 1984), cert. denied, 471 U.S. 1065 (1985), with Maryland Dep't of Human Resources v. Department of Health & Human Serv., 763 F.2d 1441 (D.C. Cir. 1985); State of Conn. Dept. of Income Maintenance v. Heckler, 731 F.2d 1052 (2d Cir. 1984).

[145]487 U.S. 879 (1988).

[146]5 U.S.C. § 702 limits district court review of final agency action to those claims "seeking relief other than money damages."

continued to be viewed as damages in the Tucker Act context.[147]

(d) Bifurcating the Case: Separating the Tucker Act and Non-Tucker Act Claims. Related to the question of which suits fall within the Tucker Act is what happens when a plaintiff seeks both monetary and equitable relief from the federal government in a single lawsuit. If the money claim exceeds $10,000, does exclusive jurisdiction over the entire lawsuit reside in the Court of Federal Claims? Or may the district court bifurcate the case, sending the money claim to the Court of Federal Claims and retaining the equitable claim? For example, if a soldier, who has been involuntarily separated, sues in district court for reinstatement in the Army and for back pay in excess of $10,000, must the district court transfer the entire lawsuit to the Court of Federal Claims? Or may it retain the claim for reinstatement and transfer only the back pay claim?

The federal courts have taken inconsistent approaches. Some courts, fearing that a district court's decision on the retained reinstatement claim will have a preclusive effect on the money claim in the Court of Federal Claims, have refused to permit bifurcation. These courts envision a threat to the exclusive jurisdiction of the Court of Federal Claims over the money claim by the potential collateral

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[147]Charles v. Rice, 28 F.3d 1312 (1st Cir. 1994); Mitchell v. United States, 930 F.2d 893 (Fed. Cir. 1991); Sibley v. Ball, 924 F.2d 25 (1st Cir.); aff'd, 944 F.2d 913 (Fed. Cir. 1991). But see Ward v. Brown, 22 F.3d 516 (2d Cir. 1994); Poole v. Rourke, 779 F. Supp. 1546 (E.D. Cal. 1991).

estoppel[148] effect of the district court's adjudication of the legality of the government's action in the reinstatement claim.[149] The position of these courts is bolstered by the fact that, since 1972, the Court of Claims (and now the Court of Federal Claims) has had jurisdictional authority to award equitable relief (such as reinstatement) incidental to a money judgment.[150]

On the other hand, a number of federal courts have held that a district court can retain jurisdiction over equitable claims grounded on the same facts as the money claims over which the Court of Federal Claims has exclusive jurisdiction. In such cases, the district courts may assume jurisdiction over the equitable claims if the nonmonetary relief is the primary purpose of the lawsuit. "[T]he declaratory or injunctive relief [sought must have] significant prospective effect or considerable value apart from merely determining monetary liability of the government. . . ."[151]

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[148]Collateral estoppel prohibits relitigation of previously litigated matters in a subsequent controversy. Vestal, The Constitution & Preclusion/Res Judicata, 62 Mich. L. Rev. 33 n.3 (1963).

[149]See, e.g., Matthews v. United States, 810 F.2d 109 (6th Cir. 1987); Keller v. MSPB, 679 F.2d 220 (11th Cir. 1982); Denton v. Schlesinger, 605 F.2d 484 (9th Cir. 1979); Cook v. Arentzen, 582 F.2d 870 (4th Cir. 1978); Carter v. Seamans, 411 F.2d 767 (5th Cir. 1969), cert. denied, 397 U.S. 941 (1970).

[150]Act of Aug. 29, 1972, Pub. L. No. 92-415, 86 Stat. 652 (codified at 28 U.S.C. § 1491(a)(2)).

[151]State of Minn. v. Heckler, 718 F.2d 852, 858 (8th Cir. 1983).

Thus, for example, in Giordano v. Roudebush,[152] the Eighth Circuit affirmed the district court's retention of jurisdiction over a reinstatement claim brought by a Veterans' Administration doctor who had been discharged for unsatisfactory performance. The district court transferred the back pay claim, which was over $10,000, to the Court of Claims. The court of appeals found that the plaintiff's claims were primarily nonmonetary in nature, since the gist of his action was to get his job back and to clear his name.[153]

(e) Waiver and Transfer. Plaintiffs who have asserted a Tucker Act claim in excess of $10,000 may remain in the district court if they waive any portion of the claim in excess in $10,000.[154] The waiver must not only include the amount of the claim that antedates the lawsuit, but also any money that accrues between the filing of the complaint and the entry of final judgment.[155] The waiver need not appear in the

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[152]617 F.2d 511 (8th Cir. 1980); see also Steffan v. Cheney, 733 F. Supp. 115 (D.D.C. 1989).

[153]Id. at 515. See also Shaw v. Gwatney, 795 F.2d 1351 (8th Cir. 1986); Hahn v. United States, 757 F.2d 581 (3d Cir. 1985); Hondros v. United States Civil Serv. Comm'n, 720 F.2d 278 (3d Cir. 1983); Rowe v. United States, 633 F.2d 799 (9th Cir. 1980); Atwell v. Orr, 589 F. Supp. 511 (D.S.C. 1984); Bruzzone v. Hampton, 433 F. Supp. 92 (S.D.N.Y. 1977).

[154]See, e.g., Zumerling v. Devine, 769 F.2d 745, 748 (Fed. Cir. 1985); Professional Managers' Ass'n v. United States, 761 F.2d 740, 742-43 (D.C. Cir. 1985); Lichtenfels v. Orr, 604 F. Supp. 271, 274-75 (S.D. Ohio 1984); Powell v. Marsh, 560 F. Supp. 636 (D.D.C. 1983); Heisig v. Secretary of the Army, 554 F. Supp. 623 (D.D.C. 1982), aff'd, 719 F.2d 1153 (Fed. Cir. 1983).

[155]Goble v. Marsh, 684 F.2d 12, 15-16 (D.C. Cir. 1982). Cf. Shaw v. Gwatney, 795 F.2d 1351 (8th Cir. 1986) (continued...)

initial complaint, however. It may be made at a later stage in the proceedings.[156]

If the plaintiff files a Tucker Act claim over $10,000 in the district court and refuses to waive the money claim in excess of the court's jurisdiction, the district court may, in the interest of justice, transfer the action to the Court of Federal Claims.[157] The United States Court of Appeals for the Federal Circuit has exclusive jurisdiction of an interlocutory appeal of a district court order granting or denying, in whole or in part, a transfer of a case to the Court of Federal Claims.[158]

(4) The Tucker Act and Substantive Rights to Relief. As will be discussed in greater detail,[159] the Tucker Act is only a jurisdictional statute. It does not create any substantive rights enforceable against the United States for money damages.[160] Instead, a

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[155](...continued)
(Tucker Act claim includes amount accrued during the pendency of the lawsuit).

[156]See Steffan v. Cheney, 733 F. Supp. 115, 120 n.2 (D.D.C. 1989), citing Heisig v. Secretary of the Army, 554 F. Supp. 623 (D.D.C. 1982), aff'd, 719 F.2d 1153 (Fed. Cir. 1983).

[157]28 U.S.C. § 1631. This statute simply gives the district court the requisite jurisdiction to transfer the case. If in the interest of justice the court does not transfer the case, it must dismiss the case for lack of jurisdiction. See Goad v. United States, 661 F. Supp. 1073 (S.D. Tex. 1987).

[158]Judicial Improvements and Access to Justice Act, § 501, Pub. L. No. 100-702, 102 Stat. 4652 (1988).

[159]See infra § 4.3b.(2)(a).

[160]United States v. Testan, 424 U.S. 392 (1976).

plaintiff must show a contract, or a constitutional, statutory, or regulatory provision that grants a right to monetary relief from the United States.[161] The courts disagree about whether the absence of a substantive right to monetary relief is a defect of a jurisdictional character in a suit under the Tucker Act.[162]

Examples of statutes creating substantive rights to pay are the Back Pay Act, 5 U.S.C. § 5596(b), for civilian employees of the government and the military pay statute, 37 U.S.C. § 204, for members of the military services.[163] Nonappropriated fund employees, who are not covered by the Back Pay Act, have no substantive basis for back pay claims against the United States absent an employment contract.[164]

(5) Appeal of Tucker Act Cases.

(a) General Rules. Under the Federal Courts Improvement Act of 1982,[165] the Court of Appeals

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[161]United States v. Testan, 424 U.S. 392 (1976); United States v. Woods, 986 F.2d 669 (3d Cir.), cert. denied, 114 S. Ct. 90 (1993).

[162]Compare Commonwealth of Mass. v. Departmental Grant Appeals Bd., 815 F.2d 778, 787 (1st Cir. 1987); Maryland Dep't of Human Resources v. Department of Health & Human Serv., 763 F.2d 1441, 1449-50 (D.C. Cir. 1985), with Hahn v. United States, 757 F.2d 581, 588 n.4 (3d Cir. 1985). See generally Bell v. Hood, 327 U.S. 678 (1946).

[163]See, e.g., Murphy v. United States, 993 F.2d 871 (Fed. Cir. 1993); Sanders v. United States, 594 F.2d 804 (Ct. Cl. 1979).

[164]AAFES v. Sheehan, 456 U.S. 728 (1982); Lunetto v. United States, 560 F. Supp. 712 (N.D. Ill. 1983).

[165]Pub. L. No. 97-164, § 127, 96 Stat. 37 (codified at 28 U.S.C. § 1295(a)(2)).

for the Federal Circuit has exclusive appellate jurisdiction over district court judgments whenever the subject-matter jurisdiction of the district courts is based, in whole or in part, on the Tucker Act.[166] Even where a district court's subject-matter jurisdiction is also based on some other statute, if the plaintiff makes any claim that invokes the Tucker Act, the entire case must be appealed to the Federal Circuit.[167] A plaintiff invokes the Tucker Act when his or her claim "(1) seek[s] money (2) not exceeding $10,000 (3) from the United States and (4) [is] founded either upon a contract or a provision of 'the Constitution, or any Act of Congress, or any regulation of an executive department,' that 'can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.'"[168] If all of these elements are present, the claim falls under the Tucker Act and the Federal Circuit has exclusive jurisdiction over the appeal.[169] The Court of Appeals for the Federal Circuit

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[166]United States v. Hohri, 482 U.S. 64 (1987); Sibley v. Ball, 924 F.2d 25 (1st Cir.); aff'd, 944 F.2d 913 (Fed. Cir. 1991); Parker v. King, 935 F.2d 1174 (11th Cir. 1991); Williams v. Secretary of the Navy, 787 F.2d 552, 558 (Fed. Cir. 1986); Bray v. United States, 785 F.2d 989, 990 (Fed. Cir. 1986); Maier v. Orr, 754 F.2d 973, 980-81 (Fed. Cir. 1985).

[167]United States v. Hohri, 482 U.S. 64 (1987); Van Drasek v. Lehman, 762 F.2d 1065, 1068 (D.C. Cir. 1985); Professional Managers' Ass'n v. United States, 761 F.2d 740, 743-44 (D.C. Cir. 1985).

[168]Van Drasek v. Lehman, 762 F.2d 1065, 1068 (D.C. Cir. 1985), quoting United States v. Mitchell, 463 U.S. 206 (1983).

[169]Id.

also has exclusive jurisdiction over all appeals from the United States Court of Federal Claims.[170]

(b) Exceptions. The federal courts have carved a number of exceptions out of the general rule that appeal of all cases invoking the Tucker Act is to the Federal Circuit. For example, where a plaintiff's Tucker Act claim is frivolous or exceeds the jurisdiction of the district court, appeal to the regional court of appeals is appropriate.[171]

Moreover, while not all courts agree, where a claim may be brought under statutes that independently confer jurisdiction upon the district court to award money damages against the United States, the claim is not deemed to be based on the Tucker Act for purposes of appellate jurisdiction.[172]

The jurisdiction of the Federal Circuit, however, may not be avoided by artful pleading. "[N]either a plaintiff's nor a district court's mere recitation of the basis for jurisdiction may alter the scope of [the Federal Circuit's jurisdiction]. . . . [The court] will look to the true nature of the action in the district court in determining jurisdiction of an appeal. . . . A civil action for the recovery of money against the

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[170]28 U.S.C. § 1295(a)(3).

[171]Empire Kosher Poultry, Inc. v. Hallowell, 816 F.2d 907, 917 (3d Cir. 1987); Shaw v. Gwatney, 795 F.2d 1351, 1353 (8th Cir. 1986); Sharp v. Weinberger, 798 F.2d 1521 (D.C. Cir. 1986); Van Drasek v. Lehman, 762 F.2d 1065, 1070 (D.C. Cir. 1985); Doe v. United States Dep't of Justice, 753 F.2d 1092, 1101-02 (D.C. Cir. 1985).

[172]Van Drasek v. Lehman, 762 F.2d 1065, 1070-71 (D.C. Cir. 1985).

United States cannot be disguised by couching it in [other] terms."[173] The Court of Appeals for the Seventh Circuit, citing the need for judicial efficiency and economy, refused to transfer a Tucker Act claim to the Federal Circuit that had already been decided by the court.[174] While recognizing that the liberal language of 28 U.S.C. § 1295(a)(2) required such a transfer, the Seventh Circuit held that it would be inefficient and unfair to vacate the court's opinion simply to give the Government--the losing party--the opportunity to reargue the case before the Federal Circuit.[175]

(c) Interlocutory Appeals. As is apparent, the overlapping jurisdiction of the Court of Federal Claims and district courts in cases involving monetary claims against the United States raises difficult jurisdictional issues. Prior to 1988, a party who believed it was improperly before the district court had to wait until the conclusion of the trial court proceeding before contesting jurisdiction at the appellate level. In 1988, Congress enacted legislation to facilitate expeditious review of intricate questions

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[173]Maier v. Orr, 754 F.2d 973, 982 (Fed. Cir. 1985). See also Sibley v. Ball, 924 F.2d 25 (1st Cir. 1991); Wronke v. Marsh, 767 F.2d 354, 355 (7th Cir. 1985); Megapulse, Inc. v. Lewis, 672 F.2d 959, 967 (D.C. Cir. 1982). Where a plaintiff obviously does not seek money, however, the courts will not infer a Tucker Act claim. ben Shalom v. Secretary of the Army, 807 F.2d 982, 987 (Fed. Cir. 1986).

[174]Squillacote v. United States, 747 F.2d 432 (7th Cir. 1984), cert. denied, 471 U.S. 1016 (1985).

[175]Id. at 439-40. But see Professional Managers' Ass'n v. United States, 761 F.2d 740, 745 (D.C. Cir. 1985) (refusing to follow Squillacote). See also Wronke v. Marsh, 767 F.2d 354 (7th Cir. 1985) (limiting Squillacote to its unique facts).

about Tucker Act jurisdiction.[176] The statute authorizes an interlocutory appeal to the Court of Appeals for the Federal Circuit of any district court order which grants or denies, in whole or in part, a motion to transfer an action to the Court of Federal Claims.[177] When an interlocutory appeal is filed, the district court must suspend proceedings until the Federal Circuit decides the jurisdictional question.[178]

d. The Federal Tort Claims Act.

(1) General. The Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2761-2780, creates jurisdiction for tort suits against the United States. The jurisdictional provision of the Act is 28 U.S.C. § 1346(b), which provides:

> (b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

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[176]Pub. L. No. 100-702, § 501, 102 Stat. 4652 (codified at 28 U.S.C. § 1292(d)(4)).

[177]See Kanemoto v. Reno, 41 F.3d 641 (Fed. Cir. 1994) Mitchell v. United States, 930 F.2d 893 (Fed. Cir. 1991).

[178]See 28 U.S.C. § 1292(d)(4).

(2) Historical Origins. Before 1855, the doctrine of sovereign immunity barred judicial resolution of claims for money damages against the United States. The only recourse available to claimants was to seek relief from Congress through private bills.[179] In 1855, to relieve the workload and inequities caused by the private bill procedure, Congress created the Court of Claims.[180] The new court received jurisdiction to determine all claims founded upon any law of Congress, or regulation of an executive department, or any contact, express or implied, with the United States.[181] Although its early jurisdictional statutes made no mention of tort claims,[182] the Court of Claims, and later the Supreme Court, held that Congress had not conferred upon the Court of Claims jurisdiction to adjudicate tort suits.[183] Under the Tucker Act, enacted in 1887, Congress expressly limited the Court of Claims jurisdiction to cases "not sounding in tort."[184]

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[179]United States v. Mitchell, 463 U.S. 206, 212 (1983). See also supra notes 108-111 and accompanying text.

[180]Act of Feb. 24, 1855, 10 Stat. 612.

[181]Id.

[182]Id.; Act of March 3, 1863, 12 Stat. 765; Act of March 17, 1866, 14 Stat. 9.

[183]See, e.g., Morgan v. United States, 81 U.S. (14 Wall.) 531 (1871); Gibbons v. United States, 75 U.S. (8 Wall.) 269 (1868); Spicer v. United States, 1 Ct. Cl. 316 (1865); Pitcher v. United States, 1 Ct. Cl. 17 (1863). See generally 1 L. Jayson, Handling Federal Tort Claims 2-11 - 2-14 (1986).

[184]Act of March 3, 1887, 24 Stat. 505. The House bill would have given the court jurisdiction over tort claims. The Senate, however, refused to accede and tort claims (continued...)

From the time of the creation of the Court of Claims, Congress slowly encroached upon the government's sovereign immunity from tort claims. During the late 19th and early 20th centuries, Congress provided limited judicial and administrative remedies for particular torts caused by agents and employees of the United States.[185]

As the federal government grew, so did the torts committed by its employees. The burden of private relief bills, as well as pressure from the academic community, the private bar, and the judicial and executive branches, forced Congress to consider a general waiver of the federal government's sovereign immunity from tort claims.[186] From the 1920's to 1946, Congress debated various proposals for a general tort claims act.[187] The Federal Tort Claims Act finally became law in 1946.[188] In 1966, Congress amended the Act to make

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[184](...continued)
were excluded from the law. L. Jayson, supra note 183, at 2-16 - 2-17.

[185]L. Jayson, supra note 183, at 2-18. These statutes are described in id. at 2-19 - 2-45. They include the Military Claims Act of July 3, 1943, 57 Stat. 372; the Suits in Admiralty Act, Act of March 9, 1920, 41 Stat. 1525; and the Federal Employees' Compensation Act, Act of Sept. 7, 1916, 39 Stat. 742.

[186]L. Jayson, supra note 183, at 2-51, 2-67.

[187]These bills are described in id. at 2-54 to 2-67.

[188]Pub. L. No. 79-601, 60 Stat. 812 (1946) (codified at 28 U.S.C. §§ 1346(b), 2671 - 2680).

administrative review of tort claims a prerequisite to suit in the federal courts.[189]

(3) Jurisdictional Prerequisites. A plaintiff must meet two jurisdictional prerequisites to perfect a claim under the Federal Tort Claims Act. First, the plaintiff must present the claim to the appropriate federal agency within two years of the accrual of the cause of action.[190] At a minimum, this administrative claim must consist of a demand in writing for a specified sum of money.[191] A failure either to file an administrative claim or to file it within two years of its accrual will deprive a district court of jurisdiction over the claim. Neither failure can be waived.[192] Second, the plaintiff must file suit in the district court within six months of the denial of the administrative claim by the agency, or the claim is

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[189]Act of July 18, 1966, Pub. L. No. 89-506, 80 Stat. 306 (codified at 28 U.S.C. § 2675).

[190]28 U.S.C. §§ 2401(b), 2675 (1982). See generally L. Jayson, supra note 183, at §§ 135, 138.

[191]See, e.g., Montoya v. United States, 841 F.2d 102 (5th Cir. 1988); Burns v. United States, 764 F.2d 722 (9th Cir. 1985).

[192]See, e.g., Magruder v. Smithsonian Inst., 758 F.2d 591, 593 (11th Cir. 1985) (two-year statute of limitations); Lee v. United States, 980 F.2d 1337 (10th Cir. 1992); Avila v. INS, 731 F.2d 616, 618 (9th Cir. 1984) (administrative claim requirement); Jackson v. United States, 730 F.2d 808, 809 (D.C. Cir. 1984) (administrative claim requirement); Lykins v. Pointer, Inc., 725 F.2d 645, 646 (11th Cir. 1984) (administrative claim requirement); Gould v. Dep't of Health and Human Services, 905 F.2d 738 (4th Cir. 1990) (two-year statute of limitations); Richman v. United States, 709 F.2d 122, 124 (1st Cir. 1983) (two-year statute of limitations). Cf. United States v. Kubrick, 444 U.S. 111, 117-18 (1979) (statute of limitations a condition on the waiver of sovereign immunity under the Federal Tort Claims Act).

jurisdictionally barred.[193] Under the Feres doctrine, military personnel may not bring claim under the Federal Tort Claims Act.[194]

(4) The Federal Tort Claims Act and Substantive Rights to Relief. Like the Tucker Act, the Federal Tort Claims Act does not provide an independent cause of action or a substantive right enforceable against the United States. The statute simply confers jurisdiction and waives sovereign immunity whenever the cause of action or the substantive right exists.[195] In general, the Act confers jurisdiction on the district courts to adjudicate a limited number of state-created tort claims against the federal government.[196]

e. Mandamus.

(1) General. The mandamus statute, 28 U.S.C. § 1361, grants "original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a

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[193]28 U.S.C. § 2401(b). See, e.g., McNeil v. United States, 964 F.2d 647 (7th Cir. 1992), aff'd, 113 S. Ct. 1980 (1993); Houston v. U.S.P.S., 823 F.2d 896, 903 (5th Cir. 1987); Allen v. Veterans Admin, 749 F.2d 1386 (9th Cir. 1984); Willis v. United States, 719 F.2d 608 (2d Cir. 1983); Woirhaye v. United States, 609 F.2d 1303, 1306 (9th Cir. 1979).

[194]See, e.g., Miller v. United States, 42 F.3d 297 (5th Cir. 1995) (Naval Academy midshipman could not sue for physical disability resulting from a sailing accident during training).

[195]Graham v. Henegar, 640 F.2d 732 (5th Cir. 1981); Reynolds v. United States, 643 F.2d 707 (10th Cir. 1981), cert. denied, 454 U.S. 817 (1981).

[196]28 U.S.C. § 1346(b). See L. Jayson, supra note 183, at §§ 150-51.

duty owed to the plaintiff." The plaintiff must have a clear right to the relief sought, and the duty on the part of the defendant must be ministerial, as opposed to discretionary, in character.[197]

(2) Historical Origins.

(a) Mandamus before 1962. "The writ of mandamus was developed by the English law courts as a broad remedial measure by which parties could be compelled to perform in a certain manner."[198] After the American Revolution, state courts in the United States adopted the English mandamus remedy, "but in the federal courts the issuance of the writ became intertwined with basic questions of separation of powers and federal court jurisdiction."[199] In 1803, the Supreme Court decided in Marbury v. Madison,[200] that it lacked original jurisdiction under the Constitution to grant writs of mandamus. Ten years later, in M'Intire v. Wood,[201] the Court held that the lower federal courts were without jurisdiction to grant original writs of mandamus under the Judiciary Act of 1789. In 1838, however, the Supreme Court found that the Circuit Court for the District of Columbia, as the inheritor of the common law

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[197]See, e.g., Matthews v. United States, 810 F.2d 109 (6th Cir. 1987); Turner v. Weinberger, 728 F.2d 751, 755 (5th Cir. 1984); Carter v. Seamans, 411 F.2d 767 (5th Cir. 1969), cert. denied, 397 U.S. 941 (1970); Atwell v. Orr, 589 F. Supp. 511, 516-17 (D.S.C. 1984).

[198]French, The Frontiers of the Federal Mandamus Statute, 21 Vill. L. Rev. 637, 640 (1976).

[199]Id. at 641.

[200]5 U.S. (1 Cranch) 137 (1803).

[201]11 U.S. (7 Cranch) 504 (1813).

jurisdiction of Maryland--which ceded the District to the Federal Government--had original jurisdiction to issue writs of mandamus.[202] Thus, until 1962, only the federal court in the District of Columbia had power to grant mandamus relief in original actions.[203] Even where mandamus was available, the scope of the remedy was relatively constricted. Mandamus would only issue to compel a ministerial--as opposed to a discretionary--function where no other adequate specific remedy existed.[204] Mandamus issues to compel an officer to perform a purely ministerial duty. It cannot be used to compel or control a duty in the discharge of which by law he is given discretion. The duty may be discretionary within limits. He cannot transgress those limits, and if he does so, he may be controlled by injunction or mandamus to keep within them. The power of the court to intervene, if at all, thus depends upon what statutory discretion he has. Under some statutes, the discretion extends to a final construction by the officer of the statute he is executing. No court in such case can control by mandamus his interpretation, even if it may think it erroneous.[205]

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[202]Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524 (1838).

[203]Byse & Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action, 81 Harv. L. Rev. 308, 312 (1967).

[204]Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524, 614 (1838).

[205]Work v. United States ex rel. Rives, 267 U.S. 175, 177 (1925). See also United States ex rel. Girard Trust Co. v. Helvering, 301 U.S. 540, 543-44 (1937); Wilbur v. United States ex rel. Kadrie, 281 U.S. 206, 218 (1930); United States ex rel. Dunlap v. Black, 128 U.S. 40, 48 (1888); Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 515-
(continued...)

(b) The Mandamus and Venue Act of 1962. In response to pressure by the western states to decentralize mandamus jurisdiction outside the District of Columbia, Congress enacted the Mandamus and Venue Act of 1962,[206] Under section 1361, all federal district courts, not just the District Court for the District of Columbia, could exercise mandamus jurisdiction. While the Act expanded the courts that could grant mandamus relief, however, "it [was] not intended to expand either the availability or scope of judicial review of federal administrative actions."[207] "Section 1361 does not enlarge the instances in which the writ of mandamus will issue, or affect the doctrine of sovereign immunity or the doctrine of separation of powers of the branches of the federal government."[208] Consequently, mandamus under section 1361 continues to be governed by traditional limits on the remedy.[209]

The mandamus remedy is discussed in greater detail in chapter 4.

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[205](...continued)
16 (1840); Marbury v. Madison, 5 U.S. (1 Cranch.) 137, 169-71 (1803).

[206]Pub. L. No. 87-748, 76 Stat. 744 (codified at 28 U.S.C. §§ 1361, 1391(e)). See Byse & Fiocca, supra note 202, at 313-18; French, supra note 197, at 644.

[207]Byse & Fiocca, supra note 202, at 319.

[208]7B Moore's Federal Procedure JC-548-549 (1984). See also Project, Federal Administrative Law Developments-1972; Mandamus in Administrative Actions: Current Approaches, 1973 Duke L.J. 207, 209.

[209]4 K. Davis, Administrative Law Treatise § 23.8 (1983).

f. Habeas Corpus.

(1) General. As noted in the previous chapter, 28 U.S.C. §§ 2241-2255 set out federal habeas corpus procedures. The operative jurisdictional provision of the habeas corpus statutes is 28 U.S.C. § 2241, which provides:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdiction. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
>
> (b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless--
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> (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
>
> (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States; or
>
> (4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

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(2) Historical Origins.

(a) Early English History. The writ of habeas corpus originated in England as a device for compelling a defendant's appearance before the King's courts.[210]

It was a form of mesne process--a procedural order issued after the initiation of legal proceedings--by which a party to a lawsuit (usually the defendant) could be taken into custody by the sheriff and forced to appear in court.[211] This procedural device was firmly established in England by 1230.[212] Between the mid-fourteenth century and the mid-sixteenth century, the common law courts used the writ in their power struggles with inferior courts and rival central courts, such as

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[210]Duker, The English Origins of the Writ of Habeas Corpus: A Peculiar Path to Fame, 53 N.Y.U.L. Rev. 983, 1053 (1978). A number of legal scholars, including Coke and Blackstone, have linked the writ of habeas corpus to the Magna Carta, writing that the writ had its origins in the Great Charter. See D. Meador, Habeas Corpus and Magna Carta: Dualism of Power and Liberty 3-4, 22-30 (1966). In fact, the two were unrelated; habeas corpus predates the Magna Carta. Id. at 5.

[211]D. Meador, supra note 209, at 8; Duker, supra note 209, at 992, 995; Developments in the Law--Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1042 (1969).

[212]Duker, supra note 209, at 992.

the Chancery, the Admiralty, and the Star Chamber.[213] The writ was employed as a means to deprive these rival courts of their ultimate sanction--imprisonment, and it enabled the common law courts to enlarge and consolidate their jurisdictional authority.[214] In the late-sixteenth century and early-seventeenth century, the writ began to be used to challenge arbitrary confinement by the Crown, especially the Privy Council and the Star Chamber.[215] In early cases, the writ proved to be ineffective against the power of the King.[216]

In its struggles with the Crown during the seventeenth century, however, Parliament enacted several measures to strengthen the efficacy of the writ, including the Petition of Right,[217] the Habeas Corpus Act of 1641,[218] and the Habeas Corpus Act of 1679.[219] Moreover, several judicial opinions during this period further enhanced habeas corpus as a bulwark against the

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[213]Id. at 1007; D. Meador, supra note 209, at 12; Developments in the Law--Federal Habeas Corpus, supra note 210, at 1042.

[214]Duker, supra note 209, at 1012, 1015-1025; Developments in the Law--Federal Habeas Corpus, supra note 210, at 1042.

[215]Duker, supra note 209, at 1026; Developments in the Law--Federal Habeas Corpus, supra note 210, at 1043.

[216]See Darnel's Case, 3 Cobbett's St. Tr. 1 (K.B. 1627) (court refused to look beyond return stating prisoner held by command of the King). See generally D. Meador, supra note 209, at 13-19.

[217]3 Car. I, c. I.

[218]16 Car. I, c. 10.

[219]31 Car. 2, c. 2.

arbitrary exercise of executive power.[220] By the time of the American Revolution, the writ of habeas corpus had become an effective means of protecting Englishmen from unlawful imprisonment by the government.[221]

(b) Development of the Writ in the United States. Although Parliament's habeas corpus legislation was never formally extended to the American colonies, "the writ as a part of the common law was considered to be the heritage of every Englishman."[222] "This claim received legitimation in colonial charters and later in state legislation that adopted in substance the English Habeas Corpus Act of 1679."[223] After independence, there was some debate whether to include a habeas corpus provision in the federal constitution.[224] The Constitutional Convention finally settled upon a provision barring the writ's suspension.[225]

Following the adoption of the Constitution, the Congress passed the Judiciary Act of 1789, "which empowered federal courts to issue writs of habeas corpus

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[220]E.g., Chamber's Case, 79 Eng. Rep. 746 (K.B. 1630); Bushell's Case, 124 Eng. Rep. 1006 (C.P. 1670).

[221]Duker, supra note 209, at 1054.

[222]Developments in the Law--Federal Habeas Corpus, supra note 210, at 1045.

[223]Rosen, The Great Writ--A Reflection of Societal Change, 44 Ohio St. L.J. 337, 338 (1983). See also D. Meador, supra note 209, at 30-32.

[224]D. Meador, supra note 209, at 32, 34; Rosen, supra note 222, at 338.

[225]Rosen, supra note 222, citing U.S. Const. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it").

to prisoners 'in custody under or by colour of the authority of the United States. . . .'"[226] The federal courts have had jurisdiction to grant habeas corpus relief ever since.[227]

(3) Custody Requirement. Habeas corpus is the classic remedy for relief from unlawful custody.[228] Indeed, custody is a jurisdictional requirement for habeas relief.[229] Habeas corpus is a principal means of collaterally attacking the sentence to confinement of a court-martial.[230] It is also a remedy for persons claiming they are being held improperly by military

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[226]Developments in the Law--Federal Habeas Corpus, supra note 210, at 1045, quoting Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81-82.

[227]See infra chapter 8 for a discussion of the use of habeas corpus to collaterally challenge courts-martial.

[228]E.g., Johnson v. Avery, 393 U.S. 483, 485 (1969); Fay v. Noia, 372 U.S. 391, 409 (1963).

[229]28 U.S.C. § 2241; Wales v. Whitney, 114 U.S. 564 (1885). See generally Developments in the Law--Federal Habeas Corpus, supra note 210, at 1072. "Until recently the custody requirement was strictly construed." Hart & Wechlsler's Federal Courts, supra note 11, at 1507. In the 1960's the Supreme Court began to expand the notion of custody. See, e.g., Maleng v. Cook, 109 S. Ct. 1923 (1989) (petitioner "in custody" for purposes of challenging State court conviction even though not currently serving sentence under state conviction because of confinement in federal prison on federal charges where state has placed detainer on prisoner); Hensley v. Municipal Court, 411 U.S. 345 (1973) (petitioner free on bail in custody for purpose of habeas corpus); Jones v. Cunningham, 371 U.S. 236 (1963) (petitioner free on parole in custody). See also Carafas v. LaVallee, 391 U.S. 234 (1968) (if person in custody when petition filed, court retains habeas jurisdiction even if petitioner is later unconditionally released).

[230]See, e.g., Burns v. Wilson, 346 U.S. 137 (1953); Ex parte Reed, 100 U.S. 13 (1879).

authorities.[231] Thus, a servicemember denied an administrative separation can litigate the propriety of the denial in a habeas corpus proceeding. Retention in the military, even though not constituting arrest or imprisonment, is regarded as "custody" for purposes of habeas corpus jurisdiction.[232]

Similarly, a member of the Army Reserve ordered to involuntary active duty is also in "custody" for purposes of the habeas statute.[233]

(4) Venue. A habeas petitioner must bring his action in the district where the custodian resides.[234] For military prisoners, jurisdiction is in the district where the commander of the confinement facility is located.[235] Active duty servicemembers can challenge continued military service in the federal districts where their "chain-of-command" resides, normally at their assigned installation.[236] Reservists who are not assigned to any particular unit may be able to file their habeas petitions in the judicial district in which

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[231]See, e.g., Parisi v. Davidson, 405 U.S. 34 (1972); Leondard v. Dep't of the Navy, 786 F. Supp. 82 (D. Me. 1992).

[232]Schlanger v. Seamans, 401 U.S. 487 (1971).

[233]Strait v. Laird, 406 U.S. 341 (1972).

[234]28 U.S.C. § 2241(a). See generally Hart & Wechsler's Federal Courts, supra, note 11, at 1430-34.

[235]E.g., Chatman v. Hernandez, 805 F.2d 453 (1st Cir. 1986); Scott v. United States, 586 F. Supp. 66 (E.D. Va. 1984).

[236]Schlanger v. Seamans, 401 U.S. 487 (1971); Centa v. Stone, 755 F. Supp. 197 (N.D. Ohio 1991).

they have had the most significant contacts with the military.[237]

g. Civil Rights Jurisdiction. The jurisdictional predicate for lawsuits under the various civil rights statutes,[238] is 28 U.S.C. § 1343, which provides:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
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> (1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of title 42;
>
> (2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of title 42 which he had knowledge were about to occur and power to prevent;
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
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> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

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[237]Strait v. Laird, 406 U.S. 341 (1972).

[238]E.g., 42 U.S.C. §§ 1981, 1983, 1985, 2000e. See, e.g., Drumheller v. Department of the Army, 49 F.3d 1566 (Fed. Cir. 1995) (civilian employee of the Army was not denied constitutional rights when her security clearance was revoked).

h. Other Jurisdictional Bases for Suit.

(1) Statutes Providing Jurisdiction. A number of statutes provide jurisdiction for lawsuits against the military in special types of cases. For example, both the Freedom of Information Act,[239] and the Privacy Act,[240] provide jurisdictional bases for litigation in the district courts.

(2) Statutes Not Providing Jurisdiction. Plaintiffs' counsel often incorrectly cite several other statutory provisions as jurisdictional grounds for suit. Most common are the Administrative Procedure Act,[241] the Declaratory Judgment Act,[242] and civil rights statutes besides Title VII of the Civil Rights Act of 1964.[243]

## 3.4 Justiciability.

a. General. The power of the federal courts is not only confined to the jurisdiction granted by Congress. Federal court jurisdiction also is limited by the "case" or "controversy" requirement of article III

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[239]5 U.S.C. § 552(a)(4).

[240]5 U.S.C. § 552a(g)(1). See, e.g., Balbinot v. United States, 872 F. Supp. 546 (C.D. Ill. 1994) (false statement by a former commander of a Naval enlistee was not a "record" so the statement did not violate the Privacy Act).

[241]5 U.S.C. §§ 701-06. See Califano v. Sanders, 430 U.S. 99 (1977).

[242]28 U.S.C. §§ 2201-02. See Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1952).

[243]See, e.g., Holloway v. Bentsen, 870 F. Supp. 898 (N.D. Ind. 1994) (suit by a federal employee against other federal employees under 42 U.S.C. § 1981 dismissed).

of the Constitution. The Supreme Court has derived from the words "case" and "controversy" an entire body of doctrine describing the circumstances under which federal courts may or may not exercise their subject matter jurisdiction.[244] The terms "case" and "controversy" embody two separate concepts: in part the words limit the courts to questions presented in an adversary context, and in part the words involve concerns that federal courts should not intrude into areas constitutionally committed for decision to the other two branches of the Government.[245] "Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-and-controversy doctrine."[246] The dual limits are known as the adversarial prong and the political question prong of justiciability.

The various rules embodying justiciability are not simply hypertechnical procedural hurdles devised by the Supreme Court to avoid the adjudication of substantive issues. Instead, these doctrines limiting who can challenge governmental action[247] and when the challenge can be brought involve "fundamental assumptions as to the Court's appropriate role in our constitutional

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[244]L. Tribe, supra note 13, at 52-53.

[245]Flast v. Cohen, 392 U.S. 83, 94-95 (1968).

[246]Id. at 95 (emphasis added).

[247]The "case or controversy" requirement arises infrequently in private litigation. Justiciability comes almost entirely from lawsuits challenging governmental actions. C. Wright, supra note 11, at 62.

scheme."[248] They define the proper role of the federal courts in our tripartite system of government, governing the circumstances under which the courts can intrude into the business of the other branches of the government.[249]

b. Adversarial Prong. The adversarial prong of justiciability requires that a case be presented "in a form historically viewed as capable of resolution through the judicial process."[250] Specifically, this

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[248]Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L.J. 1363, 1363-64 (1973). See also Rescue Army v. Municipal Court, 331 U.S. 549, 570 (1947); Brilmayer, The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement, 93 Harv. L. Rev. 297, 302-15 (1979).

[249]The "case of controversy" requirement is also "intimately related to the doctrine of judicial review." C. Wright, supra note 11, at 54. In Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), the Court reasoned that the power to declare a law unconstitutional was incidental to its obligation to decide the particular case before it: "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each." Id. at 177 (emphasis added). The orthodox view of Marbury is that federal courts can decide constitutional questions only in the context of cases that conform to the traditional model of private litigation. C. Wright, supra note 11, at 54. See also Ashwander v. TVA, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring); Liverpool, N.Y. & Philadelphia Steamship Co. v. Commissioner of Emigration, 113 U.S. 33, 39 (1885); G. Gunther, Constitutional Law 1533-34 (11th ed. 1985); Monaghan, supra note 238, at 1365-66.

[250]Flast v. Cohen, 392 U.S. 83, 94-95 (1968). See, e.g., Bunch v. United States, 33 Fed. Cl. 337 (1995) (suit by Colonel Bunch seeking an order that he be promoted to brigadier general and given retroactive pay raises was not justiciable so the court had no power to grant the (continued...)

includes the prohibition against advisory opinions, the requirements of ripeness and standing, and the proscription against deciding moot cases.

(1) Advisory Opinions. "[T]he oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions. . . ."[251] An advisory opinion is the legal opinion of a court outside the context of a "case or controversy." It is an answer to a hypothetical question of law unconnected with any particular case. As such, advisory opinions do not fall within the traditional view of the judicial function.[252]

Very early in the nation's history the federal courts refused to render advisory opinions. In

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[250](...continued)
relief sought); Lee v. United States, 32 Fed. Cl. 530 (1995) (Air Force Reserve officer's discharge was nonjusticiable as there was no standard by which the court could measure the actions of the Air Force); Clark v. Widnall, 51 F.3d 917 (10th Cir. 1995) (Reserve officer failed to demonstrate that military authority acted in any way that would justify interference by a civil court).

[251]C. Wright, supra note 11, at 65.

[252]See Hart & Wechsler's Federal Courts, supra note 11, at 66:

> [T]he judicial function is essentially the function (in such cases as may be presented for decision) of authoritative application to particular situations of general propositions drawn from preexisting sources--including as a necessary incident the function of determining the facts of the particular situation and of resolving uncertainties about the content of the applicable general propositions.

Hayburn's Case,[253] a number of Supreme Court justices sitting as circuit judges would not give advice to Congress and the Secretary of War on the disposition of Revolutionary War pension applications. The justices reasoned that the rendition of such advice did not fall within the ambit of the judicial function.[254] The following year, the Court refused to answer questions submitted by President Washington, through Secretary of State Jefferson, about America's neutrality in the war between France and Great Britain.[255]

While the questions of advisory opinions rarely appear in their pure form,[256] the concerns that underlie

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[253]2 U.S. (2 Dall.) 409 (1792).

[254]The fatal defect in the pension adjudication scheme was that the circuit courts' decisions were subject to the revision of the Secretary of War and Congress. Thus, the decisions lacked finality; they amounted to little more than advice. See also Chicago & Southern Air Lines v. Waterman S.S. Corp., 333 U.S. 103 (1948); Gordon v. United States, 69 U.S. (2 Wall.) 561 (1864); United States v. Ferreira, 54 U.S. (13 How.) 40 (1852).

[255]See Hart & Wechsler's Federal Courts, supra note 11, at 64-66. For example, Jefferson asked: "Do the treaties between the United States and France give to France or her citizens a right, when at war with a power with whom the United States are at peace, to fit out originally in and from the ports of the United States vessels armed for war, with or without commission?" "Do the laws authorize the United States to permit to France the erection of Courts within their territory and jurisdiction for the trial and condemnation of prizes, refusing that privilege to a power at war with France?" "May we, within our ports, sell ships to both parties, prepared merely for merchandise? May they be pierced for guns?" Id. at 64-65.

[256]Early in this century, many feared that the declaratory judgment remedy would contravene the prohibition against advisory opinions. See Willing v. Chicago Auditorium Ass'n, 277 U.S. 274 (1928); Muskrat v. United States, 219 (continued...)

the prohibition against advisory opinions also support the other limits imposed by the "case or controversy" requirement.[257]

(2) Ripeness.

(a) General. The ripeness doctrine involves both jurisdictional limits imposed by article III's requirement of a "case" or "controversy," and prudential concerns arising from the problems of prematurity and abstractness that may present insurmountable obstacles to the exercise of a federal court's jurisdiction, even though jurisdiction is technically present.[258] Simply put, when a case is not ripe for adjudication, it is not yet ready for judicial

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[256](...continued)
U.S. 346 (1911). These fears dissipated after the Supreme Court's decision in Nashville, C & St. Louis Ry. v. Wallace, 288 U.S. 249 (1933), in which the Court reviewed a state court declaratory judgment. And following enactment of the Federal Declaratory Judgment Act of 1934, 48 Stat. 955, the Court upheld the constitutionality of declaratory relief. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937). See infra chapter 4.

[257]G. Gunther, supra note 239, at 1537-38. See Hart & Wechsler's Federal Courts, supra note 11, at 67, for some of the considerations justifying the prohibition against advisory opinions. Most deal with the limited competence of courts to deal with questions outside the context of a concrete case. The prohibition also narrows the circumstances under which the courts may interfere with the political branches of government.

[258]Regional Rail Reorganization Act Cases, 419 U.S. 102, 138 (1974); United Public Workers v. Mitchell, 330 U.S. 75, 90-91 (1947); Meadows of Memphis v. City of W. Memphis, 800 F.2d 212, 214 (8th Cir. 1986); Automotive, Petroleum & Allied Indus. Emps. Union Local 618 v. Gelco Corp., 758 F.2d 1272, 1275 (8th Cir. 1985); Johnson v. Sikes, 730 F.2d 644, 647-48 (11th Cir. 1984).

review. It is a matter of timing.[259] The purpose of the doctrine is to avoid premature adjudication of suits, and to protect executive agencies from judicial interference until administrative decisions have become final and felt by the parties in a concrete way.[260]

(b) Test. The question of ripeness turns on a two-fold inquiry: first, the court must evaluate the fitness of the issues for judicial decision, and second, the court must test the relative hardship to the parties of withholding court consideration.[261] The first part of the inquiry "requires consideration of a variety of pragmatic factors," including: whether the challenged agency's actions or inactions are "final"[262]; whether the issues presented for review are primarily legal, as opposed to factual, in nature; and whether administrative remedies have been exhausted, at least to the extent an adequate factual record has been established.[263] The second part of the

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[259]United States v. McKinley, 38 F.3d 428 (9th Cir. 1994); City of Houston v. HUD, 24 F.3d 1421 (D.C. Cir. 1994).

[260]Abbott Laboratories v. Gardner, 387 U.S. 136, 148 (1967); Brown v. Ferro Corp., 763 F.2d 798, 801-02 (6th Cir.), cert. denied, 474 U.S. 947 (1985); Eagle-Picher Indus., Inc. v. EPA, 759 F.2d 905, 912-13 (D.C. Cir. 1985).

[261]Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967). See also Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 201 (1983); Eagle-Picher Indus., Inc. v. EPA, 759 F.2d 905, 915 (D.C. Cir. 1985).

[262]See, e.g., Haines v. MSPB, 44 F.3d 998 (Fed. Cir. 1995) (letter from Clerk of MSPB was not a final order and Court of Appeals, therefore, lacked jurisdiction).

[263]Seafarers Internat'l Union v. United States Coast Guard, 736 F.2d 19, 26 (2d Cir. 1984). See also (continued...)

test involves a determination of whether the plaintiff will suffer immediate adverse consequences if review is withheld. This entails the evaluation of a number of considerations, such as the likelihood the challenged agency action will affect the plaintiff; the nature of the consequences risked by the plaintiff if affected by the challenged action; and whether the plaintiff has actually been forced to alter his conduct as a result of the action under attack.[264] "'This two-pronged inquiry in essence requires the court to balance its interest in deciding the issue in a more concrete setting against the hardship to the parties caused by the delay.'"[265]

(c) Examples. The issue of ripeness usually arises in cases involving pre-enforcement attacks on statutes or regulations. The plaintiff generally seeks to enjoin or declare invalid a law that arguably adversely affects his interests, but which the

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[263](...continued)
Herrington v. County of Sonoma, 834 F.2d 1488, 1495-96 (9th Cir. 1987); State Farm Mut. Auto. Ins. Co. v. Dole, 802 F.2d 474, 479 (D.C. Cir. 1986); Eagle-Picher Indus., Inc. v. EPA, 759 F.2d 905, 915 (D.C. Cir. 1985).

[264]State Farm Mut. Auto. Ins. Co. v. Dole, 802 F.2d 474, 480 (D.C. Cir. 1986); Wisconsin's Environmental Decade, Inc. v. State Bar of Wis., 747 F.2d 407, 411 (7th Cir. 1984), cert. denied, 471 U.S. 1100 (1985); Roshan v. Smith, 615 F. Supp. 901, 904-06 (D.D.C. 1985); International Union, UAW v. Facet Enterprises, Inc., 601 F. Supp. 292 (S.D. Mich. 1984).

[265]Andrade v. Lauer, 729 F.2d 1475, 1480 (D.C. Cir. 1984), quoting Webb v. Department of Health & Human Serv., 696 F.2d 101, 106 (D.C. Cir. 1982). Compare Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), with Toilet Goods Ass'n v. Gardner, 387 U.S. 158 (1967).

state has not yet sought to enforce against him.[266] Ripeness is also an issue when plaintiffs seek to enjoin ongoing, uncompleted administrative proceedings.[267] In the military context, questions of ripeness have also

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[266]E.g., Socialist Labor Party v. Gilligan, 406 U.S. 583 (1972) (Ohio loyalty oath); Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) (FDA drug labelling regulation); Toilet Goods Ass'n v. Gardner, 387 U.S. 158 (1967) (FDA cosmetic coloring regulation); Frozen Foods Express v. United States, 351 U.S. 40 (1956) (ICC interpretation of exemptions from certification requirement); United States v. Storer Broadcasting Co., 351 U.S. 192 (1956) (FCC broadcast station ownership regulation); Mountain States Telephone and Telegraph Company v. Federal Communications Commission, 939 F.2d 1035 (D.C. Cir.1991); Columbia Broadcasting Sys., Inc. v. United States, 316 U.S. 407 (1942) (FCC radio network regulations); Consolidated Rail Corp. v. United States, 812 F.2d 1444 (3d Cir. 1987) (ICC constraints on rates on coal carriers); Action Alliance of Senior Citizens v. Heckler, 789 F.2d 931 (D.C. Cir. 1986) (HHS regulations implementing Age Discrimination Act); Wisconsin's Environmental Decade, Inc. v. State Bar of Wis., 747 F.2d 407 (7th Cir. 1984), cert. denied, 471 U.S. 1100 (1985); (unauthorized practice of law rules); Seafarers Internat'l Union v. United States Coast Guard, 736 F.2d 19 (2d Cir. 1984) (Coast Guard vessel manning and working conditions regulations). Cf. California Energy Resources Conservation & Dev. Comm'n. v. Johnson, 807 F.2d 1456 (9th Cir. 1986) (challenge to unexecuted contract provisions); State Farm Mut. Auto. Ins. Co. v. Dole, 802 F.2d 474 (D.C. Cir. 1986) (challenge to potential recision of Department of Transportation passive restraint regulation); Middle South Energy, Inc. v. City of New Orleans, 800 F.2d 488 (5th Cir. 1986) (challenge to possible exercise of franchise option).

[267]E.g., Hastings v. Judicial Conf. of the United States, 770 F.2d 1093 (D.C. Cir. 1985) (investigation of judge's conduct); Andrade v. Lauer, 729 F.2d 1475 (D.C. Cir. 1984) (Department of Justice RIF); North v. Walsh, 656 F. Supp. 414 (D.D.C. 1987) (investigation of independent counsel appointed under Ethics in Government Act); Ticor Title Ins. Co. v. FTC, 625 F. Supp. 747 (D.D.C. 1986) (FTC proceedings); Watkins v. United States Army, No. C-81-1065R (W.D. Wash. Oct. 23, 1981) (separation for homosexuality).

arisen when, without congressional authorization, the President threatens the use of military force.[268]

(3) Mootness.

(a) General. "Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies."[269] As a general proposition, a moot case is one in which "a justiciable controversy once existing between the parties is no longer at issue due to some change in circumstance after the case arose."[270] Simply put, a case is moot when its underlying issues have been resolved in one way or another; no case or controversy exists once the issues in a lawsuit have been settled.[271]

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[268]E.g., Ange v. Bush, 752 F. Supp. 509 (D.D.C. 1990); Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990) (challenges to military buildup in Persian Gulf as part of Operation Desert Shield).

[269]Iron Arrow Honor Society v. Heckler, 464 U.S. 67 (1983); Church of Scientology of California v. United States, 113 S. Ct. 447 (1992) (a federal court has no authority to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before). See also DeFunis v. Odegaard, 416 U.S. 312, 316 (1974).

[270]Kates & Barker, Mootness in Judicial Proceedings: Toward a Coherent Theory, 62 Calif. L. Rev. 1385, 1387 (1974). See also UAW Local 1369 v. Telex Computer Products, Inc., 816 F.2d 519, 521 (10th Cir. 1987) ("Mootness is jurisdictional").

[271]See United States Dep't. of Justice v. Provenzano, 469 U.S. 14 (1984); Lewis v. Continental Bank Corp., 494 U.S. 472 (1990) (when, during the pendency of an appeal, events occur that would prevent the appellate court from fashioning effective relief, the appeal should be dismissed as moot).

(b) Test. "[M]ootness has two aspects: 'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'"[272] A moot case meets two criteria: first, "it can be said with assurance that 'there is no reasonable expectation . . . ' that the alleged violation will recur, . . . and [second] interim relief or events have completely and irrevocably eradicated the effects of the alleged violation."[273] "When both conditions are satisfied it may be said that the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law."[274]

An example of a moot case in the military context is Ringgold v. United States:

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[272]United States Parole Comm'n v. Geraghty, 445 U.S. 388, 396 (1980), quoting Powell v. McCormick, 395 U.S. 486, 496 (1969). See also Murphy v. Hunt, 455 U.S. 478, 481 (1982); Monaghan, supra note 246, at 1384.

[273]County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979), quoting United States v. W. T. Grant Co., 345 U.S. 629, 632 (1953). See also Ethredge v. Hail, 996 F.2d 1173 (11th Cir. 1993); Martinez v. Wilson, 32 F.3d 1415 (9th Cir. 1994); AFL-CIO v. Rockwell Int'l Corp., 7 F.3d 1487 (10th Cir. 1993); Moseanko v. Yeutter, 944 F.2d 418 (8th Cir. 1991); Save the Bay Inc. v. United States Army, 639 F.2d 1100 (5th Cir. 1981).

[274]County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979). An action is moot if the court can no longer grant effective relief. Fox v. Board of Trustees of State University of New York, 42 F.3d 135 (2d Cir. 1994), cert. denied, ___ S. Ct. ___, 1995 WL 293620 (June 26, 1995); Roth v. United States, 952 F.2d 611 (1st Cir. 1991); Wilson v. United States, Dep't of Interior, 799 F.2d 591, 592 (9th Cir. 1986). Conversely, a claim is not moot if any claim for relief remains alive. In the Matter of Commonwealth Oil Refining Co., 805 F.2d 1175, 1181 (5th Cir. 1986).

RINGGOLD v. UNITED STATES

553 F.2d 309 (2d Cir. 1977)

Before SMITH and FEINBERG, Circuit Judges, and TENNEY, District Judge.

PER CURIAM:

In early June 1976, Cadet Timothy D. Ringgold filed suit in the United States District Court for the Southern District of New York against the United States of America and officials of the Department of the Army and the United States Military Academy, seeking to prevent defendants from applying the Academy's Cadet Honor Code to him and others similarly situated. After denying preliminary motions by Ringgold, Judge Richard Owen in September 1976 granted summary judgment for defendants. On appeal, Ringgold presses in this court several constitutional challenges to the Honor Code, but we have not considered them because the appeal is moot.

In April 1976, at a meeting with the Undersecretary of the Army, Ringgold had asserted that there were many instances of cheating at the Academy. Word of this disclosure reached the Cadet Honor Committee, which eventually concluded that Ringgold had violated the Honor Code prohibition on "toleration" of the offenses of others. On August 17, 1976, before Ringgold's case was submitted to the Board of Officers under the Army's procedural regulations, Ringgold voluntarily resigned from the Academy, effective September 1, 1976.

Ringgold's resignation moots this appeal. Although the suit was filed as a class action, Judge Owen never certified the class so we have only the claim of Ringgold before us. The Article III limitation of federal jurisdiction to "Cases" and "Controversies" has been interpreted to mean that we are "without the power to decide questions that cannot affect the rights of litigants in the case" before us. North Carolina v. Rice, 404 U.S. 244, 246, 92 S. Ct. 402, 404, 30 L.Ed.2d 413 (1971). When he resigned voluntarily, after filing suit and while the district judge

> was considering the case on the merits, Ringgold removed himself from the Honor Code's purview. Thus, a decision on the validity of the Code or its application would not now affect him. This case does not fall within the exception to the mootness doctrine for disputes that are "capable of repetition, yet evading review." Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515, 31 S. Ct. 279, 283, 55 L.Ed. 310 (1911). Ringgold's own action, not the nature of his claim or the alleged wrong, has frustrated his quest for review. And although Ringgold has applied to the Academy for readmission, we cannot assume that he will be readmitted, again violate the Honor Code and be prosecuted once more. Moreover, nothing prevents another cadet from raising the same general attack on the Honor Code or the procedures for administering it.
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> Appeal dismissed as moot, with instructions to the district court to vacate the judgment on the ground of mootness.[275]

(c) Doctrine Applicable Throughout the Proceedings. That a controversy may have been "live" at the time the lawsuit was commenced does not preclude operation of the doctrine of mootness. "The controversy

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[275] See also Sandidge v. State of Wash., 813 F.2d 1025 (9th Cir. 1987) (challenge to OER mooted by separation from military service); De Arellano v. Weinberger, 788 F.2d 762 (D.C. Cir. 1986) (en banc) (suit to enjoin US from operating Military Training Center on plaintiffs' land in Honduras mooted by the withdrawal of the troops); James Luterbach Constr. Co. v. Adamkus, 781 F.2d 599 (7th Cir. 1986) (suit to enjoin contract award moot after contract completed); Gulf Oil Corp. v. Brock, 778 F.2d 834 (D.C. Cir. 1985) (suit to enjoin disclosure under FOIA moot after request withdrawn); Conyers v. Reagan, 765 F.2d 1124 (D.C. Cir. 1985) (suit to enjoin Grenada invasion moot after invasion terminated); Save the Bay, Inc. v. United States Army, 639 F.2d 1100 (5th Cir. 1981) (suit to enjoin construction of railroad moot after railroad completed); Quinn v. Brown, 561 F.2d 795 (9th Cir. 1977) (suit to enjoin transfer moot after orders revoked).

must exist at every stage of the proceeding, including the appellate stage."[276]

(d) Exceptions. The federal courts have created a number of exceptions to the mootness doctrine:

(i) "Capable of Repetition, Yet Evading Review." A case is not moot if the underlying controversy is one that is "capable of repetition, yet evading review."[277] When a case falls within this exception, two elements are combined: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again."[278] For example, in Roe v. Wade,[279] the Supreme

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[276]Oakville Development Corp. v. F.D.I.C., 986 F.2d 611 (1st Cir. 1993); Jefferson v. Abrams, 747 F.2d 94, 96 (2d Cir. 1984). See also Sosna v. Iowa, 419 U.S. 393, 398 (1975); Golden v. Zwickler, 394 U.S. 103, 108 (1969); Mills v. Green, 159 U.S. 651, 653 (1895); Railway Labor Executives Ass'n v. Chesapeake W. Ry., 915 F.2d 116, 118 (4th Cir. 1990), cert. denied, 111 S. Ct. 1312 (1991); Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater, 777 F.2d 598, 605 n.19 (11th Cir. 1985), cert. denied, 476 U.S. 1116 (1986); New Jersey Turnpike Auth. v. Jersey Central Power & Light, 772 F.2d 25, 30-31 (3d Cir. 1985); Matthews v. Marsh, 755 F.2d 182 (1st Cir. 1985).

[277]Southern Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911).

[278]Weinstein v. Bradford, 423 U.S. 147, 149 (1975). See also Murphy v. Hunt, 455 U.S. 478, 482 (1982); Illinois Elections Bd. v. Socialist Workers Party, 440 U.S. 173, 187 (1979); SEC v. Sloan, 436 U.S. 103, 109 (1978); First Nat'l Bank v. Bellotti, 435 U.S. 765, 774 (1978); Super Tire Eng'r Co. v. McCorkle, 416 U.S. 115, 122 (1974); Moore v. Ogilvie, 394 U.S. 814, 816 (1969); cf. Bunker Limited Partnership v. United States, 820 F.2d 308, 312 (continued...)

Court's famous abortion decision, the Court was faced with the argument that the controversy was moot because the plaintiff's pregnancy had been terminated naturally through the birth of her child. The Court rejected the argument, stating:

> But, when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be "capable of repetition, yet evading review." Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911).

By way of contrast is DeFunis v. Odegaard,[280] in which the plaintiff sued the University of Washington Law School claiming that he was denied admission because of race. The trial court issued a mandatory injunction ordering the plaintiff's admission into the school. By the time

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[278](...continued)
(9th Cir. 1987) (case not necessarily moot where new statute in pertinent part is manifestly unchanged from old statute because the injustice caused by the old statute is capable of repetition); Northwest Resource Information Center Inc. v. National Marine Fisheries Service, __ F.3d ___, 1995 WL 325293 (9th Cir. June 1, 1995) (although challenged permit now expired, successive permit would allow opportunity for challenge).

[279]410 U.S. 113 (1973).

[280]416 U.S. 312 (1974).

the case reached the Supreme Court, the plaintiff was in the final quarter of his third year of law school. The Supreme Court held that the "capable of repetition, yet evading review" exception to the mootness doctrine was inapplicable since the plaintiff "will never again be required to run the gauntlet of the law school's admission process, and so the question is certainly not 'capable of repetition' so far as he is concerned."[281] An example of this exception arising in a military case is Flynt v. Weinberger, which involved the prohibition of press coverage of the initial stages of United States military intervention in Grenada:

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[281] Id. at 319. See also City of Houston v. HUD, 24 F.3d 1421 (D.C. Cir. 1994); Ethredge v. Hail, 996 F.2d 1173 (11th Cir. 1993); Nomi v. Regents for the University of Minnesota, 5 F.3d 332 8th Cir. 1993); McFarlin v. Newport Special School District, 980 F.2d 1208 (8th Cir. 1992); Westmoreland v. National Transp. Safety Bd., 833 F.2d 1461, 1463 (11th Cir. 1987); Thompson v. United States Dep't of Labor, 813 F.2d 48, 51 (3d Cir. 1987); Leonard v. Hammond, 804 F.2d 838, 842-43 (4th Cir. 1986); Campesinos Unidos, Inc. v. United States Dep't of Labor, 803 F.2d 1063, 1068 (9th Cir. 1986); Ameron, Inc. v. United States Army Corps of Eng'rs, 787 F.2d 875 (3d Cir. 1986); Conyers v. Reagan, 765 F.2d 1124, 1128-29 (D.C. Cir. 1985); Dash v. Commanding General, 307 F. Supp. 849 (D.S.C. 1969), aff'd, 429 F.2d 427 (4th Cir.), cert. denied, 401 U.S. 981 (1970). But cf. Christian Knights of the Ku Klux Klan Invisible Empire Inc. v. District of Columbia, 972 F.2d 365 (D.C. Cir. 1992); Doe v. Sullivan, 938 F.2d 1370 (D.C. Cir. 1991); Cox v. McCarthy, 829 F.,2d 800, 804 (9th Cir. 1987) (a law creating an inability to satisfy "same-plaintiff test" calls capability of repetition analysis into question by stripping a class of any federal judicial remedy).

FLYNT v. WEINBERGER
588 F. Supp. 57 (D.D.C. 1984),
aff'd, 762 F.2d 134 (D.C. Cir. 1985)

MEMORANDUM

GASCH, District Judge.

In this case plaintiffs are challenging the decision to prohibit press coverage of the initial stages of the United States' military intervention in Grenada. Defendants have moved the Court to dismiss this challenge as moot. For the reasons discussed below, this motion is granted.

On October 25, 1983 the United States began a military intervention on the island nation of Grenada. The purpose of this military action according to the Reagan administration was "to protect U.S. and foreign citizens in Grenada and to assist in stabilizing the situation in [that] country." It is undisputed that representatives of the press were prohibited from accompanying the invasion forces in the initial landings on the island and that members of the press who attempted to make their own way to the island were prevented from reporting news of the invasion. In short, in its initial stages, a total news blackout of the military action was imposed and the only information available to the public about the events occurring on Grenada was issued by official United States government sources.

Beginning on October 27, 1983, the press ban was lifted and a limited number of press representatives were transported by military aircraft to Grenada. When Grenada's civilian airport reopened on November 7, 1983, all restrictions on travel to the island were eliminated and, consequently, members of the press had unlimited access to it. This remains the situation today.

The United States' military intervention on Grenada is now over. At the present time only a small detachment of 300 United States military personnel remain on the island. This United States military presence, consists of military police, logistics, engineering,

medical and other support personnel. More importantly, the press now has unlimited freedom to report about events in Grenada, including those involving the United States' military presence there.

Plaintiffs' complaint in this action seeks only declaratory and injunctive relief. They seek an injunction prohibiting defendants from "preventing or otherwise hindering Plaintiffs from sending reporters to the sovereign nation of Grenada to gather news . . ." and they seek a declaration that "the course of conduct engaged in by Defendants, . . . in preventing Plaintiffs, or otherwise hindering Plaintiffs', efforts to send reporters to the sovereign nation of Grenada for the purpose of gathering news is in violation of the Constitution [sic] laws, and treaties of the United States. . . ."

On its face, plaintiffs' claim for injunctive relief appears to be moot. There is no relief the Court can give plaintiffs that they do not already enjoy. At least since November 7, 1983, plaintiffs have had unlimited access to Grenada and there is no evidence that defendants have engaged in any acts since that time designed to "[prevent] or otherwise [hinder] Plaintiffs from sending reporters to . . . Grenada." Nor is there any real possibility that defendants will engage in such acts in the future because the military action that precipitated the temporary press ban on Grenada is long since over.

The Supreme Court has stated that

> [I]n general a case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome."

Murphy v. Hunt, 455 U.S. 478, 481, 102 S. Ct. 1181, 1182-1183, 71 L.Ed.2d 353 (1982), quoting United States Parole Commission v. Geraghty, 445 U.S. 388, 390, 100 S. Ct. 1202, 1205, 63 L.Ed.2d 479 (1980). Limited exceptions to this general rule have been recognized where (i) the controversy is one

that is "capable of repetition, yet evading review," Weinstein v. Bradford, 423 U.S. 147, 148, 96 S. Ct. 347, 348, 46 L.Ed.2d 350 (1975), or (ii) the defendant has voluntarily ceased the challenged activity, United States v. W.T. Grant Co., 345 U.S. 629, 632, 73 S. Ct. 894, 897, 97 L.Ed. 1303 (1953).

This case falls outside the first exception. The "capable of repetition, yet evading review doctrine" is limited to the situation where:

> (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and
>
> (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again.

Murphy v. Hunt, 455 U.S. at 482, 102 S. Ct. at 1183, quoting Weinstein v. Bradford, 423 U.S. at 149, 96 S. Ct. at 348. Although the activity challenged by plaintiffs did "not last long enough for complete judicial review" of the controversy it created, Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 126, 94 S. Ct. 1694, 1700, 40 L.Ed.2d 1 (1974), there is no "reasonable expectation" that the controversy will recur. The Supreme Court has required not merely a "physical or theoretical possibility," Murphy v. Hunt, 455 U.S. at 482, 102 S. Ct. at 1183, but a "demonstrated probability" that it will recur. Weinstein v. Bradford, 423 U.S. at 149, 96 S. Ct. at 348. No such probability exists in this case.

The invasion of Grenada was, like any invasion or military intervention, a unique event. Its occurrence required a combination of geopolitical circumstances not likely to be repeated. In addition, it required a discretionary decision by the President of the United States as Commander-in-Chief to commit United States forces. The decision to impose a temporary press ban was also a discretionary one. It was made by the military commander in the field of operations because the safety of press representatives could not be guaranteed and in order to ensure that secrecy was

> maintained, thereby protecting the safety of United States troops and promoting the success of the military operation. As the supplemental papers submitted by the parties at the Court's request demonstrate, a press ban has not often been resorted to in military actions involving United States troops. In fact, this is apparently the first time that a decision to impose one has been objected to, or at least the first time that these plaintiffs have objected to such a decision. Given the discretionary nature of the decision to impose a press ban and the infrequency with which such a decision has been implemented, the Court is unable to detect a "demonstrated probability" that a press ban to which plaintiffs will object will be imposed in the foreseeable future.[282]

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(ii) Voluntary Cessation. A case is not made moot simply because the defendant voluntarily ceases his putatively unlawful conduct.[283] Unless "the defendant can demonstrate 'there is no reasonable expectation that the wrong will be repeated,'" the case is not moot.[284] Otherwise, "[t]he defendant is free to

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[282]See also Nation Magazine v. Department of Defense, 762 F. Supp. 1558 (S.D.N.Y. 1991) (dismissing as moot first amendment challenges to press restrictions during Operation Desert Storm).

[283]United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 304-10 (1897).

[284]County of Los Angeles v. Davis, 440 U.S. 625 (1979); United States v. W. T. Grant Co., 345 U.S. 629, 633 (1953), quoting United States v. Aluminum Co. of America, 148 F.2d 416, 448 (2d Cir. 1945); Oregon Natural Resources Council, Inc. v. Grossarth, 979 F.2d 1377 (9th Cir. 1992).

return to his old ways" once the lawsuit is dismissed.[285] The voluntary cessation issue arose in the case of Berlin Democratic Club v. Rumsfeld:

BERLIN DEMOCRATIC CLUB v. RUMSFELD
410 F. Supp. 144 (D.D.C. 1976)

MEMORANDUM AND ORDER, WILLIAM B. JONES, Chief Judge.

INTRODUCTION

> This is an action by a number of American citizens and organizations and one Austrian citizen, residing in West Berlin or the Federal Republic of Germany [FRG], who challenge certain of the United States Army's intelligence activities. The plaintiffs are the Berlin Democratic Club [BDC], which among other activities supported Senator McGovern for president in 1972 and the impeachment proceedings against former President Nixon in 1973; the Lawyers Military Defense Committee [LMDC] which operates as a legal aid service for members of the armed forces overseas; present and former members of the BDC; attorneys and consultants to the LMDC; American writers and journalists; an Austrian journalist who has acted as consultant to the LMDC; and two American ministers formerly residing at Gossner Mission in Mainz, West Germany. The defendants are myriad Department of Defense Army officials and uniformed personnel allegedly responsible for or instrumental in conducting the intelligence program as it has been carried out in West Berlin and in the Federal Republic of Germany.
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> Plaintiffs allege numerous acts of warrantless electronic surveillance; covert infiltration of BDC meetings; covert infiltration of the Gossner Mission for the purpose of disrupting the Mission's counseling

[285] Id. at 632. See also Thompson v. United States Dep't of Labor, 813 F.2d 48, 51 (3d Cir. 1987); Dial v. Coler, 791 F.2d 78, 81 (7th Cir. 1986); Olagues v. Russoniello, 770 F.2d 791, 795 (9th Cir. 1985); Community for Creative Non-Violence v. Hess, 745 F.2d 697, 700 (D.C. Cir. 1984).

activities and provoking Mission personnel to commit illegal acts; covert infiltration of English language journals, for which several plaintiffs work, for the purpose of disrupting their journalistic activities and provoking the journalists to commit illegal acts; deliberate disruption of the counseling activities of the Austrian journalist; maintenance of "dissidence identification" files and "blacklists"; dissemination of these files to military and civilian agencies and private citizens, resulting in the dismissal of two plaintiffs from jobs at the United States exhibit at the German Industrial Fair, termination of two jobs held by another plaintiff at the British supply depot in West Berlin and with a private landscaping firm in West Berlin, debarment of another plaintiff from access to all United States military installations in Berlin, institution of deportation proceedings against another plaintiff by the German authorities, the inability of several other plaintiffs to obtain security clearances for jobs they were seeking, damage to the professional reputations of the LMDC, its lawyers, the American journalists and illegal opening of plaintiffs' mail either by American authorities or by German authorities at the inducement of defendants. Plaintiffs claim that these activities as alleged violate their first, fourth, sixth and ninth amendment rights as well as their statutory rights. They seek injunctive, declaratory, and monetary relief for violation of their statutory and constitutional rights.

. . . .

MOOTNESS

Defendants also argue that AR 381-17 and AR 380-13, promulgated in September 1974, have mooted any claim plaintiffs might otherwise have for injunctive relief. Neither regulation, however, can provide a basis for denial of injunctive relief.

First, AR 381-17, as will be discussed in the next section, does not and never has provided for prior judicial authorization of

wiretaps, which plaintiffs contend the fourth amendment requires. Thus, plaintiffs' fourth amendment claims for injunctive relief are not mooted.

Nor does AR 380-13 as amended moot the remainder of plaintiffs' claims for injunctive relief. As noted earlier, the allegations of abusive dissemination of information, illegal disruption of activities, etc., not permitted by AR 380-13, present a justiciable controversy under the first amendment. Defendants contend they "are confident" that abusive surveillance techniques and dissemination of information as alleged by plaintiffs will not be repeated. Moreover, they assert by affidavit that no investigations of non-DOD-affiliated citizens are presently being conducted. Def. Exhibit 36-F. Plaintiffs should be granted discovery to contravene these assertions, which are clearly contrary to the allegations in plaintiffs' complaint, factually suspect in light of the earlier admitted misrepresentations to the Court, and in fact questioned by at least one Army action undertaken since promulgation of revised AR 380-13. Moreover, the pattern of action alleged in the complaint alone is sufficient to reject defendant's mootness argument. As the Court of Appeals noted in Watkins v. Washington, 472 F.2d 1373 (1972), when faced with a comparable argument in a racial discrimination case:

> Where pervasive racial discrimination is demonstrated, the court has not only the power, but also the duty, to render a decree eliminating the effects of past discrimination and ensuring equal opportunity in the future. Louisiana v. United States, 380 U.S. 145 (1965). That there is a new Director of the Housing Division who has taken steps to ensure equal employment opportunity does not justify denying affirmative equitable relief. The period of nondiscrimination since 1968 is very brief compared to the long record of discrimination demonstrated in this

> case, and even if the new supervisors are entirely in good faith the task of eliminating ingrained discriminatory practices is a difficult one deserving of active judicial support. [cites omitted]

153 U.S. App. D.C. 298, 472 F.2d at 1376. Defendants' argument must therefore be rejected.[286]

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(iii) Collateral Consequences. A case is not moot where, even though terminated and not likely to recur, the Government's putatively illegal conduct leaves lasting adverse consequences.[287] The collateral consequences exception to mootness is illustrated in the following case:

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[286]Compare Iron Arrow Honor Society v. Heckler, 464 U.S. 67 (1983) (action of third party terminates unlawful conduct); DeFunis v. Odegaard, 416 U.S. 312 (1974) (defendant not free to return to challenged behavior); Boston Teachers Union v. Edgar, 787 F.2d 12 (1st Cir. 1986) (challenge to anti-strike statute mooted when plaintiff-union voted not to strike); Gulf Oil Corp. v. Brock, 778 F.2d 834 (D.C. Cir. 1985) (challenge to FOIA disclosure moot after nonparty requestor withdrew FOIA request); Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater, 777 F.2d 598, 605 (11th Cir. 1985), cert. denied, 476 U.S. 1116 (1986) (permanent repeal of challenged ordinance and replacement by new ordinance moots challenge). See also Flake v. Bennett, 611 F. Supp. 70 (D.D.C. 1985) (voluntary cessation of putatively unlawful personnel policy does not moot challenge to policy).

[287]Pennsylvania v. Mimms, 434 U.S. 106, 108 n.3 (1977); Sibron v. New York, 392 U.S. 40, 53-54 (1968). See also Kisser v. Cisneros, 14 F.3d 615 (D.C. Cir. 1994); Leonard v. Hammond, 804 F.2d 838, 842 (4th Cir. 1986).

CONNELL v. SHOEMAKER
555 F.2d 483 (5th Cir. 1977)

[The Commanding General, Fort Hood, placed off-limits apartments owned by the plaintiff, Ted C. Connell, because of racial discrimination. The plaintiff brought suit seeking declaratory and injunctive relief from the off-limits sanction. After suit was filed, but before the district court decided the case, the sanction was lifted. The district court subsequently dismissed the action as moot. The plaintiff appealed.]

Mootness

The sole issue on appeal is whether the court below properly dismissed this action as moot. While appellants' claim for injunctive relief concededly was rendered moot by the Army's lifting of the rental prohibition, appellants dispute the mootness of their claim for declaratory judgment. Since it is possible for a "live" controversy to remain where some but not all issues in a case have become moot, Powell v. McCormack, 395 U.S. 486, 497, 89 S. Ct. 1944, 23 L.Ed.2d 491 (1969), the question of the mootness vel non of appellants' claim under the Declaratory Judgment Act, 28 U.S.C. § 2201, becomes "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issue of a declaratory judgment." Maryland Cas. Co. v. Pacific Coal & Oil Co., 321 U.S. 270, 273, 61 S. Ct. 510, 512, 85 L.Ed. 826 (1941). We hold that such a controversy exists in the present case.

While appellants attack the district court's finding of mootness on various bases, we view the continuing practical consequences of the Army's determination of discrimination as sufficient to negate mootness. Appellants have interests in various businesses engaged in retail sales of goods and services directly to the public in the area adjacent to Fort Hood. Since a favorable public image is vital to the success of such enterprises, the imputation of bigotry implicit in the Army's

> widely publicized sanctions against appellants could not but harm their reputations and, concomitantly, their livelihoods with clientele both black and white. Additionally, appellant Ted Connell has held various local civic and elective political positions; whatever such aspirations he might yet harbor have almost certainly been undercut by the same stigma. In holding that an attorney's challenge to his conviction for criminal contempt was not rendered moot by completion of his sentence, this Court assessed the collateral consequences of the conviction and, in addition to its legal consequences, gave considerable weight to the possibility of harm to the attorney's practice of law as well as to his "[o]pportunities for appointment to the bench or to other high office." United States v. Schrimsher (In re Butts), 493 F.2d 842, 844 (5th Cir. 1974). Although the present case does not involve a criminal conviction, we view the collateral consequences in the two cases as analogous.
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> . . . .
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> Accordingly, we reverse and remand to the district court for its consideration of the merits of appellants' claim for declaratory judgment.
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> REVERSED and REMANDED.[288]

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(iv) Class Actions. Finally, where a court certifies a case as a class action, the action is not rendered moot simply because the issues have been

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[288] See also Larche v. Simons, 53 F.3d 1068 (9th Cir. 1995) (habeas petition not moot even after completion of sentence where petitioner would sufer collateral legal consequences if conviction allowed to stand); McAiley v. Birdsong, 451 F.2d 1244 (6th Cir. 1971) (suit contesting denial of conscientious objector discharge not mooted by subsequent undesirable discharge).

resolved with respect to the named plaintiffs.[289] Moreover, a trial court's denial of a motion for class certification may be reviewed on appeal after the named plaintiffs' personal claims have become "moot."[290] If the appeal results in reversal of the class certification denial, and a class subsequently is properly certified, the merits of the class claim may then be adjudicated. . . ."[291] An action may no longer be live, however, when the claims of the named plaintiffs as well as those of a large part of the class have become moot.[292]

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[289]Franks v. Bowman Transp. Co., 424 U.S. 747 (1976); Sosna v. Iowa, 419 U.S. 393 (1975).

[290]United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980); Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326 (1980); Reed v. Heckler, 756 F.2d 779, 785-87 (10th Cir. 1985).

[291]United States Parole Comm'n v. Geraghty, 445 U.S. 388, 404. Compare Indianapolis School Comm'rs v. Jacobs, 420 U.S. 128 (1975) (case mooted before class certification properly pursued). Two important corollaries parallel the rule that a plaintiff with a mooted claim may appeal a denial of class certification. First, a plaintiff may not immediately appeal a denial of class certification. Such a denial is not an appealable interlocutory order; consequently, the plaintiff must wait until after final judgment before lodging an appeal. Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478 (1978); Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978); Shanks v. City of Dallas, 752 F.2d 1092 (5th Cir. 1985). Second, courts will permit class members to intervene to appeal the denial of class certification after the named plaintiff's claim has become moot. United Airlines, Inc. v. McDonald, 432 U.S. 385 (1978).

[292]Kremens v. Bartley, 431 U.S. 119 (1977).

(4) Standing.

(a) General.

(i) Of all the justiciability doctrines, the requirement that a litigant have standing to invoke the power of the federal courts is perhaps most important.[293] The doctrine of standing delimits the persons permitted to bring a lawsuit in the federal courts.[294] "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated."[295] In other words, "[s]tanding analysis . . . does not determine whether the claim is justiciable; instead, it resolves whether the 'proper' party has raised that claim."[296]

(ii) As a general rule, standing requires that a person challenging a governmental action have been directly and personally injured by the action

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[293]Allen v. Wright, 468 U.S. 737, 750 (1984).

[294]See Action Alliance of Senior Citizens v. Heckler, 789 F.2d 931, 940 (D.C. Cir. 1986); Sierra Club v. SCM Corp., 747 F.2d 99, 103 (2d Cir. 1984).

[295]Flast v. Cohen, 392 U.S. 83, 99 (1968).

[296]Comment, The Generalized Grievance Restriction: Prudential Restraint or Constitutional Mandate?, 70 Geo. L.J. 1157, 1162 (1982) [hereinafter Comment, The Generalized Grievance Restriction]. See also Flast v. Cohen, 392 U.S. 83, 99-100; Fulani v. Bentsen, 35 F.3d 49 (2d Cir. 1994); American Legal Found. v. FCC, 808 F.2d 84, 88 (D.C. Cir. 1987); McKinney v. United States Dep't of the Treasury, 799 F.2d 1544, 1549 (Fed. Cir. 1986); In the Matter of Appointment of Independent Counsel, 766 F.2d 70, 73 (2d Cir.), cert. denied, 474 U.S. 1020 (1985) ("Standing asks whether a particular litigant is entitled to invoke the power of the federal court").

challenged, and that the injuries suffered be redressable by a federal court. The standing doctrine subsumes both constitutional and prudential concerns, both of which will be discussed in greater detail below.

(b) Purposes of Standing. The standing doctrine serves two fundamental purposes:

(i) First, the standing requirement ensures that the parties to a case "will provide the court with the fact-presentation and issue-definition capabilities it lacks." "The essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'"[297] In Schlesinger v. Reservists Comm. to Stop the War,[298] the Supreme Court explained the importance of the "fact-presentation, issue definition" ensured by the standing doctrine:

> Concrete injury, whether actual or threatened, is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution. It adds the essential dimension of specificity to the dispute by requiring that the

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[297]Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 72 (1978), quoting Baker v. Carr, 369 U.S. 186, 204 (1962). See also Flast v. Cohen, 392 U.S. 83, 101 ("the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution").

[298]418 U.S. 208, 220-21 (1974).

> complaining party have suffered a particular injury caused by the action challenged as unlawful. This personal stake is what the Court has consistently held enables a complainant authoritatively to present to a court a complete perspective upon the adverse consequences flowing from the specific set of facts undergirding his grievance. Such authoritative presentations are an integral part of the judicial process, for a court must rely on the parties' treatment of the facts and claims before it to develop its rules of law.[10] Only concrete injury presents the factual context within which a court, aided by parties who argue within the context, is capable of making decisions.

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[10] This is in sharp contrast to the political processes in which the Congress can initiate inquiry and action, define issues and objectives, and exercise virtually unlimited power by way of hearings and reports, thus making a record for plenary consideration and solutions. The legislative function is inherently general rather than particular and is not intended to be responsive to adversaries asserting specific claims or interests peculiar to themselves.

(ii) Second, and more importantly, standing serves the "idea of separation of powers."[299] The doctrine of standing "is founded in concern about the proper--and properly limited--role of the courts in a democratic society."[300] "A federal court cannot ignore [the standing requirement] without overstepping its assigned role in our system of adjudicating only actual

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[299]Wyoming v. Oklahoma, 582 U.S. 437 (1992); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Allen v. Wright, 468 U.S. 737, 752 (1984). See also Scalia, The Doctrine of Standing As an Essential Element of the Separation of Powers, 17 Suffolk U.L. Rev. 881, 888 (1983).

[300]Warth v. Seldin, 422 U.S. 490, 498 (1975).

cases and controversies."[301] The Supreme Court discussed the significance played by the doctrine of standing in preserving the separation of powers in United States v. Richardson.[302] Richardson involved a challenge to provisions of the Central Intelligence Agency Act, which allegedly violated the accounting clause of the Constitution.[303] The plaintiff contended that the CIA budget was not published in accordance with the accounting clause, and as a consequence, he could not obtain a document setting out the expenditures and receipts of the CIA. The Court held the plaintiff lacked standing because his putative injury was not direct and personal. In essence, the plaintiff's purported injury was common to all other members of the American public. Thus, to hold that the plaintiff had standing would infringe upon the prerogatives of the political branches of the Government:

> It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process. Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of

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[301]Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 39 (1976). See also Wyoming v. Oklahoma, 582 U.S. 437 (1992).

[302]418 U.S. 166 (1974).

[303]U.S. Const. art. I, § 9, cl. 7 ("No money shall be drawn from the Treasury, but in consequence of appropriation made by law; and a regular Statement and Account of the Receipts and Expenditures of all public money shall be published from time to time").

> the National Government by means of lawsuits in federal courts. The Constitution created a representative Government with the representatives directly responsible to their constituents at stated periods of two, four, and six years; that the Constitution does not afford a judicial remedy does not, of course, completely disable the citizen who is not satisfied with the "ground rules" established by the Congress for reporting expenditures of the Executive Branch. Lack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert his views in the political forum or at the polls. Slow, cumbersome, and unresponsive though the traditional electoral process may be thought at times, our system provides for changing members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them.[304]

(c) Constitutional Standing Requirements. As indicated above, the doctrine of standing includes both constitutional requirements and prudential considerations. To satisfy the constitutional standing requirement, a plaintiff must show three things: (1) a distinct and palpable injury; (2) a causal connection between the injury and the defendant's conduct; and

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[304] Id. at 179. See also Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472-73 (1982) ("the 'case and controversies' language of Art. III forecloses the conversion of the courts of the United States into judicial versions of college debating forums"); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 221-22 (1974) ("to permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process, distort the role of the judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing 'government by injunction'").

(3) a substantial likelihood that the relief requested will redress the injury. Recently, the Supreme Court stated the constitutional elements of standing as follows:

> [T]he standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted. Is the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable? Is the line of causation between the illegal conduct and injury too attenuated? Is the prospect of obtaining relief from the injury as a result of a favorable ruling too speculative?[305]

The constitutional prerequisites of standing are jurisdictional in nature and cannot be waived.[306]

(i) Injury.

(A) To establish standing, a plaintiff first must establish that he in fact has suffered some injury.[307] The plaintiff must allege that he has sustained or is immediately in danger of

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[305]Allen v. Wright, 468 U.S. 737, 752 (1984). See also County of Riverside v. McLaughlin, 500 U.S. 44 (1991); Animal Legal Defense Fund v. Espy, 29 F.3d 720 (D.C. Cir. 1994); Vote Choice, Inc. v. DiStefano, 4 F.3d 26 (1st Cir. 1993); Naturist Society v. Fillyaw, 958 F.2d 1515 (11th Cir. 1992); Haitian Refugee Center v. Gracey, 809 F.2d 794, 798-99 (D.C. Cir. 1987). See generally Nichol, Causation as a Standing Requirement: The Unprincipled Use of Judicial Restraint, 69 Ky. L. Rev. 185, 191-92 (1980-81).

[306]National Organization for Women v. Scheidler, 114 S. Ct. 798 (1994); Bender v. Williamsport Area School Dist., 475 U.S. 534, 541-42 (1986).

[307]Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972).

sustaining a distinct and palpable injury.[308] "The injury or threat of injury must be both 'real and immediate,' not 'conjectural or hypothetical.'"[309] An "[a]bstract injury is not enough."[310] Nor is a mere assertion of a right to have the government act in accordance with law sufficient to satisfy the injury requirement.[311]

(B) To appreciate the injury requirement of standing, compare Laird v. Tatum and

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[308]E.g., Allen v. Wright, 468 U.S. 737, 751 (1984); Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983); Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979); Warth v. Seldin, 422 U.S. 490, 501 (1975); Animal Legal Defense Fund v. Espy, 29 F.3d 720 (D.C. Cir. 1994); Freedom Republicans, Inc. v. Federal Election Commission, 13 F.2d 412 (D.C. Cir. 1994); Massachusetts Association of Afro-American Police, Inc. v. Boston Police Department, 973 F.2d 18 (1st Cir. 1992); Kurtz v. Baker, 829 F.2d 1133, 1141-42 (D.C. Cir. 1987); American Civil Liberties Union v. City of St. Charles, 794 F.2d 265, 268 (7th Cir. 1986); George v. State of Texas, 788 F.2d 1099, 1100 (5th Cir.), cert. denied, 477 U.S. 866 (1986); Doe v. Duling, 782 F.2d 1202, 1205-06 (4th Cir. 1986).

[309]O'Shea v. Littleton, 414 U.S. 488, 494 (1974). See also Franklin v. Massachusetts, 112 S. Ct. 2767 (1992); Los Angeles v. Lyons, 461 U.S. 95, 102 (1983).

[310]Id.; International Primate Protection League v. Institute for Behavioral Research, Inc., 799 F.2d 934 (4th Cir. 1986).

[311]Allen v. Wright, 468 U.S. 737, 754 (1984). Cf. Diamond v. Charles, 476 U.S. 54, 66-67 (1986) ("Article III requires more than a desire to vindicate value interest"). See also Cronson v. Clark, 810 F.2d 662, 664 (7th Cir. 1987); American Legal Found. v. FCC, 808 F.2d 84, 91-92 (D.C. Cir. 1987); McKinney v. United States Dept' of the Treasury, 799 F.2d 1544 (Fed. Cir. 1986). Cf. Fernandez v. Beock, 840 F.2d 622, 630 (9th Cir. 1988) (statutory language, statutory purpose, and legislative history may indicate that a statutory duty creates a correlative procedural right, the invasion of which is injury-in-fact); see also Younger v. Turnage, 677 F. Supp. 16, 20 (D.D.C. 1988).

Berlin Democratic Club v. Rumsfeld, both arising out of the conduct of Army intelligence activities:

LAIRD v. TATUM

408 U.S. 1 (1973)

MR. CHIEF JUSTICE BURGER delivered the opinion of the court.

Respondents brought this class action in the District Court seeking declaratory and injunctive relief on their claim that their rights were being invaded by the Department of the Army's alleged "surveillance of lawful and peaceful civilian political activity." The petitioners in response described the activity as "gathering by lawful means . . . [and] maintaining and using in their intelligence activities . . . information relating to potential or actual civil disturbances [or] street demonstrations." In connection with respondents' motion for a preliminary injunction and petitioners' motion to dismiss the complaint, both parties filed a number of affidavits with the District Court and presented their oral arguments at a hearing on the two motions. On the basis of the pleadings, the affidavits before the court and the oral arguments advanced at the hearing, the District Court granted petitioners' motion to dismiss, holding that there was no justiciable claim for relief.

On appeal, a divided Court of Appeals reversed and ordered the case remanded for further proceedings. We granted certiorari to consider whether, as the Court of Appeals held, respondents presented a justiciable controversy in complaining of a "chilling" effect on the exercise of their First Amendment rights where such effect is allegedly caused, not by any "specific action of the Army against them, [but] only [by] the existence and operation of the intelligence gathering and distributing system, which is confined to the Army and related civilian investigative agencies." 144 U.S. App. D.C. 72, 78, 444 F.2d 947, 953. We reverse.

There is in the record a considerable amount of background information regarding the activities of which respondents complained; this information is set out primarily in the affidavits that were filed by the parties in connection with the District Court's consideration of respondents' motion to dismiss. See Fed. Rule Civ. Proc. 12(b). A brief review of that information is helpful to an understanding of the issues.

The President is authorized by 10 U.S.C. § 331 to make use of the armed forces to quell insurrection and other domestic violence if and when the conditions described in that section obtain within one of the States. Pursuant to those provisions, President Johnson ordered federal troops to assist local authorities at the time of the civil disorders in Detroit, Michigan, in the summer of 1967 and during the disturbances that followed the assassination of Dr. Martin Luther King. Prior to the Detroit disorders, the Army had a general contingency plan for providing such assistance to local authorities, but the 1967 experience led Army authorities to believe that more attention should be given to such preparatory planning. The data-gathering system here involved is said to have been established in connection with the development of more detailed and specific contingency planning designed to permit the Army, when called upon to assist local authorities, to be able to respond effectively with a minimum of force. . . .

The system put into operation as a result of the Army's 1967 experience consisted essentially of the collection of information about public activities that were thought to have at least some potential for civil disorder, the reporting of that information to Army Intelligence headquarters at Fort Holabird, Maryland, the dissemination of these reports from headquarters to major Army posts around the country, and the storage of the reported information in a computer data bank located at Fort Holabird. The information itself was collected by a variety of means, but it is significant that the principal sources of information were the news media and publications in general circulation. Some of

the information came from Army Intelligence agents who attended meetings that were open to the public and who wrote field reports describing the meetings, giving such data as the name of the sponsoring organization, the identity of speakers, the approximate number of persons in attendance, and an indication of whether any disorder occurred. And still other information was provided to the Army by civilian law enforcement agencies.

The material filed by the Government in the District Court reveals that Army Intelligence has field offices in various parts of the country; these offices are staffed in the aggregate with approximately 1,000 agents, 94% of whose time is devoted to the organization's principal mission, which is unrelated to the domestic surveillance system here involved.

By early 1970 Congress became concerned with the scope of the Army's domestic surveillance system; hearings on the matter were held before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary. Meanwhile, the Army, in the course of a review of the system, ordered a significant reduction in its scope. For example, information referred to in the complaint as the "blacklist" and the records in the computer data bank at Fort Holabird were found unnecessary and were destroyed, along with other related records. One copy of all the material relevant to the instant suit was retained, however, because of the pendency of this litigation. The review leading to the destruction of these records was said at the time the District Court ruled on petitioner's motion to dismiss to be a "continuing" one (App. 82), and the Army's policies at that time were represented as follows in a letter from the Under Secretary of the Army to Senator Sam J. Ervin, Chairman of the Senate Subcommittee on Constitutional Rights:

> "[R]eports concerning civil disturbances will be limited to matters of immediate concern to the Army--that is, reports concerning outbreaks of violence or incidents with a high potential for violence

> beyond the capability of state and local police and the National Guard to control. These reports will be collected by liaison with other Government agencies and reported by teletype to the Intelligence Command. They will not be placed in a computer . . . . These reports are destroyed 60 days after publication or 60 days after the end of the disturbance. This limited reporting system will ensure that the Army is prepared to respond to whatever directions the President may issue in civil disturbance situations and without 'watching' the lawful activities of civilians." (App. 80).

In briefs for petitioners filed with this Court, the Solicitor General has called our attention to certain directives issued by the Army and the Department of Defense subsequent to the District Court's dismissal of the action; these directives indicate that the Army's review of the needs of its domestic intelligence activities has indeed been a continuing one and that those activities have since been significantly reduced.

The District Court held a combined hearing on respondent's motion for a preliminary injunction and petitioner's motion for dismissal and thereafter announced its holding that respondents had failed to state a claim upon which relief could be granted. It was the view of the District Court that respondents failed to allege any action on the part of the Army that was unlawful in itself and further failed to allege any injury or any realistic threats to their rights growing out of the Army's actions.

In reversing, the Court of Appeals noted that respondents "have some difficulty in establishing visible injury":

> "[T]hey freely admit that they complain of no specific action of the Army against them. . . . There is no evidence of illegal or unlawful surveillance activities.

> We are not cited to any clandestine intrusion by a military agent. So far as is yet shown, the information gathered is nothing more than a good newspaper reporter would be able to gather by attendance at public meetings and the clipping of articles from publications available on any newsstand." 144 U.S. App. D.C. at 78, 444 F.2d at 593.

The court took note of petitioners' argument "that nothing [detrimental to respondents] has been done, that nothing is contemplated to be done, and even if some action by the Army against [respondents] were possibly foreseeable, such would not present a presently justiciable controversy." With respect to this argument, the Court of Appeals had this to say:

> "This position of the [petitioners] does not accord full measure to the rather unique arguments advanced by appellants [respondents]. While [respondents] do indeed argue that in the future it is possible that information relating to matters far beyond the responsibilities of the military may be misused by the military to the detriment of these civilian [respondents], yet [respondents] do not attempt to establish this as a definitely foreseeable event, or to base their complaint on this ground. Rather, [respondents] contend that the present existence of this system of gathering and distributing information, allegedly far beyond the mission requirements of the Army, constitutes an impermissible burden on [respondents] and other person similarly situated which exercises a present inhibiting effect on their full expression and utilization of their First Amendment Rights. . . ." Id. at 79, 444 F.2d, at 954. (Emphasis in original.)

Our examination of the record satisfies us that the Court of Appeals properly

identified the issue presented, namely, whether the jurisdiction of a federal court may be invoked by a complainant who alleges that the exercise of his First Amendment rights is being chilled by the mere existence, without more, of a governmental investigative and data-gathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose. We conclude, however, that, having properly identified the issue, the Court of Appeals decided that issue incorrectly.

In recent years this Court has found in a number of cases that constitutional violations may arise from the deterrent, or "chilling," effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights. E.g., Baird v. State Bar of Arizona, 401 U.S. 1 (1971); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Lamont v. Postmaster General, 381 U.S. 301 (1965); Baggett v. Bullitt, 377 U.S. 360 (1964). In none of these cases, however, did the chilling effect arise merely from the individual's knowledge that a governmental agency was engaged in certain activities or from the individual's concomitant fear that, armed with the fruits of these activities, the agency might in the future take some other and additional action detrimental to that individual. Rather, in each of these cases, the challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging.

. . . .

The decisions in these cases fully recognize that governmental action may be subject to constitutional challenge even though it has only an indirect effect on the exercise of First Amendment rights. At the same time, however, these decisions have in no way eroded the

> "established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action. . . ." Ex parte Levitt, 302 U.S. 633, 634 (1937).

The respondents do not meet this test; their claim, simply stated, is that they disagree with the judgments made by the Executive Branch with respect to the type and amount of information the Army needs and that the very existence of the Army's data-gathering system produces a constitutionally impermissible chilling effect upon the exercise of their First Amendment rights. That alleged "chilling" effect may perhaps be seen as arising from respondents' very perception of the system as inappropriate to the Army's role under our form of government, or as arising from respondents' beliefs that it is inherently dangerous for the military to be concerned with activities in the civilian sector, or as arising from respondents' less generalized yet speculative apprehensiveness that the Army may at some future date misuse the information in some way that would cause direct harm to respondents. Allegations of a subjective "chill" are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm; "the federal courts established pursuant to Article III of the Constitution do not render advisory opinions." United Public Workers v. Mitchell, 330 U.S. 75, 89 (1947).

Stripped to its essentials, what respondents appear to be seeking is a broad-scale investigation, conducted by themselves as private parties armed with the subpoena power of a federal district court and the power of cross-examination, to probe into the Army's intelligence-gathering activities, with the district court determining at the conclusion of that investigation the extent to which those activities may or may not be appropriate to the Army's mission. The following excerpt from the opinion of the

Court of Appeals suggests the broad sweep implicit in its holding:

> "Apparently in the judgment of the civilian head of the Army not everything being done in the operation of this intelligence system was necessary to the performance of the military mission. If the Secretary of the Army can formulate and implement such judgment based on facts within his Departmental knowledge, the United States District Court can hear evidence, ascertain the facts, and decide what, if any, further restrictions on the complained-of activities are called for to confine the military to their legitimate sphere of activity and to protect [respondents'] allegedly infringed constitutional rights." 144 U.S. App. D.C., at 83, 444 F.2d, at 958. (Emphasis added.)

Carried to its logical end, this approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action; such a role is appropriate for the Congress acting through its committees and the "power of the purse"; it is not the role of the judiciary, absent actual present or immediately threatened injury resulting from unlawful governmental action.

We, of course, intimate no view with respect to the propriety or desirability, from a policy standpoint, of the challenged activities of the Department of the Army; our conclusion is a narrow one, namely, that on this record the respondents have not presented a case for resolution by the courts.

The concerns of the Executive and Legislative Branches in response to disclosure of the Army surveillance activities--and indeed the claims alleged in the complaint--reflect a traditional and strong resistance of Americans to any military intrusion into civilian affairs. That tradition has deep roots in our history and

found early expression, for example, in the Third Amendment's explicit prohibition against quartering soldiers in private homes without consent and in the constitutional provisions for civilian control of the military. Those prohibitions are not directly presented by this case, but their philosophical underpinnings explain our traditional insistence on limitations on military operations in peacetime. Indeed when presented with claims of judicially cognizable injury, resulting from military intrusion into the civilian sector, federal courts are fully empowered to consider claims of those asserting such injury; there is nothing in our Nation's history or in this Court's decided cases, including our holding today, that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied.

Reversed

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BERLIN DEMOCRATIC CLUB v. RUMSFELD
410 F. Supp. 144 (D.D.C. 1976)

[The facts of the case are set out beginning at page 3-92.]

JUSTICIABILITY

Defendants rely heavily upon Laird v. Tatum, 408 U.S. 1, 92 S. Ct. 2318, 33 L.Ed.2d 154 (1973), in arguing that the plaintiffs have not presented a justiciable controversy. In Tatum, a group of civilians complained that the intelligence gathering and dissemination activities of the Army in the United States chilled them in the exercise of their first amendment rights. . . . It was clear that there was "no evidence of illegal or unlawful surveillance activities"; there was no "clandestine intrusion by a military agent." 408 U.S. at 9, 92 S. Ct. at 2323, 33 L.Ed.2d at 161; quoting from 144 U.S. App. D.C. 72, at 78, 444 F.2d 947, at 953. Nothing detrimental had been done to the plaintiffs, nor was anything detrimental contemplated. Id. The only challenged action was the existence of

the intelligence gathering and disseminating system. To allege that this chilled first amendment rights, according to the Court, was "not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." 408 U.S. at 14, 92 S. Ct. at 2326, 33 L.Ed.2d at 164.

Tatum is readily distinguishable from the instant case. All of the plaintiffs alleged purposeful dissemination of intelligence information resulting in termination or restriction of employment opportunities, unfair military trials, or damaged reputations. Plaintiffs further allege that their phones have been illegally wiretapped and their activities have deliberately and intentionally been disrupted by infiltrators who either provided them false information or entreated them to illegal action. Certain plaintiffs complain that they have been barred from access to U.S. military facilities, have lost their jobs, or have been denied employment because of the dissemination. One plaintiff alleges that the German authorities were induced by American officials to institute deportation proceedings against her. None of these actions were part of the intelligence gathering system challenged in Tatum. Such actions clearly are justiciable.[312]

(C) Past exposure to putatively unlawful conduct does not necessarily afford present standing to seek prospective relief--such as an injunction--from the conduct. Rather, a plaintiff must

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[312]See also Meese v. Keene, 481 U.S. 465 (1987) ("chill" on speech sufficient to support standing to challenge "political propaganda" label under Foreign Agents Registration Act); American Library Association v. Barr 956 F.2d 1178 (D.C. Cir. 1992) (subjective chill alone will not suffice to confer standing on litigant to bring preenforcement facial challenge to statute allegedly infringing on freedom of speech); United Presbyterian Church v. Reagan, 738 F.2d 1375 (D.C. Cir. 1984) (generalized challenge to military intelligence-gathering activities cannot support standing in federal courts).

show "continuing, adverse effects" from the challenged activity.[313] "[S]tanding must be premised upon more than hypothetical speculation and conjecture that harm will occur in the future."[314] For example, in City of Los Angeles v. Lyons,[315] the plaintiff was subjected to an allegedly unprovoked and unjustified "chokehold" by a police officer in the course of a routine traffic stop. The plaintiff sued the City of Los Angeles seeking, inter alia, an injunction prohibiting the use of "chokeholds" by the Los Angeles Police Department. The Supreme Court characterized the plaintiff's claim as dependent upon the likelihood he would "suffer future injury from the use of chokeholds by police officers."[316] The Court held, however, that the threat the plaintiff might be injured from a similarly unlawful chokehold in the future was too speculative to support standing:

> That Lyons may have been illegally choked by the police on October 6, 1976, . . . does nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part.[317]

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[313]O'Shea v. Littleton, 414 U.S. 488, 495-96 (1974).

[314]Palmer v. City of Chicago, 755 F.2d 560, 571 (7th Cir. 1985); Stewart v. McGinnis, 5 F.3d 1031 (7th Cir. 1993), cert. denied, 114 S. Ct. 1075 (1994). See also Rizzo v. Goode, 423 U.S. 362, 372 (1976); La Duke v. Nelson, 762 F.2d 1318, 1323-25 (9th Cir. 1985).

[315]461 U.S. 95 (1983).

[316]Id. at 105.

[317]Id. at 110.

(ii) Causation. In addition to demonstrating the existence of a distinct and palpable injury, a plaintiff must show that the injury is traceable to the putatively unlawful acts or omissions of the defendant.[318] An example of the application of the causation requirement is Warth v. Seldin.[319] In Warth, various organizations and individuals in Rochester, New York, sued an adjacent town, Penfield, claiming that Penfield's zoning ordinance effectively excluded persons of low and moderate income from living in the town. The Supreme Court held the petitioners lacked standing to challenge Penfield's zoning ordinance in part because there was no established connection between the petitioners' inability to live in the town and the challenged ordinance:

> In their complaint, [the petitioners] alleged in conclusory terms that they were among the persons excluded by respondents' actions. None of them has ever resided in Penfield; each claims at least implicitly that he desires, or has desired, to do so. Each asserts, moreover, that he made some effort at some time, to locate housing in Penfield that was at once within his means and adequate for his family's needs. Each claims that his efforts proved fruitless. We may assume, as petitioners allege, that respondents' actions have contributed, perhaps substantially, to the cost of housing in Penfield. But there

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[318] E.g., Franklin v. Massachusetts, 112 S. Ct. 2767 (1992); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Diamond v. Charles, 476 U.S. 54, 65 (1986); Allen v. Wright, 468 U.S. 737, 751 (1984); Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 72 (1978); Jorman v. Veterans Administration, 830 F.2d 1420 (7th Cir. 1987); Community for Creative Non-Violence v. Pierce, 814 F.2d 663, 668-69 (D.C. Cir. 1987); Haitian Refugee Center v. Gracey, 809 F.2d 794, 800-07 (D.C. Cir. 1987).

[319] 422 U.S. 490 (1975).

remains the question whether petitioners' inability to locate suitable housing in Penfield reasonably can be said to have resulted, in any concretely demonstrable way, from respondents' alleged constitutional and statutory infractions. Petitioners must allege facts from which it reasonably could be inferred that, absent the respondents' restrictive zoning practices, there is a substantial probability that they would have been able to purchase or lease in Penfield and that, if the court affords the relief requested, the asserted inability of petitioners will be removed. Linda R. S. v. Richard D., 410 U.S. 614 (1973).

We find the record devoid of the necessary allegations. As the Court of Appeals noted, none of these petitioners has a present interest in any Penfield property; none is himself subject to the ordinance's strictures; and none has ever been denied a variance or permit by respondent officials. . . . Instead, petitioners claim that respondents' enforcement of the ordinance against third parties--developers, builders, and the like--has had the consequence of precluding the construction of housing suitable to their needs at prices they might be able to afford. The fact that the harm to petitioners may have resulted indirectly does not in itself preclude standing. When a governmental prohibition or restriction imposed on one party causes specific harm to a third party, harm that a constitutional provision or statute was intended to prevent, the indirectness of the injury does not necessarily deprive the person harmed of standing to vindicate his rights. E.g., Roe v. Wade, 410 U.S. 113, 124 (1973). But it may make it substantially more difficult to meet the minimum requirement of Art. III: to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm.

Here, by their own admission, realization of petitioners' desire to live in Penfield always has depended on the efforts and willingness of third parties to build low- and moderate-cost housing. The record

> specifically refers to other two such efforts: that of Penfield Better Homes Corp., in late 1969, to obtain the rezoning of certain land in Penfield to allow the construction of subsidized cooperative townhouses that could be purchased by persons of moderate income; and a similar effort by O'Brien Homes, Inc., in late 1971. But the record is devoid of any indication that these projects, or other like projects, would have satisfied petitioners' needs at prices they could afford, or that, were the court to remove the obstructions attributable to respondents, such relief would benefit petitioners. Indeed, petitioners' descriptions of their individual financial situations and housing needs suggest precisely the contrary--that their inability to reside in Penfield is the consequence of the economies of the area housing market, rather than of respondents' assertedly illegal acts. In short, the facts alleged fail to support an actionable causal relationship between Penfield's zoning practices and petitioners' asserted injury.[320]

(iii) Redressability. Finally, a plaintiff must establish that his injury is likely to be redressed by a favorable decision of the court.[321] For example, in Linda R. S. v. Richard D.,[322] the mother of an

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[320]Id. at 503-07 (footnotes omitted). See also Gilbert v. Shalala, 45 F.3d 1391 (10th Cir. 1995); Day v. Shalala, 23 F.3d 1052 (6th Cir. 1994); (plaintiffs must show that they detrimentally relied upon the defective denial notice to establish standing); Committee for Monetary Reform v. Board of Governors, 766 F.2d 538, 542 (D.C. Cir. 1985).

[321]Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976); Oklahoma Hosp. Ass'n v. Oklahoma Publ. Co., 748 F.2d 1421, 1424-25 (10th Cir. 1984), cert. denied, 473 U.S. 905 (1985). See also Fernandez v. Brock, 840 F.2d 622, 627 (9th Cir. 1988) (relief requested must assure favorable results and not merely increase the opportunity of such results).

[322]410 U.S. 614 (1973).

illegitimate child filed a lawsuit seeking to require a local district attorney to commence criminal proceedings for nonsupport against the putative father of the child. The Court, affirming the judgment of a three-judge district court, found that the appellant-mother was without standing to seek enforcement of the criminal nonsupport statute in the federal courts. Such enforcement would only result in the jailing of the child's father; it would not redress the appellant's injury: nonsupport.[323]

(d) Prudential Standing Considerations. "Beyond the constitutional requirements, the federal judiciary also adheres to a set of prudential principles that bear on the question of standing."[324] There are three prudential rules of standing: (1) the plaintiff ordinarily must assert his own legal interests, rather than those of third parties (jus tertii); (2) the plaintiff's injury must not be merely a "generalized grievance" shared in similar measure by all or a large class of citizens, and (3) the plaintiff's interests must come within the "zone of interests" arguably

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[323]Id. at 618. See also Franklin v. Massachusetts, 112 S. Ct. 2767 (1992); Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992); Diamond v. Charles, 476 U.S. 54, 65 (1986); United Food and Commercial Workers International Union, Local 751 v. Brown Group, 50 F.3d 1426 (8th Cir. 1995); DeBoli v. Espy, 47 F.3d 777 (6th Cir. 1995); Community for Creative Non-Violence v. Pierce, 814 F.2d 663, 669-70 (D.C. Cir. 1987); Haitian Refugee Center v. Gracey, 809 F.2d 794, 801-07 (D.C. Cir. 1987).

[324]Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 474 (1982).

protected or regulated by the law in question.[325] "These limitations arise from a perceived institutional need for judicial self-restraint rather than the Constitution itself."[326] "The Court imposes these limitations because while not mandated by article III, they nonetheless serve the policy of separation of powers."[327] A plaintiff who fails to satisfy these prudential rules generally lacks standing even though his case may fall within the constitutional boundaries of standing.[328] Unlike constitutional standing requirements, however, these prudential limitations may be overcome by Congress,[329] or by the courts themselves if they find countervailing considerations outweigh the prudential concerns.[330]

(i) Jus tertii.

(A) As a general rule, "[a] litigant may invoke only his own constitutional rights or immunities;" he may not claim standing to vindicate

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[325]Id. at 474-75. See also Allen v. Wright, 468 U.S. 737, 751 (1984); Warth v. Seldin, 422 U.S. 490, 499-501 (1974); NAACP v. City of Richmond, 743 F.2d 1346, 1351 (9th Cir. 1984).

[326]Logan, Standing to Sue: A Proposed Separation of Power Analysis, 1984 Wis. L. Rev. 37, 46.

[327]Id. at 47.

[328]Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99-100 (1979); Fors v. Lehman, 741 F.2d 1130, 1132 (9th Cir. 1984).

[329]E.g., Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979); Bread Political Action Comm. v. FEC, 455 U.S. 577, 581 (1982); Havens Realty Corp. v. Coleman, 455 U.S. 363, 375-76 (1982).

[330]Singleton v. Wulff, 428 U.S. 106, 113-15 (1976); Warth v. Seldin, 422 U.S. 490, 500-01 (1975).

the constitutional rights or immunities of some third party.[331] The reasons for this limitation are two: (1) courts should not make unnecessary constitutional adjudications; and (2) the holders of constitutional rights usually are the best parties to assert the rights.[332] The federal courts will permit jus tertii standing where the underlying justifications for the limitation are absent. In determining whether to permit such standing, the courts will consider the relationship of the litigant to the third party whose right is asserted, the effect of the challenged law or action on the nonlitigant third party, and the ability of the nonlitigant third party to assert his or her own rights.[333] Thus, for example, the courts have permitted

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[331]Monaghan, Third Party Standing, 84 Colum. L. Rev. 277 (1984). See Tileston v. Ullman, 318 U.S. 44, 46 (1943); Tyler v. Judges of Ct. of Registration, 179 U.S. 405, 406 (1900); Haitian Refugee Center v. Gracey, 809 F.2d 794, 808-11 (D.C. Cir. 1987); Darring v. Kincheloe, 783 F.2d 874, 877 (9th Cir. 1986); Allstate Ins. Co. v. Wayne County, 760 F.2d 689, 693-94 (6th Cir. 1985); Ex parte Hefner, 599 F. Supp. 95 (E.D. Tex. 1984); Family Planning Clinic, Inc. v. City of Cleveland, 594 F. Supp. 1410, 1412 (N.D. Ohio 1984). Cf. Fors v. Lehman, 741 F.2d 1130 (9th Cir. 1984) (parents lack standing to contest son's reclassification from MIA to KIA). See also Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992); Indemnified Capital Investments v. R. J. O'Brien & Associates, 12 F.3d 1406 (7th Cir. 1993). See generally Note, Standing to Assert Constitutional Jus Tertii, 88 Harv. L. Rev. 423 (1974).

[332]Singleton v. Wulff, 428 U.S. 106, 113-14 (1976); Duke Power Co. v. Carolina Envtl. Group, 438 U.S. 59, 80 (1978); Comment, The Generalized Grievance Restriction, supra note 285, at 1167.

[333]Secretary of State of Md. v. J. H. Munson, Co., 467 U.S. 947, 954-58 (1984); Carey v. Population Serv. Internat'l, 431 U.S. 678, 682-84 (1977); Craig v. Boren, 429 U.S. 190, 192-97 (1976); Singleton v. Wulff, 428 U.S. 106, 114-15 (1976); Barrows v. Jackson, 346 U.S. 249, (continued...)

jus tertii standing in challenges by doctors, brought for their patients, to state-imposed restrictions on access to abortions.[334] Similarly, Congress by statute can permit jus tertii standing. It has done so, for example, by allowing "testers" to enforce the provisions of the Fair Housing Act.[335]

(B) A corollary principle to jus tertii standing is that a plaintiff generally may only challenge a statute or a regulation in the terms in which it is applied to him. He may not contest the law as it might be construed in some future case.[336] In some types of cases, especially those involving the first

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[333](...continued)
255-57 (1953); See also Haitian Refugee Center v. Gracey, 809 F.2d 794, 809 (D.C. Cir. 1987) ("Third party standing . . . is appropriate only when the third party's rights protect that party's relationship with the litigant").

[334]E.g., Singleton v. Wulff, 428 U.S. 106 (1976). Accord Family Planning Clinic, Inc. v. City of Cleveland, 594 F. Supp. 1410 (N.D. Ohio 1984) (challenge by free-standing abortion facility to zoning ordinance prohibiting license in desired location); see also Volunteer Medical Clinic, Inc. v. Operation Rescue, 948 F.2d 218 (6th Cir. 1991); Planned Parenthood Ass'n v. City of Cincinnati, 822 F.2d 1390 (6th Cir. 1987) (operator of abortion clinic and medical director had standing to challenge city fetal-disposal ordinance).

[335]E.g., Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982); Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979). Accord Watts v. Boyd Properties, Inc., 758 F.2d 1482, 1485 (11th Cir. 1985) ("testers" have standing under 42 U.S.C. § 1982).

[336]Parker v. Levy, 417 U.S. 733, 758-61 (1974); Yazoo & Miss. Valley R.R. Co. v. Jackson Vinegar Co., 226 U.S. 217, 219-20 (1912); Hatheway v. Secretary of the Army, 641 F.2d 1376, 1382-83 (9th Cir.), cert. denied, 454 U.S. 864 (1981); Monaghan, supra note 320, at 277-78 & n.5. But see Naturist Society v. Fillyaw, 958 F.2d 1515 (11th Cir. 1992).

amendment, courts have permitted litigants to mount constitutional attacks premised on future possible unconstitutional applications of the law.[337]

(ii) "Generalized Grievances." A plaintiff normally may not assert as injury a "generalized grievance shared in substantially equal measure by all or a large class of citizens. . . ."[338] Simply put, "an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court."[339] For example, in Schlesinger v. Reservists Comm. to Stop the War,[340] the Supreme Court denied "citizen standing" to plaintiffs seeking to enjoin congressional membership in the Reserve components of the armed forces. The plaintiffs claimed such membership violated the incompatibility clause of the Constitution,[341] which in essence prohibits a member of Congress from holding another federal office. The Court found that whatever injury the plaintiffs had suffered from the putative violation of the incompatibility clause was undifferentiated from the harm suffered by the rest of the public. To permit standing under such circumstances

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[337]See, e.g., Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 634 (1980); Village of Broadrick v. Oklahoma, 413 U.S. 601, 612-16 (1973).

[338]Warth v. Seldin, 422 U.S. 490, 499 (1975). See also Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); United States v. Richardson, 418 U.S. 166 (1974); Laird v. Tatum, 408 U.S. 1 (1972).

[339]Allen v. Wright, 468 U.S. 737, 754 (1984).

[340]418 U.S. 208 (1974).

[341]U.S. Const. art. I, § 6, cl. 2.

would deprive the Court of the fact-presentation and issue-definition necessary for constitutional adjudications and violate the principle of separation of powers.[342] Consequently, the plaintiffs were held to lack standing to pursue their claim.[343]

(iii) "Zone-of-Interests."

(A) General. The final prudential standing limitation is the so-called "zone-of-interest" test first announced by the Supreme Court in Association of Data Processing Service Organizations v. Camp,[344] In Data Processing, the plaintiffs, an association of vendors of data processing services, challenged a ruling by the Comptroller of the Currency that national banks may make data processing services available to other banks and to bank customers. There was no question that the plaintiffs had been injured by the ruling--they faced lost customers and reduced profits.[345] Instead, the

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[342]Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. at 220-22.

[343]See also Ex parte Levitt, 302 U.S. 633 (1937) (challenge to the appointment of Justice Hugo Black to the Supreme Court based on the incompatibility clause); McKinney v. United States Dep't of the Treasury, 799 F.2d 1544, 1553 (Fed. Cir. 1986) (challenge to Customs Service decision to permit importation of Soviet goods allegedly produced by "forced labor"); Americans United for Separation of Church & State v. Reagan, 786 F.2d 194, 200 (3d Cir.), cert. denied, 479 U.S. 914 (1986) (challenge to establishment of diplomatic relations with the Vatican); Pietsch v. Bush, 755 F. Supp. 62, 67 (E.D.N.Y. 1991) (challenge to military activities in Persian Gulf following invasion of Kuwait by Iraq); Antosh v. Federal Election Comm'n, 631 F. Supp. 596, 598 (D.D.C. 1986) (challenge by Oklahoma resident to Arizona election).

[344]397 U.S. 150 (1970).

[345]Id. at 152.

Court added a new layer to the standing inquiry, and considered whether the interest sought to be protected by the plaintiffs was "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[346] While recognizing that the Administrative Procedure Act (APA) grants wide-reaching standing to persons "aggrieved by agency action within the meaning of a relevant statute,"[347] the Court added a "gloss" to the standing provisions of the APA by limiting the class of people who can challenge governmental action to those whose interests are protected or regulated by the statute or constitutional provision under which the challenge is brought.[348] The Court concluded that the plaintiffs were arguably protected by the statute under which they sued--the Bank Service Corporation Act of 1962[349]--which forbids bank service corporations from engaging in activities other than the performance of bank services for banks.[350]

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[346] Id. at 153.

[347] 5 U.S.C. § 702.

[348] Association of Data Processing Serv. Org. v. Camp, 397 U.S. at 153-54. See also Clarke v. Securities Indus. Ass'n, 479 U.S. 388 (1987).

[349] 12 U.S.C. § 1864.

[350] Association of Data Processing Serv. Org. v. Camp, 397 U.S. at 155. See also Animal Legal Defense Fund v. Espy, 29 F.3d 720 (D.C. Cir. 1994); National Federation of Federal Employees v. Cheney, 883 F.2d 1038 (D.C. Cir. 1989), cert. denied, 496 U.S. 936 (1990); Investment Co. Inst. v. Camp, 401 U.S. 617 (1971); Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970); Barlow v. Collins, 397 U.S. 159 (1970).

(B) Application of the "zone-of-interests" test. Since its decision in Data Processing, the Court has inconsistently applied the "zone-of-interests" test.[351] Moreover, the precise boundaries of the test are unclear,[352] and it has been the subject of intense academic criticism.[353] The Court recently returned to the test in Clarke v. Securities Industry Association,[354] in which a trade association of securities brokers, underwriters, and investment bankers challenged a decision by the Comptroller of the Currency to permit national banks to open offices offering discount brokerage services to the public. Finding the plaintiff had standing, the Court held that, at least for suits under the APA,[355] the "zone" test was not very demanding. It served the purpose of precluding suits by persons Congress clearly could not have intended to reach under the law at issue.[356]

The zone of interest test is a guide for deciding whether, in view of Congress' evident intent to make

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[351]4 K. Davis, Administrative Law Treatise 273-280 (2d ed. 1983).

[352]Id.

[353]See, e.g., id.; Stewart The Reformation of American Administrative Law, 88 Harv. L. Rev. 1667, 1731-34 (1975).

[354]479 U.S. 388 (1987).

[355]"The principal cases in which the zone of interest test has been applied are those involving claims under the APA. . . ." Id. at 758 n.16.

[356]With only one exception, the Court has invoked the "zone-of-interests" test only to statutes. Id. See Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 320-21 n.3 (1977) ("zone-of-interest" test in suit under commerce clause).

agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision. In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. The test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff.[357]

The "zone" test focuses on the particular interests the plaintiffs are asserting in the litigation, rather than on the plaintiffs themselves or their interests in general. Thus, if a plaintiff has stated an interest that is arguably within the scope of interests encompassed by the law in question, the "zone" test is satisfied.[358] For example, in Calumet Industries, Inc. v. Brock,[359] manufacturers of carcinogenic lubricants contested a determination of the Occupational Safety and Health Administration [OSHA] that exempted certain other lubricants from a labelling requirement. The labels notified users of the effected lubricants of their

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[357]Clarke v. Securities Indus. Ass'n, 479 U.S. 388 (1987) (footnotes omitted), overruling Control Data Corp. v. Baldrige, 655 F.2d 283, 293-94 (D.C. Cir.), cert. denied, 454 U.S. 881 (1981) (requiring indicia of congressional intent to benefit plaintiff).

[358]Tax Analysts & Advocates v. Blumenthal, 566 F.2d 130, 142 (D.C. Cir. 1977), cert. denied, 434 U.S. 1086 (1978). See also Haitian Refugee Center v. Gracey, 809 F.2d 794, 812 (D.C. Cir. 1987).

[359]807 F.2d 225 (D.C. Cir. 1986).

potential hazards. Even though the plaintiffs' products were in fact carcinogenic, they contended that there was no bright line between a carcinogenic and noncarcinogenic lubricant. And until such a distinction could clearly be made, the plaintiff's contended that OSHA should require all manufacturers of lubricating oils to label their products. The court held, however, that the interest protested by Occupational Safety and Health Act[360] was worker safety, not business profits. Consequently, the competitive interests asserted by the plaintiffs did not fall within the zone of interests protected by the Act.[361]

(C) The "zone-of-interest" test arises in military cases when servicemembers or civilian employees base their claims for relief on statutes or regulations never intended to benefit them. An example of the application of the "zone-of-interest" test in the military is Hadley v. Secretary of the Army.

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[360]29 U.S.C. § 655(b).

[361]Calumet Indus., Inc. v. Brock, 807 F.2d at 228. See also Air Courier Conference of America v. American Postal Workers Union, 498 U.S. 517 (1991); National Federation of Federal Employees v. Cheney, 883 F.2d 1038 (D.C. Cir.) reh'g denied, 892 F.2d 98 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 3214 (1990); Haitian Refugee Center v. Gracey, 809 F.2d 794, 811-16 (D.C. Cir. 1987); Libertad v. Welch, 53 F.3d 428 (1st Cir. 1995); Schering Corporation v. FDA, 51 F.3d 390 (3d Cir. 1995); Animal Legal Defense Fund v. Espy, 29 F.3d 720 (D.C. Cir. 1994). Compare Douglas County v. Babbitt, 48 F.3d 1495 (9th Cir. 1995); Legal Assistance for Vietnamese Asylum Seekers v. Department of State, 45 F.3d 469 (D.C. Cir. 1995); Investment Co. Inst. v. FDIC, 815 F.2d 1540, 1544 (D.C. Cir. 1987); Hotel & Restaurant Emps. Union v. Attorney General, 804 F.2d 1256, 1263 (D.C. Cir. 1986).

HADLEY v. SECRETARY OF THE ARMY

479 F. Supp. 189 (D.D.C. 1979)

MEMORANDUM AND ORDER

OBERDORFER, District Judge.

This matter is before the Court on cross-motions by the parties for summary judgment. The plaintiff, a major in the Army Medical Corps, brought this action for declaratory and injunctive relief to compel the Secretary of the Army to (honorably) discharge him in accordance with 10 U.S.C. § 3303 (1976). The Army's promotion system for officers provides generally that an officer seeking advancement in rank will be considered by promotion selection boards established and governed by statute. See 10 U.S.C. § 3281-3314 (1976). An officer who is not recommended for promotion by a board becomes a "deferred officer"; section 3303 provides that a deferred officer who is not recommended for promotion by the next promotion board to consider him "shall . . . be honorably discharged." 10 U.S.C. § 3303(d).

Plaintiff maintains that having been passed over twice for promotion by statutory promotion selection boards, the Army is compelled to discharge him, despite the fact that he thereafter was promoted. Plaintiff asserts that a subsequent promotion conferred by a Standby Advisory Board ("STAB") exceeded statutory authority and could not nullify the action of the statutory promotion boards. He complains that he is stigmatized by the two pass-overs, and despite his later promotion, is subject to embarrassment and humiliation because of his failure to be promoted by statutory promotion selection boards. Plaintiff also asserts that the presence in his personnel record of the material that justified his earlier nonpromotions will effectively foreclose him from future advancement in rank.

The Secretary takes issue with each of the plaintiff's allegations. He asserts that the provision requiring discharge after two "pass-overs" exists solely for the benefit of

the Army, and does not confer upon military officers a right to discharge. In addition, the Secretary argues that any effect of plaintiff's second non-promotion was nullified by subsequent favorable review by the STAB Board, which had legal authority to reverse the findings of the statutory board. Finally, the Secretary maintains that to the extent that the plaintiff is subject to the embarrassment or prejudice by the presence of adverse material in his personnel file, he has failed to exhaust administrative remedies established by statute and Army regulation.

The exchange of legal assertions, however, only begins to render intelligible the novel issues before the Court. In reality, plaintiff complains that he is the victim of a "wrongful promotion," illegally conferred upon him by the Secretary. The implications of the controversy can best be understood in the context of the fact that plaintiff received his college and medical training at government expense in return for a substantial commitment to serve in the U.S. Army. Defendant's Cross Motion for Summary Judgment, July 12, 1979, Ex. A at 38-39, 96 (hereinafter "Exhibit A"). He had only just begun to fulfill that obligation when he filed the instant action, accusing the Secretary of "contriving" to keep him in the Army in violation of law.

The resolution of this case turns fundamentally upon plaintiff's rights and the defendant's duties under 10 U.S.C. § 3303(d). The parties' statements of material facts filed pursuant to Local Rule 1-9(h) make plain that there are no genuine issues of material fact as to any of the issues raised by the cross-motions for summary judgment. The Court holds that the undisputed material facts warrant the entry of summary judgment for the defendant.

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. . . Plaintiff's claim that the Army wrongfully promoted and failed to discharge him turns upon whether 10 U.S.C. § 3303(d) confers upon an officer the right to compel the Army to discharge him if he has twice

failed to be promoted by statutory promotion selection boards. To litigate this claim, plaintiff must first establish that he has standing to complain of the Army's action. Specifically, a party will be denied standing if the interest allegedly injured is not arguably within the zone of interests protected by the statute invoked, even though injury in fact has been sufficiently established. Committee for Auto Responsibility v. Solomon, 195 U.S.App.D.C. 340, 603 F.2d 992 (D.C. Cir. 1979); Tax Analysts & Advocates v. Blumenthal, 184 U.S.App.D.C. 238, 566 F.2d 130 (1977). For the reasons set forth below, the Court concludes that plaintiff Hadley lacks standing to bring this action.

The statutory basis for the Army promotion system is the Officer Personnel Act of 1947, as amended. Act of August 7, 1947, ch. 512, 61 Stat. 795 (1947). The Act substituted a system of statutory promotion selection boards for the former, seniority-based system. Under the promotion board scheme, which has been incorporated virtually intact into the present section 3303, each officer is considered for promotion by a selection board whose membership and procedures are set out by statute. See 10 U.S.C. §§ 3281-3314 (1976). An officer who has been once considered by a selection board and not recommended for promotion becomes a "deferred officer." A deferred officer is considered for promotion by the next selection board considering officers of his grade. Section 3303(d) provides that:

> A deferred officer who is not recommended by the next selection board considering officers of his grade shall . . . (3) . . . be honorably discharged. . . .

10 U.S.C. § 3303(d) (1976).

The purpose of this system, as described by the House Report on the Act, was to strengthen the officers corps. H.R. Rep. No. 640, 80th Cong., 1st Sess. 3 (1947). The provisions of section 3303 are plainly for the benefit of the Army, to guarantee that the

most fit officers are systematically selected for promotion and the remaining officers are discharged. The statute cannot sensibly be read to encompass the interest of an officer to seek a discharge when the Army has determined that its interests would best be served by his retention. Such an interpretation would contravene the well-established principle that statutes pertaining to the Army should be read narrowly, so as to limit judicial interference in military affairs and protect the discretion of military commanders. See, e.g., Parker v. Levy, 417 U.S. 733, 743, 94 S. Ct. 2547, 41 L.Ed.2d 439 (1974); Orloff v. Willoughby, 345 U.S. 83, 94, 73 S. Ct. 534, 97 L.Ed. 842 (1953); Dilley v. Alexander, 195 U.S.App.D.C. 332, 337-338, 603 F.2d 914, 919-920 (1979). In similar situations, where military personnel have sought to invoke a provision relating to the fitness of personnel as a lever to force their discharge, the Courts have uniformly rejected the proffered constructions. See Orloff v. Willoughby, supra; Allgood v. Kenan, 470 F.2d 1071 (9th Cir. 1972); Silverthorne v. Laird, 460 F.2d 1175, 1186 (5th Cir. 1972). For such a construction would create incentives for military personnel to disqualify themselves physically, or in this case create disincentives for promotion, which would tend to defeat the obvious objective of Congress to create incentives for military personnel to keep fit and to strive for promotion. See Orloff v. Willoughby, supra, 345 U.S. at 94-95, 73 S. Ct. 534.

The conclusion that this plaintiff's claim for discharge is not in the zone of interests protected by 10 U.S.C. § 3303(d) is quite consistent with the Court's recognition that section 3303 protects the interests of officers wrongfully refused promotion and discharged. See, e.g., Knehans v. Alexander, 184 U.S.App.D.C. 420, 566 F.2d 312 (1977), cert. denied, 435 U.S. 995, 98 S. Ct. 1646, 56 L.Ed.2d 83 (1978). It is no great leap to conclude that a statute designed to strengthen the officer corps would protect the interests of qualified officers who are wrongfully denied promotions through violations of specific procedural guarantees. An officer being discharged, having been wrongfully

denied promotion on account of discrimination, for example, might also have such a claim. But the plaintiff here conspicuously fails to complain about the underlying decisions not to promote him. He seeks instead to capitalize upon them by a discharge.

Finally, plaintiff lifts the phrase "shall . . . be honorably discharged" in section 3303(d) out of its context to allege that it is mandatory and designed to confer a right of discharge upon an unhappy officer. This interpretation does not survive analysis. The term "shall" in section 3303(d) precedes three alternatives that describe how an officer not recommended for promotion shall be separated from the Army; it guarantees that officers eligible for retirement will not be perfunctorily discharged, but will be treated with concern for approaching retirement dates. Section 3303(d)(1) guarantees that an officer within two years of retirement under section 3913 will be maintained on the active list until he is eligible for retirement. Read in its entirety, section 3303(d) is plainly inconsistent with the plaintiff's argument that it is designed to protect the interest of a non-promoted officer in a speedy severance from the Army. To the extent that section 3303(d) imposes any mandatory duty upon the Army, it is to protect the interests of a non-promoted officer after the Army has made a discretionary determination to discharge him. It requires the Army to separate the officer in accordance with the provisions of section 3303(d)(1-3) rather than by immediate discharge, without severance pay or concern for upcoming retirement dates.

The Court concludes that the plaintiff's claim is not arguably within the zone of interests protected by section 3303(d) of Title 10, U.S.C. He may not, for this reason, complain of the action of the STAB Board in promoting him to Captain, RA, or of the Secretary of the Army in retaining him on active service. He must, in contending with the consequences of administrative grace, accept the sweet with the bitter. Knehans v. Alexander, 184 U.S.App.D.C. at 423, 566 F.2d at 315; compare Arnett v. Kennedy, 416 U.S.

134, 153-54, 94 S. Ct. 1633, 40 L.Ed.2d 15 (1974).

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In sum, the Court holds that the defendant is entitled to summary judgment as a matter of law.[362]

(e) Taxpayer Standing.

(i) The Supreme Court, in Flast v. Cohen,[363] relaxed somewhat the concept of standing in a limited class of cases involving plaintiffs suing as federal taxpayers.[364] In Flast, the plaintiffs challenged, on first amendment establishment clause grounds, the use of federal funds to assist parochial schools under the Elementary and Secondary Education Act of 1965. The plaintiffs claimed standing as federal taxpayers. The Court found nothing in article III to absolutely bar such standing,[365] and held that to

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[362]See also Allgood v. Kenan, 470 F.2d 1071 (9th Cir. 1972) (no standing to demand discharge for unsuitability); Silverthorne v. Laird, 460 F.2d 1175 (5th Cir. 1972) (no standing to demand discharge for unfitness or unsuitability); Cortright v. Resor, 447 F.2d 245, 251 (2d Cir. 1971), cert. denied, 405 U.S. 965 (1972) (no standing to contest transfer on ground PCS regulation violated where regulation existed for purpose of cost efficiency in Army). But cf. Specter v. Garrett, 971 F.2d 936 (3d Cir. 1992), rev'd on other grounds, 114 S. Ct. 2771; Friends of the Earth v. United States Navy, 841 F.2d 927 (9th Cir. 1988).

[363]392 U.S. 83 (1968).

[364]But cf. Kurtz v. Baker, 829 F.2d 1133, 1140 (D.C. Cir. 1987) (explained that the Supreme Court believed that although the Flast test is met, taxpayer standing exists only where causation and redressability exist (citing Warth v. Seddon, 422 U.S. 490, 508 (1975)).

[365]Id. at 101.

establish taxpayer standing a plaintiff must show a "logical nexus between the [taxpayer] status asserted and the claim sought to be adjudicated."[366] The nexus demanded of federal taxpayers has two aspects. First, the plaintiff must establish a "logical link" between the taxpayer status and the type of legislative enactment being challenged.[367] Taxpayer standing is only proper where the plaintiff attacks exercises of congressional power under the taxing and spending clause of the Constitution (art. I, § 8).[368] Second, the plaintiff must show a nexus between the taxpayer status and the precise nature of the constitutional infringement alleged.[369] "Under this [second] requirement, the [plaintiff] must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8."[370] In Flast, the Court found that the plaintiffs met the test for taxpayer standing: they had challenged a congressional enactment under the taxing and spending clause (the Elementary and Secondary Education Act of 1965), and they had alleged a specific constitutional limitation on the exercise of the taxing

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[366] Id. at 102.

[367] Id.

[368] Id.

[369] Id.

[370] Id. at 102-03 (emphasis added).

and spending power (the establishment clause of the first amendment).[371]

(ii) The issue of taxpayer standing arose in the military context in a case involving a constitutional challenge to the Army chaplaincy:

KATCOFF v. MARSH

582 F. Supp. 463 (E.D.N.Y. 1984), aff'd, 755 F.2d 223 (2d Cir. 1985)

MEMORANDUM AND ORDER

McLAUGHLIN, District Judge.

INTRODUCTION

> Chaplains have been members of the United States Army since the Revolutionary War. Plaintiffs, who brought this action while they were still Harvard law students, have never served in the military. They sue to declare the Army Chaplaincy Program (the "Chaplaincy Program," or the "Program") unconstitutional on the ground that it runs afoul of the First Amendment's command that Congress "shall make no law respecting the establishment of religion." U.S. Const. amend. I.
>
> There are some who might argue that this question is more the grist of a moot court competition that a case or controversy to occupy the energies of a federal court. There is, thus, a threshold question of plaintiff's standing.

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[371] Id. at 103-104. See also Kurtz v. Baker, 829 F.2d 1133, 1140 (D.C. Cir. 1987) (no taxpayer standing to contest congressional chaplain program where program receives no federal government stipend); Kurtz v. Kennickell, 622 F. Supp. 1414, 1416 (D.D.C. 1985) (court found taxpayer standing to contest use of public funds to publish prayers offered by congressional chaplains).

For the reasons set forth below, I conclude that there is a case or controversy, and that the plaintiffs do have standing. On the merits, I conclude that the Chaplaincy Program is constitutional. Accordingly, plaintiffs' motion for summary judgment is denied. Defendants' cross-motion for summary judgment is granted.

. . . .

II. Standing

If plaintiffs have any standing to bring this suit, it can only be by virtue of their status as taxpayers. The analysis, therefore, must begin with Flast v. Cohen, 392 U.S. 83, 88 S. Ct. 1942, 30 L.Ed.2d 947 (1968).

In Flast, federal taxpayers sought to declare that the expenditure of federal funds under the Elementary and Secondary Education Act of 1965 constituted a violation of the First Amendment. Recognizing that the 1923 decision in Frothingham v. Mellon, 262 U.S. 447, 43 S. Ct. 597, 67 L.Ed. 1078 (1923) "[had] stood for 45 years as an impenetrable barrier to suits . . . brought by individuals who [could] assert only the interest of federal taxpayers," Flast, supra, 392 U.S. at 85, 88 S. Ct. at 1944, the Supreme Court decided nonetheless, that a fresh examination of the taxpayer standing issue was due.

The Flast Court began by noting that the notion of standing is but one strand in the rope that constitutes the broader concept of justiciability. Standing focuses on the plaintiff to ascertain whether "the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court . . . depends for illumination of difficult constitutional questions.'" Id. at 99, 88 S. Ct. at 1952 (quoting Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct 691, 703, 7 L.Ed.2d 663 (1962)). As subsequent Supreme Court decisions have made clear, the federal judiciary is an inappropriate forum "for the ventilation of public grievances or the refinement of jurisprudential understanding."

Valley Forge, supra, 454 U.S. alt 473, 102 S. Ct. at 759.

The Flast Court then fashioned a two-pronged test to determine whether the necessary "personal stake" in the outcome has been established. First, the party must establish a "logical link" between his taxpayer status and the type of legislation he challenges. Hence, a taxpayer is a proper party to challenge only "exercises of congressional power under the taxing and spending clause of Art. I, § 8. . . . It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute." Flast v. Cohen, supra, 392 U.S. at 102, 88 S. Ct. at 1954.

Second, the taxpayer must demonstrate a "nexus" between his status qua taxpayer "and the precise nature of the constitutional infringement alleged. . . . [He] must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8." Id. at 102-03, 88 S. Ct. at 1954.

The Court fleshed out the nexus skeleton by holding that plaintiff's challenge to the exercise of the taxing and spending power under Article I, § 8, satisfied the first prong, and that the Establishment Clause of the First Amendment, viewed historically, operated as a specific limitation on Congress' ability to tax and spend. Thus, because the claims were specifically rooted in the Establishment Clause, the second prong was also satisfied.

Application of the two-step test announced in Flast creates a high risk of debasing the concept of taxpayer standing into a constitutional word-game. Fortunately, however, we are not without guidance. The Flast Court itself summarized the standing test:

> Consequently, we hold that a taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power.

Flast v. Cohen, supra, 392 U.S. at 105-06, 88 S. Ct. at 1955. Thus viewed, the difficult task of finding a "logical link" and a "nexus" is reduced to a more straightforward proposition: The challenged action must be: (1) congressional in nature; (2) an exercise of Congress' taxing and spending power; and (3) an alleged violation of a specific constitutional provision limiting the exercise of that power. Flast v. Cohen, supra; see Valley Forge, supra, 454 U.S. at 478-79, 102 S. Ct. at 761-62.

Two post-Flast cases, in which standing was denied, shed additional light. In United States v. Richardson, 418 U.S. 166, 94 S. Ct. 2940, 41 L.Ed.2d 678 (1974), plaintiff sued the Government to compel the Executive Branch to reveal certain expenditures by the C.I.A. The Court held that plaintiff lacked taxpayer standing because he alleged a violation of the Statement and Account Clause, Art. I, § 9, cl. 7, 50 U.S.C. § 403a et seq., rather than a transgression of the taxing and spending powers of Congress. Id. at 174-75, 94 S. Ct. at 2945-46. Likewise, in Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 108, 94 S. Ct. 2925, 41 L.Ed.2d 706 (1974), plaintiff failed to establish standing because his challenge to a Pentagon policy allowing members of Congress to retain their status in the Armed Forces Reserve concerned the Incompatibility Clause, not the Taxing and Spending Clause. Id. at 228, 94 S. Ct. at 2935.

Richardson and Schlesinger instruct us that taxpayer standing thrives in narrow confines. Nevertheless, they are of limited assistance here, because the statutes

challenged in those cases plainly did not involve Congress' taxing and spending power.

A much closer question was presented in Valley Forge, where plaintiffs challenged the conveyance of some land to the Valley Forge Christian College, a religious institution. The transfer was effected pursuant to three distinct links in the following chain of authority: (a) the Property Clause of the United States Constitution, Art. IV, § 3, cl. 2, vests Congress with the "[p]ower to dispose of and make all needful Rules and Regulations respecting the . . . Property belonging to the United States." Pursuant to this constitutional authority, (b) Congress enacted the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 471 et seq. The relevant section of the statute is section 484, which provides that "property that has outlived its usefulness to the Federal Government is declared 'surplus' and may be transferred to private or other public entities." Valley Forge, supra, 454 U.S. at 466-67, 102 S. Ct. at 755 (footnote omitted). Subsection (k)(1) of Section 484 authorizes the Secretary of Education to dispose of such surplus property "for school, classroom, or other educational use," and subparagraphs (A) and (C) of that subsection empower the Secretary to take into account any actual or potential benefit to the United States from the sale or lease of property to non-profit, tax exempt institutions. The latter has been further defined by the third link in this chain, 34 C.F.R. § 12.9(a) (1980), which provides for the computation of a "public benefit allowance," discounting the transfer price of the property "on the basis of benefits to the United States from the use of such property for educational purposes."

The land in Valley Forge was appraised at $577,500 when it was conveyed. The Secretary, however, granted a 100% public benefit allowance, thereby permitting Valley Forge Christian College to acquire the property without actually paying anything. Plaintiffs attacked the transfer, asserting that they "would be deprived of the fair and constitutional use of [their] tax dollar . . . in violation of [their] rights under the First

Amendment of the United States Constitution." Id. at 469, 102 S. Ct. at 757.

The District Court dismissed the complaint for lack of standing, but the Third Circuit reversed. The Circuit Court conceded that, because taxpayer standing required the challenged enactment to be an exercise of Congressional power under the Taxing and Spending Clause of Art. I, § 8, plaintiffs had not satisfied the requirements of Flast (the conveyance had been authorized by legislation enacted under the Property Clause).

Blazing a new trail, the Circuit Court, nonetheless, found that plaintiffs had standing, and molded a new concept of standing: Citizens, claiming "'injury in fact' to their shared individuated right to a government that 'shall make no law respecting the establishment of religion,'" Americans United for Separation of Church and State, Inc., v. United States Dep't of H.E.W., 619 F.2d 252, 261 (3d Cir. 1980), rev'd sub nom. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 102 S. Ct. 752, 70 L.Ed.2d 700 (1982), could now bring suits.

It was this "unusually broad and novel view of standing," Valley Forge, supra, 454 U.S. at 470, 102 S. Ct. at 757, that prompted the Supreme Court to grant certiorari. Reversing, the Court reaffirmed Flast. Discussing at length its holdings in Richardson and Schlesinger, the Court regarded these cases as removing "[a]ny doubt that once might have existed concerning the rigor with which the Flast exception to the Frothingham principle ought to be applied." Id. at 481, 102 S. Ct. at 763.

Plaintiffs in Valley Forge failed to satisfy the Flast requirements in several respects. First, their challenge was not to a congressional action directly, but to a decision by an agency--H.E.W.--to transfer federal property. Second, and, as the Court recognized, "perhaps redundantly," the property transfer complained of was an exercise of Congress' power under the Property Clause, Art. IV, § 3, cl. 2, rather than under

the Taxing and Spending Clause of Art. I, § 8. Id. at 480, 102 S. Ct. at 762.

Two conclusions emerge from the Flast, Richardson, Schlesinger and Valley Forge cases. To earn standing the plaintiffs must launch their attack against an action by Congress (as distinct from bureaucratic implementation of congressional directives); and that attack must rest squarely upon a specific constitutional limitation on Congress' power under the Taxing and Spending Clause of Article I.

Defendants vigorously deny that either condition has been fulfilled in this case; and they rest foursquare upon Valley Forge for their argument. I find Valley Forge inapposite, however, and I conclude that plaintiffs have standing.

1. The Congressional Action Requirement

In Flast, Congressional funds were spent by New York State on religious materials and instruction. These funds were originally provided by Congress under Title I of the Elementary and Secondary Education Act of 1965. By the terms of 20 U.S.C. § 241f (1976), Congress had broad power to oversee expenditures by the states. Congressional action was clearly in issue.

In Valley Forge, the asserted governmental impropriety was the decision by H.E.W. to grant surplus land to a religious organization. Respondents failed "the test for taxpayer standing . . . [because] the source of their complaint [was] not a congressional action, but a decision by HEW to transfer a parcel of federal property." Valley Forge, supra, 454 U.S. at 479, 102 S. Ct. at 762 (footnote omitted).

The challenge here is to that portion of the overall congressional appropriation for the Army that is used for the operation and maintenance of the Chaplaincy Program. This eighty-five million dollar expense is included in the Army's annual budget, and can no more be characterized as "an incidental expenditure of tax funds in the administration of an

essentially regulatory statute," Flast v. Cohen, supra, 392 U.S. at 102, 88 S. Ct. at 1954, than could the appropriations that were the subject of the Flast suit. Whatever additional powers Congress may have exercised in passing the Army's budget, which includes funds for the Program, it clearly exercised its Constitutional authority to spend.

Defendants argue that the funds for the Chaplaincy Program are only a small part of the entire Army allocation. This might be a relevant consideration, but only if Congress were unaware of the use to which the funds were being put. If, for example, Congress budgeted funds for one purpose, and a bureaucrat spent them for another and unconstitutional purpose, Congress could not be deemed to have authorized the ultimate expenditure. In such a case, the taxpayer would be challenging unconstitutional action by the Executive Branch, not a Congressional transgression in the exercise of its spending powers. Cf. Public Citizens, Inc. v. Simon, 539 F.2d 211 (D.C. Cir. 1976) (plaintiff lacked taxpayer standing to challenge use of White House staff for campaign purposes in violation of Appropriations Clause).

Congress, however, knows all about the Chaplaincy Program and scrutinizes its funding regularly. "Congress has repeatedly considered, and reaffirmed, the need for an Army Chaplaincy, and has frequently exercised its oversight authority to insure that general appropriations have not been spent unnecessarily. . . ." Defendant's Reply Memorandum at 8. Thus, despite the wide latitude the Army is given in the expenditure of tax dollars, it is Congress that consistently decides whether the Chaplaincy Program merits funding. See infra pt. III, A, 3.

2. The Taxing and Spending Clause Requirement

Defendants make an attractive argument that the constitutional source of the Congress' power over the Chaplaincy Program traces, not to the Taxing and Spending Clause, but to the War Powers Clause of Art. I, § 8.

They rely principally upon Velvet v. Nixon, 415 F.2d 236 (10th Cir. 1969), cert. denied, 396 U.S. 1042, 90 S. Ct. 684, 24 L.Ed.2d 686 (1970), where the Court held that Congressional expenditures for the Viet Nam War were authorized by the War Powers Clause, not by the Taxing and Spending Clause. I reject this argument.

Because there is no litmus test to determine which power Congress exercises in enacting a given statute, some writers have suggested that it is wiser to regard "all government spending [as] an exercise of the congressional power to tax and spend." Davis, Standing: Taxpayers and Others, 35 U.Chi.L.Rev. 601, 605 (1968). This view finds some support in Flast, where the Court repeatedly emphasized that taxpayer standing was designed to allow federal taxpayers to challenge "a specific expenditure of federal funds." Flast v. Cohen, supra, 392 U.S. at 114, 88 S. Ct. at 1960 (Stewart, J., concurring). In limiting the scope of taxpayer standing, the Court's concern was to block challenges to "essentially regulatory statute[s]." Id. at 102, 88 S. Ct. at 1954. It may be fairly inferred that the fact of Congressional spending--rather than the nominal source of that spending--was the Court's central concern.

It cannot be gainsaid that the Chaplaincy Program, like the challenged statute in Flast, involves congressional spending. Absent a clear sign from the Supreme Court to the contrary, I am persuaded that, in such a case, a federal court should not attempt to divine whether a particular statute authorizing spending is enacted under the Taxing and Spending Clause, or under some other, arguably appropriate, source of Congressional power.

It is also noteworthy that the Taxing and Spending Clause itself expressly states that one of the purposes of taxing and spending is to "provide for the common defence." Art. I, § 8, cl. 1. In their affidavits and memoranda, Army personnel and defendants argue that the Chaplaincy is necessary for the efficient functioning of the Army. It would therefore be disingenuous, at best, to

conclude that Congress was not acting under the Taxing and Spending Clause when it provided funding for the Chaplaincy.

3. Constitutional Limitations on the Taxing and Spending Power

Flast requires that for a taxpayer to have standing, the challenged action must be grounded in a congressional breach of "a specific limitation upon its taxing and spending power." Flast v. Cohen, supra, 392 U.S. at 105, 88 S. Ct. at 1955. One such limitation is the Establishment Clause: "We have noted that the Establishment Clause of the First Amendment does specifically limit the taxing and spending power conferred by Art. I, § 8." Id. Plaintiffs, having alleged this specific violation, clearly satisfy this requirement for taxpayer standing.

Accordingly, for the reasons discussed above, I conclude that plaintiffs have standing, as taxpayers, to challenge the constitutionality of the Chaplaincy Program.

[On the merits of the case, the court held the Army chaplaincy was constitutional.]

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(iii) As the judge in Katcoff noted, the Supreme Court has been unwilling to expand taxpayer standing to challenges other than those to legislation enacted under the taxing and spending clause.[372]

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[372]Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982) (property clause); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) (incompatibility clause); United States v. Richardson, 418 U.S. 166 (1974) (accounting clause). See also Phelps v. Reagan, 812 F.2d 1293, 1294 (10th Cir. 1987) (foreign affairs power); Americans United for Separation of Church & State v. Reagan, 786 F.2d 194, 199 (3d Cir.), cert. denied, 479 U.S. 914 (1986) (foreign affairs power); Pietsch v. Bush, 755 F. Supp. 62, 66-67 (E.D.N.Y. 1991) (war powers and (continued...)

Moreover, only challenges to congressional, as opposed to executive branch, action can create taxpayer standing.[373] Finally, the plaintiff must be able to show a specific constitutional limitation on the taxing and spending clause, such as the establishment clause of the first amendment; reliance on a general limitation on congressional power is not sufficient.[374]

(f) Organizational Standing. The Government often is sued by organizations or associations--ranging from the ACLU to the Sierra Club--seeking relief for purported injuries to themselves or their members. Clearly an organization or association has standing to sue for injuries suffered in its own right.[375] In the

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[372](...continued)
commander-in-chief clauses).

The Supreme Court itself has recognized its unwillingness to expand taxpayer standing beyond the limits of the Flast exception. See Bowen v. Kendrick, 487 U.S. 589, 617 (1988).

[373]Bowen v. Kendrick, 487 U.S. 589 (1988); Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 479 (1982); Thompson v. County of Franklin 15 F.3d 245 (2d Cir. 1994); United States v. City of New York, 972 F.2d 464 (2d Cir. 1992); Phelps v. Reagan, 812 F.2d 1293, 1294 (10th Cir. 1987); Americans United for Separation of Church & State v. Reagan, 786 F.2d 194, 200 (3rd Cir.), cert. denied, 479 U.S. 914 (1986).

[374]See Frothingham v. Mellon, 262 U.S. 447 (1923) (fifth amendment due process clause not a specific constitutional limitation). Cf. Clark v. United States, 609 F. Supp. 1249, 1251 (D. Md. 1985) (statutory violations do not create taxpayer standing).

[375]See, e.g., Immigration and Naturalization Service v. Legalization Assistance Project of the Los Angeles County Federation of Labor, 114 S. Ct. 433 (1993); Havens Realty (continued...)

absence of injury to itself, an organization or association may have standing to sue on behalf of its members when "(a) its members have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[376] A mere "abstract concern" or "special interest" in a public issue, however, is not sufficient to confer organizational standing.[377]

> The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought the suit. . . . So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its

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[375](...continued)
Corp. v. Coleman, 455 U.S. 363, 378-79 (1982); NAACP v. Alabama, 357 U.S. 449, 458-60 (1958); Humane Society of the United States v. Babbitt, 46 F.3d 93 (D.C. Cir. 1995); EEOC v. Nevada Resort Ass'n, 792 F.2d 882, 885 (9th Cir. 1986).

[376]Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 343 (1977). See also Lujan v. National Wildlife Federation, 497 U.S. 871 (1990); International Union, UAW v. Brock, 477 U.S. 274, 282 (1986); Humane Soc'y v. Hodel, 840 F.2d 45, 58 (D.C. Cir. 1988) (germaneness standard is undemanding).

[377]Olagues v. Russoniello, 770 F.2d 791, 798 (9th Cir. 1985).

members, entitled to invoke the court's jurisdiction.[378]

c. Political Question Prong.

(1) General. The second ingredient of justiciability involves the separation of powers doctrine and the policy of judicial self-restraint. Federal courts will not intrude into areas committed by the Constitution to the political--i.e., Legislative and Executive--branches of the Government.[379]

(2) Identifying Political Questions. In addressing this aspect of justiciability, courts will analyze the facts of a case to determine whether, notwithstanding the fact that an actual controversy exists, the fundamental issue is a "political question" that is inappropriate for resolution in a judicial forum.[380] In the landmark case of Baker v. Carr,[381] the Supreme Court defined the elements that serve to identify nonjusticiable political questions. At least one of the facts must be present before the lawsuit can be dismissed as nonjusticiable:

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[378]Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 342-43 (1977). See also Lujan v. National Wildlife Federation, 497 U.S. 871 (1990); International Union, UAW v. Brock, 477 U.S. 274, 281 (1986); Action Alliance of Senior Citizens v. Heckler, 789 F.2d 931, 939 n.10 (D.C. Cir. 1986); Bittner v. Secretary of Defense, 625 F. Supp. 1022, 1024-26 (D.D.C. 1986).

[379]C. Wright, supra note 11, at 84; see also L. Tribe, supra, note 13, at 79.

[380]See, e.g., Flast v. Cohen, 392 U.S. 83 (1942); Murphy v. United States, 993 F.2d 871 (Fed. Cir. 1993); McIntyre v. O'Neill, 603 F. Supp. 1053, 1058 (D.D.C. 1985).

[381]369 U.S. 186, 210 (1962).

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

More recently, Justice Powell, concurring in Goldwater v. Carter,[382] summarized the relevant factors as follows:

> [T]he doctrine incorporates three inquiries: (1) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?

(3) Justiciability and the Armed Forces. Because the Constitution entrusts the regulation and the use of the armed forces to the Congress and the President,[383] the political question prong of justiciability is especially important in lawsuits

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[382]444 U.S. 996, 998 (1979).

[383]U.S. Const., art., I, § 8, art. II, §§ 1-3.

involving the military. The Supreme Court opinion in Gilligan v. Morgan is illustrative:

GILLIGAN v. MORGAN

413 U.S. 1 (1973)

Mr. Chief Justice Burger delivered the opinion of the Court.

Respondents, alleging that they were full-time students and officers in the student government at Kent State University in Ohio, filed this action in the District Court on behalf of themselves and all other students on October 15, 1970. The essence of the complaint is that, during a period of civil disorder on and around the University campus in May 1970, the National Guard, called by the Governor of Ohio to preserve civil order and protect public property, violated students' rights of speech and assembly and caused injury to a number of students and death to several, and that the actions of the National Guard were without legal justification. They sought injunctive relief against the Governor to restrain him in the future from prematurely ordering National Guard troops to duty in civil disorders and an injunction to restrain leaders of the National Guard from future violation of the students' constitutional rights. They also sought a declaratory judgment that § 2923.55 of the Ohio Revised Code is unconstitutional. The District Court held that the complaint failed to state a claim upon which relief could be granted and dismissed the suit. The Court of Appeals unanimously affirmed the District Court's dismissal with respect to injunctive relief against the Governor's "premature" employment of the Guard on future occasions and with respect to the validity of the state statute. At the same time, however, the Court of Appeals, with one judge dissenting, held that the complaint stated a cause of action with respect to one issue which was remanded to the District Court with directions to resolve the following question:

> "Was there and is there a pattern of training, weaponry and orders in the Ohio National Guard which singly or together require or make inevitable the use of fatal force in suppressing civilian disorders when the total circumstances at the critical time are such that nonlethal force would suffice to restore order and the use of lethal forces is not reasonably necessary."

We granted certiorari to review the action of the Court of Appeals.

We note at the outset that since the complaint was filed in the District Court in 1970, there have been a number of changes in the factual situation. At the oral argument, we were informed that none of the named respondents is still enrolled in the University. Likewise, the officials originally named as party defendants no longer hold offices in which they can exercise any authority over the State's National Guard, although the suit is against such parties and their successors in office. In addition, both the petitioners, and the Solicitor General appearing as amicus curiae, have informed us that since 1970 the Ohio National Guard has adopted new and substantially different "use-of-force" rules differing from those in effect when the complaint was filed; we are also informed that the initial training of National Guard recruits relating to civil disorder control has been revised.

Respondents assert, nevertheless, that these changes in the situation do not affect their right to a hearing on their entitlement to injunctive and supervisory relief. Some basis therefore exists for a conclusion that the case is now moot; however, on the record before us we are not prepared to resolve the case on that basis and therefore turn to the important question whether the claims alleged in the complaint as narrowed by the Court of Appeals remand are justiciable.

We can treat the question of justiciability on the basis of an assumption

that respondents' claims, within the framework of the remand order, are true and could be established by evidence. On that assumption we address the question whether there is any relief a District Court could appropriately fashion.

It is important to note at the outset that this is not a case in which damages are sought for injuries sustained during the tragic occurrence at Kent State. Nor is it an action seeking a restraining order against some specified and imminently threatened unlawful action. Rather, it is a broad call on judicial power to assume continuing regulatory jurisdiction over the activities of the Ohio National Guard. This far-reaching demand for relief presents important questions of justiciability.

Respondents continue to seek for the benefit of all Kent students a judicial evaluation of the appropriateness of the "training, weaponry and orders" of the Ohio National Guard. They further demand and the Court of Appeals remand would require that the District Court establish standards for the training, kind of weapons, scope and kind of orders to control the actions of the National Guard. Respondents contend that thereafter the District Court must assume and exercise a continuing judicial surveillance over the Guard to assure compliance with whatever training and operations procedures may be approved by that court. Respondents press for a remedial decree of this scope, even assuming that the recently adopted changes are deemed acceptable after an evidentiary hearing by the court. Continued judicial surveillance to assume compliance with the changed standards is what respondents demand.

In relying on the Due Process Clause of the Fourteenth Amendment, respondents seem to overlook the explicit command of Art. I, § 8, cl 16, which vests in Congress the power:

"To provide for organizing, arming and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of

Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." (Emphasis added.)

The majority opinion in the Court of Appeals does not mention this very relevant provision of the Constitution. Yet that provision is explicit that the Congress shall have the responsibility for organizing, arming and disciplining the Militia (now the National Guard), with certain responsibilities being reserved to the respective States. Congress has enacted appropriate legislation pursuant to Art. I, § 8, cl 16, and has also authorized the President--as the Commander-in-Chief of the Armed Forces--to prescribe regulations governing organization and discipline of the National Guard. The Guard is an essential reserve component of the Armed Forces of the United States, available with regular forces in time of war. The Guard also may be federalized in addition to its role under state governments, to assist in controlling civil disorders. The relief sought by respondents, requiring initial judicial review and continuing surveillance by a federal court over the training, weaponry and orders of the Guard, would therefore embrace critical areas of responsibility vested by the Constitution in the Legislative and Executive Branches of the Government.

The Court of Appeals invited the District Court on remand to survey certain materials not then in the record of the case:

> "[F]or example: Prevention and Control of Mobs and Riots, Federal Bureau of Investigation, U.S. Dept. of Justice, J. Edgar Hoover (1967) . . ., 32 C.F.R. § 501 (1971), 'Employment of Troops in Aid of Civil Authorities'; Instructions for Members of the Force at Mass Demonstrations, Police Department City of New York (no date); Report of the National Advisory Commission on Civil Disorders (1968)." 456 F.2d, at 614.

This would plainly and explicitly require a judicial evaluation of a wide range of

possibly dissimilar procedures and policies approved by different law enforcement agencies or other authorities; and the examples cited may represent only a fragment of the accumulated data and experience in the various States, in the armed services, and in other concerned agencies of the Federal Government. Trained professionals, subject to the day to day control of the responsible civilian authorities, necessarily must make comparative judgments on the merits as to evolving methods of training, equipping, and controlling military forces with respect to their duties under the Constitution. It would be inappropriate for a district judge to undertake this responsibility, even in the unlikely event that he possessed requisite technical competence to do so.

Judge Celebrezze in dissent correctly read Baker v. Carr when he said:

> "I believe that the congressional and executive authority to prescribe and regulate the training and weaponry of the National Guard, as set forth above, clearly precludes any form of judicial regulation of the same matters. (Emphasis added.) I can envision no form of judicial relief which, if directed at the training and weaponry of the National Guard, would not involve a serious conflict with a 'coordinate political department; . . . a lack of judicially discoverable and manageable standards for resolving [the question]; . . . the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; . . . the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; . . . an unusual need for unquestioning adherence to a political decision already made; [and] the potentiality of embarrassment from multifarious pronouncements by various

> departments on one question." Baker v. Carr, supra, 369 U.S. at 217. . . .
> "Any such relief, whether it prescribed standards of training and weaponry or simply ordered compliance with the standards set by the Congress and/or the Executive, would necessarily draw the courts into a nonjusticiable political question, over which we have no jurisdiction." 456 F.2d, at 619. (Emphasis added.)

In Flast v. Cohen, 392 U.S. 83 (1968), this Court noted that:

> "[J]usticiability is itself a concept of uncertain meaning and scope. Its reach is illustrated by the various grounds upon which questions sought to be adjudicated in federal courts have been held not to be justiciable. Thus, no justiciable controversy is prescribed when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion, when the question sought to be adjudicated has been mooted by subsequent developments, and when there is no standing to maintain the action. Yet it remains true that [j]usticiability is . . . not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures. . . . Poe v. Ullman, 367 U.S. 497, 508 (1961)."

In determining justiciability, the analysis in Flast thus suggests that there is no justiciable controversy (a) "when the parties are asking for an advisory opinion," (b) "when the question sought to be adjudicated has been mooted by subsequent developments," and (c) "when there is no standing to maintain the action." As we noted in Poe v. Ullman, 367 U.S. 497 (1961), and repeated in Flast, "[j]usticiability is . . .

not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures. . . ." 367 U.S., at 508.

In testing this case by these standards drawn specifically from Flast, there are serious deficiencies with respect to each. The advisory nature of the judicial declaration sought is clear from respondents' argument and indeed from the very language of the Court's remand. Added to this is that the nature of the questions to be resolved on remand are subjects committed expressly to the political branches of government. These factors when coupled with the uncertainties as to whether a live controversy still exists and the infirmity of the posture of respondents as to standing renders the claim and the proposed issues on remand nonjusticiable.

It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches, directly responsible--as the Judicial Branch is not--to the elective process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of government which are periodically subject to electoral accountability. It is this power of oversight and control of military forces by elected representatives and officials which underlies our entire constitutional system; the majority opinion of the Court of Appeals failed to give appropriate weight to this separation of powers.

Voting rights cases such as Baker v. Carr, 369 US 186 (1962); Reynolds v. Sims, 377 US 533 (164), and prisoner rights cases such as Haines v. Kerner, 404 US 519 (1972), are cited by the court as supporting the "diminishing vitality of the political

question doctrine." Yet because this doctrine has been held inapplicable to certain carefully delineated situations it is no reason for federal courts to assume its demise. The voting rights cases, indeed, have represented the Court's efforts to strengthen the political system by assuring a higher level of fairness and responsiveness to the political processes, not the assumption of a continuing judicial review of substantive political judgments entrusted expressly to the coordinate branches of government.

In concluding that no justiciable controversy is presented, it should be clear that we neither hold nor imply that the conduct of the National Guard is always beyond judicial review or that there may not be accountability in a judicial forum for violations of law or for specific unlawful conduct by military personnel, whether by way of damages or injunctive relief. We hold only that no such questions are presented in this case. We decline to require a United States district court to involve itself so directly and so intimately in the task assigned that court by the Court of Appeals. Orloff v. Willoughby, 345 US 83, 94-94, 97 (1953).

Reversed.

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(4) Deployment of Military Forces. Cases involving challenges to the commitment and manner of use of the armed forces provide the quintessential application of the political question prong of justiciability. Historically, courts have refused to intrude into the decisions of the political branches to use military force, regardless of the absence of a formal declaration of war.[384] More than 70 lawsuits were

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[384] E.g., Johnson v. Eisentrager, 339 U.S. 763, 789 (1950); Martin v. Mott, 25 U.S. (12 Wheat.) 19, 30-31 (1827); Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800); Vanderheyden v. Young, 11 Johns. 150, 157-58 (N.Y. 1814). Compare (continued...)

brought challenging American military involvement in Vietnam and Southeast Asia.[385] The fact the war was "undeclared" was frequently brought to the federal judiciary's attention. In no case, however, did the courts hold the involvement unconstitutional, and "most of the courts refused to reach the merits of the constitutional issue by finding that the suits raised a political question or were otherwise nonjusticiable."[386] American military involvement since Vietnam similarly has been the subject of lawsuits challenging the use of the armed forces. An example of such litigation is Greenham Women Against Cruise Missiles v. Reagan, a lawsuit challenging American deployment of missiles in Great Britain.

GREENHAM WOMEN AGAINST CRUISE MISSILES v. REAGAN

591 F. Supp. 1332 (S.D.N.Y. 1984), aff'd, 755 F.2d 34 (2d Cir. 1985)

MEMORANDUM OPINION AND ORDER

EDELSTEIN, District Judge.

Plaintiffs in this action fall into three distinct categories: British women who live

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[384](...continued)
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (President's decision to seize steel industries without congressional approval during Korean War presented justiciable controversy).

[385]C. Wright, supra note 11 at 89.

[386]Id. E.g., Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973), cert. denied, 416 U.S. 936 (1974); Massachusetts v. Laird, 451 F.2d 26 (1st Cir. 1971); Orlando v. Laird, 443 F.2d 1039 (2d Cir.), cert. denied, 404 U.S. 869 (1971); Luftig v. McNamara, 373 F.2d 664 (D.C. Cir. 1967), cert. denied, 387 U.S. 945 (1968).

within a 100 mile radius of the United States Air Force Base in Greenham Common, Great Britain, suing on their own behalf and on behalf of their minor children, and an association of these women ("Greenham plaintiffs"); a United States citizen living in London, Deborah Law; and two United States Congressmen, Ronald Dellums of California and Ted Weiss of New York ("congressional plaintiffs"). Plaintiffs seek to enjoin the deployment of ninety-six Ground Launched Cruise Missiles ("cruise missiles") at the United States Air Force Base in Greenham Common, which is located approximately 60 miles west of London. They contend that the deployment of the cruise missiles will create a substantial risk of a nuclear war initiated by either the United States or the Soviet Union, or of a nuclear accident. From this premise, those plaintiffs living near Greenham Common allege that the deployment of these missiles constitutes tortious injury and violates rights granted by the fifth and ninth amendments to the United States Constitution. The congressional plaintiffs allege that deployment violates their constitutional right as members of Congress to declare war and provide for the general defense and welfare.

The defendants have moved pursuant to Fed. R. Civ. P. 12(b) to dismiss the complaint for lack of subject matter jurisdiction and for lack of standing.

## BACKGROUND

The decision to deploy cruise missiles at a United States Air Force Base in Greenham Common, Great Britain was the result of a planning meeting held in January 1979 between the United States President, the British Prime Minister, the French President and the West German Chancellor. It is part of a broader plan to modernize the nuclear forces of the North Atlantic Treaty Organization ("NATO") and to provide a more adequate defense for Western Europe. The deployment decision was jointly made by President Jimmy Carter and our NATO allies in December 1979. See N.Y. Times, Dec. 13, 1979, at A1, col. 6. Congress over the years has appropriated funds for this plan.

The Cruise Missile is a jet aircraft that navigates itself without a pilot or human assistance. This pilotless jet checks its radar signals against a map of the terrain stowed in an onboard computer. These small, solid-fueled, pilotless missiles are designed to travel at subsonic speeds at very low altitudes, and with a range of up to 1,500 miles. While they do not have an intercontinental range, they can be carried to the border of the Soviet Union by B-52s and launched from the air.

The plaintiffs allege that the cruise missile system, the product of a number of technological innovations in nuclear weapon design, has three significant advantages over other nuclear weapons. The mobility of cruise missile launchers make it more difficult to destroy the missiles in an attack on their base. Plaintiffs' Memorandum in Support of Motion for a Temporary Restraining Order at 13 ("Plaintiffs' TRO Memo"). Once launched, cruise missiles are difficult to detect in flight, in part because the missiles can delay radar detection by flying at low altitudes for extended periods of time. Complaint, para. 34; Plaintiffs' TRO Memo at 14-15. Finally, cruise missiles achieve great accuracy as a result of a sophisticated guidance system. Complaint, para. 36, 41; Plaintiffs' TRO Memo at 15-16.

On November 9, 1983, plaintiffs filed this action to enjoin the deployment of ninety-six cruise missiles at Greenham Common. Plaintiffs assert that deployment of the cruise missiles will render nuclear war and accident likely, if not inevitable. Three explanations are offered in support of this contention. First, plaintiffs point to the longstanding United States' policy of "first use"--the willingness in the event any NATO member is attacked to use nuclear weapons if necessary to repel the attack. Plaintiffs assert that the deployment of cruise missiles translates this willingness on the part of the United States to use nuclear weapons first into a capability to do so. Plaintiffs contend that this combination of willingness and capability makes it likely that the United

States will in fact initiate a "limited" nuclear war. Second, plaintiffs opine that even if the United States does not initiate a nuclear exchange, this new capability for "first use" will likely provoke a preemptive nuclear attack against the missiles by the Soviet Union. Finally, plaintiffs contend that the possibility of an accidental thermonuclear detonation of a missile on the ground or of an accidental detonation of the high explosive component of the warhead increases the likelihood of nuclear disaster on British soil.

Based on these alleged consequences of deployment, the Greenham plaintiffs contend that the deployment of cruise missiles contravenes several customary norms of international law, subjecting them to tortious injury actionable under the Alien Tort Claims Act, 28 U.S.C. § 1350. The Greenham plaintiffs join plaintiff Deborah Law, a United States citizen who lives in London, in alleging that deployment violates their rights guaranteed by the fifth and ninth amendments to the United States Constitution. Plaintiffs Ted Weiss and Ronald Dellums, who are United States Congressmen, allege that deployment violates their constitutional right and responsibility as members of Congress to declare war and provide for the general defense and welfare.

. . . .

The defendants have moved pursuant to Fed. R. Civ. P. 12(b) to dismiss the complaint, arguing that all plaintiffs' claims are nonjusticiable because the action raises political questions, the congressional plaintiffs' claim lacks ripeness, and all plaintiffs lack standing. . . .

DISCUSSION

This court is asked to decide whether the instant action presents a justiciable controversy. The Constitution extends the judicial power to those "cases" and "controversies" specifically enumerated in Article III; matters not within the category of "cases" or "controversies" cannot be

entrusted to courts under Article III of the Constitution. Comprehended within the limitations imposed by these terms are constitutional and prudential concerns about the proper role of the courts in dispute resolution and the allocation of power among the three branches of our government. These concerns find definition in various doctrines of justiciability including that doctrine which restricts the judiciary from deciding political questions.

"Ever since Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803), the federal courts have declined to judge some actions of the Executive and some interactions between the Executive and Legislative branches where it is deemed inappropriate that the judiciary intrude." Holtzman v. Schlesinger, 484 F.2d 1307, 1309 (2d Cir. 1973), cert. denied, 416 U.S. 936, 94 S. Ct. 1935, 40 L. Ed. 2d 286 (1974). The most authoritative and commonly cited formulation of the political question doctrine is that of Justice Brennan in the seminal case of Baker v. Carr, 369 U.S. 186, 217, 82 S. Ct. 691, 710,7 L. Ed. 2d 663 (1961).

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] or a lack of judicially discoverable and manageable standards for resolving it; [3] or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] or an unusual need for unquestioning adherence to a political decision already made; [6] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

If one of these conditions is inextricable from the case at bar, then adjudication of the case may be said to require resolution of a political question, which is nonjusticiable and hence not reviewable by a court. Id.

This case does not present a political question under the first of the six categories enumerated in Baker--the constitutional commitment of the issue presented to a political branch. Defendants contend that the question presented here involves "the President's exercise of the power to conduct the foreign relations of the United States." Defendants' Memorandum of Law, at 10. Since the President's foreign policy powers derive from his constitutional authority as Chief Executive and Commander-in-Chief of the armed forces, defendants opine that the issue before the court is committed by the Constitution to the Executive and therefore is a nonjusticiable political question.

Defendants misapprehend the issues to be adjudicated. Looking at the pleadings in the light most favorable to the plaintiffs, this court is not asked to determine the foreign policy of the United States. Plaintiffs do not ask this court to decide the wisdom, morality, or efficacy of the decision to deploy cruise missiles at Greenham Common. The responsibility for that decision lies with the Executive and Legislative branches of the government. Plaintiffs ask this court to determine the legality of the challenged action. In particular, they ask the court; to adjudicate torts, to protect constitutional rights of citizens and noncitizens under United States control, and to enforce the constitutional mandate of separation of powers. The Constitution commits the resolution of these issues to the courts, and not to a coordinate political department.

Having decided that this action does not belong to the first Baker category, the court now considers whether there is a lack of judicially discoverable and manageable standards, the second category enumerated in Baker. In briefs and at argument, plaintiffs de-emphasize the significance of the second as

well as the other remaining Baker categories. They argue that the first of the six Baker categories is the critical one because it involves the constitutional power of the court to decide certain issues, whereas the remaining five merely involve prudential considerations and call for discretionary judgments. Plaintiffs further point out that in two decisions the Supreme Court, having determined that the issue presented was not textually committed to a political branch, dismissed the remaining Baker categories in "short order." Plaintiffs opine that this summary treatment of the last five categories indicates that they are secondary and less important than the first. See Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss at 23-28; Transcript of Argument on Nov. 22, 1983, at 40.

This argument flies in the face of a line of post-Baker precedent. In DaCosta v. Laird, 471 F.2d 1146 (2d Cir. 1973), for example, the Second Circuit Court of Appeals found the lack of judicially discoverable and manageable standards sufficient grounds for dismissing a suit as a political question. There an inductee in the United States Army alleged the President's decision to mine harbors and bomb targets in North Vietnam constituted, in the absence of congressional authorization, an illegal escalation of the war. The Second Circuit held that this suit presented a nonjusticiable political question, relying exclusively on its finding that the court is "incapable of assessing the facts" and "lack[s] discoverable and manageable standards" to resolve the issue. Id. at 1155. The court dismissed the action, noting that dismissal for lack of judicially discoverable and manageable standards is mandatory under Baker, not discretionary.

> [W]e are at a loss to understand how a court may decide a question when there are no judicially discoverable or manageable standards for resolving it. . . . [W]here all agree that standards are presently unavailable, the court has no alternative but to dismiss for lack of jurisdiction. This conclusion is

not reached by the exercise of discretion, but rather of necessity.

Id. at 1153-54.

Similarly, in Holtzman v. Schlesinger, 474 F.2d 1307 (2d Cir. 1973), cert. denied, 416 U.S. 936, 94 S. Ct. 1935, 40 L. Ed. 2d 286 (1974), plaintiffs challenged bombing and other military activity in Cambodia. The Second Circuit reversed the decision of the district court granting summary judgment for plaintiffs and directed the district court to dismiss the complaint, holding that it presented a nonjusticiable political question. The Court of Appeals particularly objected to the lower court's finding that the bombing of Cambodia, after the removal of American forces and prisoners of war from Vietnam, represented "a basic change in the situation, which must be considered in determining the duration of prior Congressional authorization" and that such action constituted a tactical decision not traditionally confided to the President. Id. at 1310. Relying on its earlier DaCosta decision, the court stated that "[t]hese are precisely the questions of fact involving military and diplomatic expertise not vested in the judiciary, which make the issue political and thus beyond the competence of [the lower] court or this court to determine." Id.

More recently, the Court of Appeals for the District of Columbia found the second Baker category to be controlling in Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983) (per curiam). A group of congressmen, including instant plaintiffs Dellums and Weiss, asked a federal court to rule, inter alia, that United States aid, military equipment and advisors had been introduced into situations in El Salvador in which "imminent involvement in hostilities" was clearly indicated and, hence, the President's failure to report such facts to the Congress violated the War Powers Resolution and the war powers clause of the Constitution. The district court dismissed the action on the ground that the war powers issue presented a nonjusticiable political question. Crockett v. Reagan, 558 F. Supp. 893, 898 (D.D.C. 1982). The lower court found

that it lacked the resources and expertise to resolve the particular factual disputes involved and that such determinations "are appropriate for congressional, not judicial, investigation and determination." Id. On appeal, the United States Court of Appeals ruled that it could find no error in the district court's judgment and affirmed "for the reasons stated by the District Court." 720 F.2d at 1357.

In the instant case, the plaintiffs ask this court to make determinations that are further beyond judicial resources and expertise than those faced by the DaCosta, Holtzman and Crockett courts. A review of plaintiffs' pleadings and exhibits reveals that if the merits were reached, the court would have to determine whether the United States by deploying cruise missiles is acting aggressively rather than defensively, increasing significantly the risk of incalculable death and destruction rather than promoting peace and stability.

The courts are simply incapable of determining the effect of the missile deployment on world peace. Plaintiffs ask this court to find that since the cruise missiles can be used in a "first use" situation, the risk that the United States will in fact initiate a limited nuclear war increases terribly; and that even if the United States does not initiate a nuclear exchange, this new capability for "first use" will likely provoke a preemptive nuclear strike by the Soviet Union. In contrast, the government takes the position that the deployment of cruise missiles promotes peace by providing a more adequate and needed defense for Western Europe thereby deterring the Soviet Union from initiating war and by motivating the Soviet Union to negotiate arms reduction seriously. "History will tell [which] assessment [is] correct, but without the benefit of such extended hindsight [the courts] are powerless to know." DaCosta v. Laird, supra, 471 F.2d at 1155.

Undoubtedly it can be said that the President and Congress cannot "know" with an absolute degree of certainty the effects of

missile deployment. But it is precisely because the ultimate effects are not altogether knowable that conjecture and predictions about them are best left to the political branches of government. Questions that are infinitely more complicated than those posed by the question "how many angels can dance on the head of a pin?" are not ready for ready answers. Questions like how to ensure peace, how to promote prosperity, what is a fair utilization and distribution of economic resources are examples of questions that must be decided by the fair, sound, seasoned and mature judgments of men and women responsive to the common good. The power to make these determinations is therefore appropriately allocated to the political branches.

Furthermore, courts are just not on an equal footing with the political branches to determine the likely consequences of missile deployment. The information pertinent to such determinations would prove unmanageable for the court. White House, Department of State, Department of Defense, Central Intelligence Agency, and congressional sources, not to mention a number of foreign governments, would all possess information relevant to this court's inquiry. Much of this information would, of necessity, be privileged, while other information would be difficult to ascertain or wholly unavailable to the court. As the court in Holtzman aptly noted, "[the court is] not privy to the information supplied to the Executive by his professional military and diplomatic advisors and even if [it] were, [the court is] hardly competent to evaluate it." Holtzman v. Schlesinger, supra, 484 F.2d at 1310.

The court concludes that the factfinding that would be necessary for a substantive decision is unmanageable and beyond the competence and expertise of the judiciary. This action therefore clearly belongs to the second category enumerated in Baker.

The lack of judicially discoverable and manageable standards is not the only reason this case is nonjusticiable. The nature of the relief plaintiffs seek directly impinges

upon the foreign policy of the United States. Plaintiffs ask the court to enjoin the deployment of cruise missiles at Greenham Common. This relief, if granted, would directly alter the military and foreign policy of the United States with its NATO allies and military and diplomatic relations with the Soviet Union. The particular delicacy of foreign affairs weighs against intervention by the court. As the Supreme Court stated in the now oft-quoted passage from Chicago & Southern Airlines v. Waterman Steamship Co., 333 U.S. 103, 111, 68 S. Ct. 431, 436, 92 L. Ed. 568 (1948):

> [T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

See also United States v. First National City Bank, 396 F.2d 897, 901 (2d Cir. 1968) ("The courts must take care not to impinge upon the prerogatives and responsibilities of the political branches of the government in the extremely sensitive and delicate area of foreign policy.").

Although not "every case or controversy which touches foreign relations lies beyond judicial cognizance." Baker v. Carr, 369 U.S. 186, 211, 82 S. Ct. 691, 707, 7 L. Ed. 2d 663 (1962), this case surely does. Our relations with foreign countries would be seriously disrupted if the federal courts exercised supervision and control over such critical elements of our foreign policy as the

deployment of cruise missiles. It is difficult to imagine how the United States could influence the policies of foreign governments through diplomatic means if the actions of the political branches could be subject to public review and rejection by United States courts.

Moreover, the relief plaintiffs request could lead to "consequences in our foreign relations completely beyond the ken and authority of this Court to evaluate." Atlee v. Laird, 347 F. Supp. 689, 705 (E.D. Pa. 1972), aff'd mem., 411 U.S. 911, 93 S. Ct. 1545, 36 L. Ed. 2d 304 (1973). The deployment decision involved an extremely subtle balancing process which took into account a complex of factors of national and international character. The process by which such a decision is reached must be flexible and depends upon the proper functioning of the political system. Only the Executive and Legislative branches have the facility for making such policy decisions and for predicting their beneficial or detrimental effects on the international posture of the United States and its allies.

For instance, enjoining cruise missile deployment could engender serious discord among our allies and unravel the carefully balanced deployment scheme. It could encourage the USSR to intensify its pressure for unilateral Western concessions which would seriously erode NATO's ability to deter Moscow's growing nuclear threat or discourage Soviet willingness to reach an arms control agreement. Whether any or all of these potentialities might be realized cannot be predicted which, of course, supports the finding that the case is nonjusticiable.

This is not the first time that the courts have been asked to enjoin the Executive or Legislature from carrying out a nuclear weapons program. In Pauling v. McNamara, 331 F.2d 796 (D.C. Cir. 1963), cert. denied, 377 U.S. 933, 84 S. Ct. 1336, 12 L. Ed. 2d 297 (1964), a case substantially similar in fact and principle to the one at bar, an action was brought on behalf of 115 United States citizens and more than 100 aliens, including

eight Nobel Laureates. The plaintiffs in Pauling sought to enjoin the government from detonating nuclear weapons for purposes of testing, alleging that such nuclear testing caused plaintiffs to be damaged genetically, somatically, and psychologically. The action was dismissed because "decisions in the large matters of basic national policy, as of foreign policy, present no judicially cognizable issues and hence the courts are not empowered to decide them." Id. at 798.

The language of then Circuit Judge Warren E. Burger is very much in point here:

> That appellants now resort to the courts on a vague and disoriented theory that judicial power can supply a quick and pervasive remedy for one of mankind's great problems is no reason why we as judges should regard ourselves as some kind of Guardian Elders ordained to review the political judgments of elected representatives of the people. In framing policies relating to the great issues of national defense and security, the people are and must be, in a sense, at the mercy of their elected representatives. But the basic and important corollary is that the people may remove their elected representatives as they cannot dismiss United States Judges. This elementary fact about the nature of our system, which seems to have escaped notice occasionally must make manifest to judges that we are neither gods nor godlike, but judicial officers with narrow and limited authority. Our entire System of Government would suffer incalculable mischief should judges attempt to interpose the judicial will above that of the Congress and President, even were we so bold as to assume that we can make a better decision on such issues.

Id. at 799.

CONCLUSION

The instant case presents a nonjusticiable political question. It is therefore not necessary to reach the other asserted bases for dismissal, ripeness and standing. Defendants' motion to dismiss the complaint is hereby ordered.

SO ORDERED.[387]

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[387]See also Tiffany v. United States, 931 F.2d 271 (4th Cir. 1991) (claims by private pilot killed in accident with intercepting Air Force jet after entering air defense identification zone without a filed flight plan are not justiciable); Ange v. Bush, 752 F. Supp. 509 (D.D.C. 1990) (deployment of forces in support of Operation Desert Shield nonjusticiable); Nejad v. United States, 724 F. Supp. 753, 755 (C.D. Cal. 1989) (claims arising out of downing Iran Air Flight 655 by U.S.S. Vincennes are not justiciable); Sanchez-Espinoza v. Reagan, 770 F.2d 202, 208 (D.C. Cir. 1985) (challenge to support of Nicaraguan Contras dismissed, in part, as nonjusticiable); In re Korean Air Lines Disaster of Sept. 1, 1983, 597 F. Supp. 613, 616-17 (D.D.C. 1984) (American aircraft reconnaissance activities near Soviet Union nonjusticiable); Conyers v. Reagan, 578 F. Supp. 324 (D.D.C. 1984), vacated as moot, 765 F.2d 1124 (D.C. Cir. 1985) (intervention in Grenada nonjusticiable); Crockett v. Reagan, 558 F. Supp. 893 (D.D.C. 1982), aff'd, 720 F.2d 1355 (D.C. Cir. 1983), cert. denied, 467 U.S. 1251 (1984) (military assistance to El Salvador nonjusticiable); Rappenecker v. United States, 509 F. Supp. 1024 (N.D. Cal. 1980) (Mayaguez rescue operation nonjusticiable). Cf. De Arellano v. Weinberger, 788 F.2d 762, 764 (D.C. Cir. 1986) (suit to enjoin expropriation of American landowner's property in Honduras for use as American military training facility dismissed in part because of political questions involved); Kline v. Republic of El Salvador, 603 F. Supp. 1313, 1321 (D.D.C. 1985) (conduct of State Department investigation into alleged murder of an American citizen by Salvadoran soldiers should not be judicially reviewed). But see Committee of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929 (D.C. Cir. 1988) (political question doctrine not a bar to claims that U.S. support of Nicaraguan contras violated plaintiffs' fifth amendment rights); Dellums v. Bush, 752 F. Supp. 1141, 1144-46 (D.D.C. 1990) (request for injunction by members of Congress to prevent President from going to war against (continued...)

(5) Other Examples. The political question prong of justiciability has also precluded judicial intervention into such areas as negotiations with foreign governments, including the extension and implementation of diplomatic relations,[388] making political appointments,[389] negotiations involving the repatriation of US citizens held as prisoners or POWs,[390] the decision to enter agreements with foreign governments,[391] the implementation of treaty obligations,[392] the establishment of academic standards at

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[387](...continued)
Iraq without first securing explicit congressional authorization not barred by political question doctrine).

[388]Phelps v. Reagan, 812 F.2d 1293 (10th Cir. 1987); Americans United for Separation of Church & State v. Reagan, 786 F.2d 194, 201-02 (3d Cir.), cert. denied, 479 U.S. 1012 (1986).

[389]National Treasury Employees Union v. Bush, 715 F. Supp. 405 (D.D.C. 1989).

[390]United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936); Flynn v. Schultz, 748 F.2d 1186, 1191-93 (7th Cir. 1984), cert. denied, 474 U.S. 830 (1985); Dumas v. President of the United States, 554 F. Supp. 10 (D. Conn. 1982). But see Smith v. Reagan, 663 F. Supp. 692, 694 n.1 (E.D.N.C. 1987).

[391]Cranston v. Reagan, 611 F. Supp. 247 (D.D.C. 1985).

[392]Compare Holmes v. Laird, 459 F.2d 1211 (D.C. Cir.), cert. denied, 409 U.S. 869 (1973), with Japan Whaling Ass'n v. American Cetacean Society, 478 U.S. 221, 230 (1986); Weinberger v. Rossi, 456 U.S. 25 (1982); and Rainbow Navigation, Inc. v. Department of the Navy, 620 F. Supp. 534, 543 (D.D.C. 1985), aff'd, 783 F.2d 1072 (D.C. Cir. 1986). A claim is not rendered nonjusticiable simply because it deals with foreign policy. E.g., Regan v. Wald, 468 U.S. 222 (1984); Dames & Moore v. Regan, 453 U.S. 654 (1981); Committee of U.S. Citizens Living in Navaragua v. Regan, 859 F.2d 929 (D.C. Cir. 1988); (continued...)

service academies,[393] the creation of promotion quotas,[394] the enforcement of accession standards by the Army Judge Advocate General's Corps,[395] and the general conduct of military intelligence gathering activities.[396] It has not, however, prevented litigation over press restrictions imposed during time of war.[397]

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[392](...continued)
Population Inst. v. McPherson, 797 F.2d 1062, 1070 (D.C. Cir. 1986).

[393]Green v. Lehman, 544 F. Supp. 260 (D. Md. 1982), aff'd, 744 F.2d 1049 (4th Cir. 1984).

[394]Blevins v. Orr, 553 F. Supp. 750 (D.D.C. 1982), aff'd, 721 F.2d 1419 (D.C. Cir. 1983).

[395]Whittle v. United States, 7 F.3d 1259 (6th Cir. 1993).

[396]Compare Laird v. Tatum, 408 U.S. 1 (1972), and United Presbyterian Church v. Reagan, 738 F.2d 1375 (D.C. Cir. 1984), with Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144 (D.D.C. 1976).

[397]See, e.g., Nation Magazine v. U.S. Department of Defense, 762 F. Supp. 1558, 1566-68 (S.D.N.Y. 1991) (rejecting the government's political question argument, although denying the injunction sought as the war's end made the issue moot).

# CHAPTER 4

# FEDERAL REMEDIES

## 4.1 Introduction.

Courts may fashion a wide range of judicial relief in lawsuits against the military. Chief among the remedies sought in military litigation are money damages, mandamus, habeas corpus, injunctions, and declaratory judgments.

## 4.2 Sovereign Immunity.

a. General.

(1) General Rule. Any discussion of the remedies available from the government must begin with the doctrine of sovereign immunity, which operates as a bar to recovery of certain forms of relief from the United States. "The basic rule of federal sovereign immunity is that the United States cannot be sued at all without the consent of Congress."[1] "The absence of consent is a fundamental, jurisdictional defect that may be asserted at any time either by the parties or by the court on its own motion."[2]

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[1]Block v. North Dakota, ex rel. Bd. of Univ. and School Lands, 461 U.S. 273, 287 (1983).

[2]14 C. Wright et al., Federal Practice and Procedure 186-90 (1976) (footnotes omitted) [hereinafter 14 C. Wright, A. Miller, & E. Cooper]. See Library of Congress v. Shaw, 478 U.S. 310, 314 (1986) ("the United States, in the absence of its consent, is immune from suit"). United States v. Mitchell, 463 U.S. 206, 212 (1983) ("the (continued...)

(2) Historical Origins. The doctrine of sovereign immunity is derived from the English concept that the king can do no wrong.[3] It was not until the fifteenth century that the king attained such a protected position. During the Roman Empire, kings were believed to have received all power from the people and were therefore subject to the law.[4] The kings and officials of the middle ages, even in places remote from Roman law, were responsible for impairments or violations of individual's private rights.[5] Thus, prior to the fifteen century, although procedurally it was difficult to challenge kings, theoretically they were still capable of wrong.[6]

Between the fifteen and the eighteenth centuries, strengthened monarchies and increased interest in the ideas of divine right and absolute immunity encouraged the belief that the king could do or think no wrong.[7] The theory became so pervasive that the king was unable

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[2](...continued)
existence of consent is a prerequisite for jurisdiction"); United States v. Mitchell, 445 U.S. 535, 538 (1980); United States v. Testan, 424 U.S. 392, 399 (1976); United States v. Sherwood, 312 U.S. 584, 586 (1941); Hill v. United States, 50 U.S. (9 How.) 386, 389 (1850); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411-12 (1821).

[3]14 C. Wright et al., supra note 2, at 200. See generally 1 W. Blackstone, Commentaries *239.

[4]See Borchard, Governmental Responsibility in Tort, Part VI, 36 Yale L. J. 1039, 1049 (1927).

[5]Id.

[6]Id. at 23, 27.

[7]Id. at 31.

to even authorize an unlawful act. Torts committed by his officers were deemed "ultra vires."[8] The harsh effects of this theory were eventually tempered by the imposition of personal liability on the officers.[9]

During the eighteenth century, interest in the theory of natural law increased. The belief that man was endowed with inalienable rights directly conflicted with the immunity of sovereign kings.[10] The conflict was most notably expressed in the French and American Revolutions.[11]

How the English doctrine of sovereign immunity subsequently became a part of American jurisprudence is regarded as something of a mystery in the law.[12] The doctrine, as it has been developed in this country, does not rest on royal prerogatives and powers, but instead on the rationale that "official actions of the government must be protected from undue judicial interference."[13]

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[8]See 1 W. Blackstone, supra note 3, at 238-39 ("The king, moreover, is not only incapable of doing wrong, but even of thinking wrong: he can never do an improper thing: in him is no folly or weakness"); Borchard, supra note 5, at 7.

[9]See Borchard, supra note 5, at 2.

[10]Id.

[11]Borchard, Governmental Responsibility in Tort, Part VII, 28 Colum. L. Rev. 577, 583 (1928).

[12]See James, Tort Liability of Governmental Units and Their Officers, 22 U. Chi. L. Rev. 610, 612 (1955).

[13]Cramton, Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant, 68 Mich. L. Rev. 387, 397 (1970); see Block, Suits Against Government Officers and the Sovereign Immunity Doctrine, 59 Harv. L. Rev. 1060 (1946).

Despite harsh criticism,[14] the Supreme Court has repeatedly reaffirmed the doctrine of sovereign immunity and Congress has never generally waived it.[15]

(3) Congressional Waiver. Only Congress can waive the sovereign immunity of the United States,[16] and as will be discussed below, "[O]ver the years Congress has successively broadened the consent of the United States to be sued."[17] A congressional waiver of sovereign immunity cannot be implied, but must be unequivocally expressed in statute.[18] Such waivers "are

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[14]See, e.g., Engdahl, Immunity & Accountability for Positive Governmental Wrongs, 44 U. Colo. L. Rev. 1 (1972); Note, Rethinking Sovereign Immunity After Bivens, 57 N.Y.U. L. Rev. 597 (1982).

[15]Interfirst Bank Dallas v. United States, 769 F.2d 299, 303 (5th Cir. 1985), cert. denied, 475 U.S. 1081 (1986). But see Chisholm v. Georgia, 2 Dall. 419 (U.S. 1793) (Supreme Court concluded that doctrine of state immunity from suit was characteristic of autocracy and inconsistent with popular sovereignty); Borchard, supra note 5, at 38 (the 11th amendment [passed after Chisholm] restored the ancient doctrine in full effect, regardless of its historical origin in an autocratic conception of a personal sovereign).

[16]Library of Congress v. Shaw, 478 U.S. 310, 314-15 (1986); Block v. North Dakota, 461 U.S. 273, 287 (1983). See 14 C. Wright et al., supra note 2, at 190-92; Roberts v. United States, 498 F.2d 520, 529 (9th Cir.), cert. denied, 419 U.S. 1070 (1974).

[17]C. Wright, Law of Federal Courts 128 (5th ed. 1983).

[18]United States v. Mitchell, 445 U.S. 535, 538 (1980), citing United States v. King, 395 U.S. 1, 4 (1969). See Steel v. United States, 813 F.2d 1545, 1552 (9th Cir. 1987); Booth v. United States, 990 F.2d 617 (Fed. Cir. 1993).

to be strictly construed in favor of the sovereign."[19] Moreover, Congress can attach conditions to legislation waiving the sovereign immunity of United States, such as statutes of limitations. These conditions are jurisdictional in character and must be strictly observed.[20]

(4) Federal Agencies and Officials as Defendants. That a plaintiff names a federal agency or federal official instead of the United States as a party to a lawsuit does not overcome the bar of sovereign immunity. Whether a suit is one against the United States (and within the purview of the sovereign immunity doctrine) is not determined by the identity of the parties named in the caption of the complaint, but by the result of the judgment or decree that a court may enter.[21] Thus, a federal agency--such as the Department of Defense--that is not statutorily authorized to be sued in its own name, shares the sovereign immunity of the

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[19]McMahon v. United States, 342 U.S. 25, 27 (1951) (footnote omitted). See Library of Congress, 478 U.S. at 318; Norton v. United States, 581 F.2d 390, 396 (4th Cir.), cert. denied, 439 U.S. 1003 (1978).

[20]See Block, 461 U.S. at 287; Lehman v. Nakshian, 453 U.S. 156, 160-61 (1981); United States v. Kubrick, 444 U.S. 111, 117-18 (1979); United States v. Sherwood, 312 U.S. 584, 586-87 (1941) ("the terms of [the government's] consent to be sued in any court define that court's jurisdiction to entertain the suit"). But see Irwin v. Dep't of Veterans Affairs, 111 S. Ct. 453 (1990) (statutes of limitations for suits against the United States are presumptively subject to the doctrine of equitable tolling); Phillips v. Heine, 984 F.2d 489 (D.C. Cir. 1993).

[21]Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 687 n.6 (1949), citing Minnesota v. Hitchcock, 185 U.S. 373, 387 (1902); Carter v. Seamans, 411 F.2d 767, 770 (5th Cir.), cert. denied, 397 U.S. 941 (1969).

government because any judgment against the agency would operate against the United States.[22] Moreover, relief sought nominally against a federal official acting in his official capacity is subject to sovereign immunity if the decree operates against the latter.[23] A decree operates against the government if it will interfere with public administration, affect the public treasury, or cause the United States to do or refrain from doing some act.[24] Simply put, as a general rule, "an action seeking specific relief from an officer of the federal government in his official capacity is considered a suit against the sovereign."[25] Sovereign immunity, however, does not bar

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[22]Florida v. United States Dep't of the Interior, 768 F.2d 1248, 1251 (11th Cir. 1985), cert. denied, 475 U.S. 1011 (1986); Midwest Growers Cooperative Corp. v. Kirkemo, 533 F.2d 455, 465 (9th Cir. 1976); Massachusetts v. Veterans Admin., 541 F.2d 119, 123 (1st Cir. 1976); Chacon v. Granata, 515 F.2d 922, 924 (5th Cir.), cert. denied, 423 U.S. 930 (1975); Helton v. United States, 532 F. Supp. 813, 818 (S.D. Ga. 1982); Hampton v. Hanrahan, 522 F. Supp. 140, 146-47 (N.D. Ill. 1981).

[23]Hawaii v. Gordon, 373 U.S. 57, 58 (1963); Larson, 337 U.S. at 687.

[24]Dugan v. Rank, 372 U.S. 609, 620 (1963); Land v. Dollar, 330 U.S. 731 (1947); Cook v. Arentzen, 582 F.2d 870, 872 n.1 (4th Cir. 1978).

[25]Helton, 532 F. Supp. at 819. See Malone v. Bowdoin, 369 U.S. 643, 648 (1962); Larson, 337 U.S. at 689; Hagemeier v. Block, 806 F.2d 197, 202 (8th Cir. 1986); Gilbert v. DaGrossa, 756 F.2d 1455, 1458 (9th Cir. 1985). Cf. Group Health Inc. v. Blue Cross Ass'n, 625 F. Supp. 69, 74-75 (S.D.N.Y. 1985), appeal dismissed, 793 F.2d 491 (2d Cir. 1986), cert. denied, 480 U.S. 930 (1987) (contractor acting as government agent may be protected by sovereign immunity).

damages actions against federal officials in their individual capacities.[26]

b. Waivers of Sovereign Immunity.

(1) Monetary Relief.

(a) General. "A money claim which can be assuaged only by expenditure from the Treasury of the United States cannot be entertained without a statutory grant of jurisdiction to a United States court, . . ." which waives the sovereign immunity of the federal government.[27] The two principal legislative waivers of sovereign immunity permitting monetary relief from the United States are the Tucker Act[28] and the Federal Tort Claims Act.[29] A number of other statutes permit money damages against the United States under specialized circumstances. More than a few constitutional and statutory provisions are erroneously asserted as waivers of the government's sovereign immunity from money damages.

(b) Tucker Act. The Tucker Act waives the sovereign immunity of the United States for nontort

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[26]Castenada v. United States Dep't of Agric., 807 F.2d 1478, 1479 n. 3 (9th Cir. 1987); Gilbert v. DaGrossa, 756 F.2d 1455, 1459 (9th Cir. 1985); Tate v. Carlson, 609 F. Supp. 7, 11 (S.D.N.Y. 1985); Newhouse v. Probert, 608 F. Supp. 978, 981 (W.D. Mich. 1985); Pavlov v. Parsons, 574 F. Supp. 393, 397 (S.D. Tex. 1983). See generally infra ch. 9.

[27]Rhodes v. United States, 760 F.2d 1180, 1184 (11th Cir. 1985).

[28]28 U.S.C. §§ 1346(a)(2), 1491.

[29]Id. §§ 1346(b), 2671-80.

money claims founded on a contract or on the Constitution, an act of Congress, or an executive department regulation.[30] As discussed previously,[31] both the district courts and the Court of Federal Claims have concurrent jurisdiction over all Tucker Act claims not exceeding $10,000.[32] The Court of Federal Claims has exclusive jurisdiction over all claims in excess of $10,000.[33] The Tucker Act only waives sovereign immunity for nontort money claims; actions sounding in tort may not be brought under the Tucker Act.[34]

(c) Federal Tort Claims Act. The Federal Tort Claims Act waives the sovereign immunity of the United States for certain types of tort claims.[35] The Federal Tort Claims Act, however, is not an all-inclusive waiver of sovereign immunity for any tort committed by a federal employee. It does not afford jurisdiction over

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[30]United States v. Mitchell, 463 U.S. 206, 212 (1983).

[31]See supra § 3.3.

[32]28 U.S.C. § 1346(a)(c).

[33]Id.; 28 U.S.C. § 1491.

[34]See, e.g., Tempel v. United States, 248 U.S. 121, 129 (1918); Gibbons v. United States, 75 U.S. (8 Wall.) 269, 275 (1868); Strick Corp. v. United States, 625 F.2d 1001 (Ct. Cl. 1980); Berdick v. United States, 612 F.2d 533, 536 (Ct. Cl. 1979); Curry v. United States, 609 F.2d 980, 982-83 (Ct. Cl. 1979); Board of Supervisors v. United States, 408 F. Supp. 556, 567 (E.D. Va. 1976), appeal dismissed, 551 F.2d 305 (4th Cir. 1977).

[35]E.g., Andrews v. United States, 732 F.2d 366, 370 (4th Cir. 1984); Valn v. United States, 708 F.2d 116, 118 (3d Cir. 1983); Lutz v. United States, 685 F.2d 1178, 1182 (9th Cir. 1982); FSLIC v. Williams, 599 F. Supp. 1184, 1197 (D. Md. 1984).

tort claims arising in foreign countries.[36] Further, certain torts are expressly excluded by the Act, such as torts arising from the exercise of discretionary governmental functions,[37] and most intentional torts.[38] Additionally, the Act only waives sovereign immunity for torts arising under state law and not for federally-based actions, such as constitutional tort claims.[39] Moreover, the Act does not waive the sovereign immunity of the United States to permit military personnel to

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[36]28 U.S.C. § 2680(k). See Schneider v. United States, 27 F.3d 1327 (8th Cir. 1994), cert. denied, 115 S. Ct. 723 (1995). United States v. Smith, 499 U.S. 160 (1991); Heller v. United States, 776 F.2d 92 (3d Cir. 1985), cert. denied, 476 U.S. 1105 (1986). Cf. Beattie v. United States, 756 F.2d 91 (D.C. Cir. 1984) (Antarctica is not a "foreign country" for purposes of FTCA). But see Mulloy v. United States, 884 F. Supp. 622 (D. Mass. 1995) (finding that, although the wife of an Army captain stationed in Schweinfurt, Germany, was raped and murdered by a soldier there, the government negligence occurred in the United States where the soldier was improperly enlisted in the Army).

[37]28 U.S.C. § 2680(a). See United States v. VARIG Airlines, 467 U.S. 797 (1984); Dalehite v. United States, 346 U.S. 15 (1953); Allen v. United States, 816 F.2d 1417 (1987), cert. denied, 484 U.S. 1004 (1988); Feyers v. United States, 749 F.2d 1222, 1225 (6th Cir. 1984), cert. denied, 471 U.S. 1125 (1985); Nevin v. United States, 696 F.2d 1229, 1230 (9th Cir.), cert. denied, 464 U.S. 815 (1983).

[38]28 U.S.C. § 2680(h). See Hoot v. United States, 790 F.2d 836 (10th Cir. 1986); Garcia v. United States, 776 F.2d 116, 117 (5th Cir. 1985); Wine v. United States, 705 F.2d 366, 367 (10th Cir. 1983); Turner v. United States, 595 F. Supp. 708, 709-10 (W.D. La. 1984). But see Mulloy, 884 F. Supp. at 622 (denying motion to dismiss based on the intentional torts exceptions).

[39]See Birnbaum v. United States, 588 F.2d 319, 327-28 (2d Cir. 1978); Brown v. United States, 653 F.2d 196, 201 (5th Cir. 1981), Nichols v. Block, 656 F. Supp. 1436, 1444 (D. Mont. 1987); Willis v. United States, 600 F. Supp. 1407, 1414 (N.D. Ill. 1985).

pursue claims for injuries incurred incident to service.[40] Similarly, federal employees are not proper claimants when covered by the Federal Employees Compensation Act (FECA).[41]

(d) Other Statutes. Beyond the Tucker Act and the Federal Tort Claims Act, Congress has enacted a number of statutes that waive the United States sovereign immunity from money damages under certain circumstances. Examples of statutes that might affect the military are the Privacy Act,[42] the Unjust Conviction

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[40]United States v. Johnson, 481 U.S. 681 (1987); United States v. Shearer, 473 U.S. 52 (1985); Feres v. United States, 340 U.S. 135 (1950); Satterfield v. United States, 788 F.2d 395 (6th Cir. 1986); Stubbs v. United States, 744 F.2d 58, 60 (8th Cir. 1984), cert. denied, 471 U.S. 1053 (1985); Maw v. United States, 733 F.2d 174, 175 (1st Cir. 1984); Heilman v. United States, 731 F.2d 1104, 1106 (3d Cir. 1984); Johnson v. United States, 704 F.2d 1431, 1435 n.2 (9th Cir. 1983); Lombard v. United States, 690 F.2d 215, 218 (D.C. Cir. 1982), cert. denied, 462 U.S. 1118 (1983); Kohn v. United States, 680 F.2d 922, 926 (2d Cir. 1982); Stanley v. CIA, 639 F.2d 1146 (5th Cir. 1981).

[41]5 U.S.C. § 8116(c). See, e.g., Tazelaar v. United States, 558 F. Supp. 1369, 1371-72 (N.D. Ill. 1983).

[42]5 U.S.C. § 552a(g).

Act,[43] Title VII of the Civil Rights Act of 1964,[44] and provisions of the Civil Rights Act of 1991.[45]

(e) Commonly Asserted Provisions Not Waiving Sovereign Immunity. Plaintiff's counsel commonly assert a number of statutory and constitutional provisions as waivers of sovereign immunity for money damages that do not waive the immunity of the United States. Some of these provisions are: (1) the federal question jurisdiction statute (28 U.S.C. § 1331);[46] (2) the commerce and trade regulation jurisdiction statute (28 U.S.C. § 1337);[47] (3) the civil rights

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[43]28 U.S.C. §§ 1495, 2513.

[44]42 U.S.C. § 2000e-16. Doe v. Garrett, 903 F.2d 1455 (11th Cir. 1990), cert. denied, 111 S. Ct. 1102 (1991). The provisions of the Civil Rights Act of 1964 do not extend to uniformed members of the armed forces. Roper v. Dep't of Army, 832 F.2d 247 (2d Cir. 1987); Stinson v. Hornsby, 821 F.2d 1537 (11th Cir. 1987); Gonzalez v. Dep't of Army, 718 F.2d 926 (9th Cir. 1983); Johnson v. Alexander, 572 F.2d 1219 (8th Cir.), cert. denied, 439 U.S. 986 (1978); Cobb v. United States Merchant Marine Academy, 592 F. Supp. 640, 642 (E.D.N.Y. 1984). But see Hill v. Berkman, 635 F. Supp. 1228 (E.D.N.Y. 1986). Claims under Title VII lie in the district court, not the Court of Claims. Bunch v. United States, 33 Fed. Cl. 337 (1995) (case dismissed where Reserve colonel sought promotion to brigadier general and retroactive back pay, in part under Title VII).

[45]42 U.S.C. § 1981.

[46]Hagemeier v. Block, 806 F.2d 197, 202-03 (9th Cir. 1986); Gilbert v. DaGrossa, 756 F.2d 1455, 1458 (9th Cir. 1985); Garcia v. United States, 666 F.2d 960, 966 (5th Cir.), cert. denied, 459 U.S. 832 (1982); Estate of Watson v. Blumenthal, 586 F.2d 925, 930 (2d Cir. 1978); Twin Cities Chippewa Tribal Counsel v. Minnesota Chippewa Tribe, 370 F.2d 529, 532 (8th Cir. 1967).

[47]Hagemeier, 806 F.2d at 203.

jurisdiction statute (28 U.S.C. § 1343);[48] (3) the mandamus statute (28 U.S.C. § 1361);[49] (5) the Declaratory Judgment Act (28 U.S.C. §§ 2201-02);[50] (6) the Administrative Procedure Act (5 U.S.C. §§ 701-06),[51] (7) the Civil Rights Acts of 1866 and 1871 (42 U.S.C. §§ 1981, 1983, & 1985);[52] and (8) the various articles and amendments of the United States

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[48]Beale v. Blount, 461 F.2d 1133, 1138 (5th Cir. 1972); Gray Moving & Storage, Inc. v. Fichback, 516 F. Supp. 1165, 1166 (D. Colo. 1981); Foreman v. General Motors Corp., 473 F. Supp. 166, 182 (E.D. Mich. 1979).

[49]Doe v. Civiletti, 635 F.2d 88, 94 (2d Cir. 1980); McQueary v. Laird, 449 F.2d 608 (10th Cir. 1971); but see Helton v. United States, 532 F. Supp. 813, 821 (S.D. Ga. 1982).

[50]Mitchell v. Riddell, 402 F.2d 842, 846 (9th Cir. 1968), cert. denied, 394 U.S. 456 (1969); Karlin v. Clayton, 506 F. Supp. 642, 644 (D. Kan. 1981).

[51]Massachusetts v. Departmental Grant Appeals Bd., 815 F.2d 778, 782-83 (1st Cir. 1987); Smith v. Booth, 823 F.2d 94, 97 (5th Cir. 1987); Rhodes v. United States, 760 F.2d 1180, 1184 (11th Cir. 1985). But cf. Maryland Dep't of Human Resources v. United States Dep't of Health & Human Serv., 763 F.2d 1441, 1446-48 (D.C. Cir. 1985) (APA authorizes suit for specific monetary relief, but not damages).

[52]Unimex, Inc. v. United States Dept. of Hsg. & Urban Dev., 594 F.2d 1060, 1061 (5th Cir. 1979) (§ 1985); United States v. Timmons, 672 F.2d 1373, 1380 (11th Cir. 1982) (§ 1981); Petterway v. Veterans Admin. Hosp., 495 F.2d 1223, 1225 (5th Cir. 1974) (§ 1981); Navy, Marshall & Gordon, P.C. v. United States Internat'l Dev.-Cooperation Agency, 557 F. Supp. 484, 488 (D.D.C. 1983) (§ 1981); Ricca v. United States, 488 F. Supp. 1317, 1325 (E.D.N.Y. 1980) (§§ 1983 & 1985); Benima v. Smithsonian Inst., 471 F. Supp. 62, 68 (D. Mass. 1979) (§ 1981); Morpurgo v. Board of Higher Educ., 423 F. Supp. 704, 714 (S.D.N.Y. 1976) (§§ 1981, 1983, & 1985).

Constitution.[53] As discussed in Chapter 9, the United States cannot be sued directly for constitutional torts, generically known as Bivens claims.[54] The government's sovereign immunity from suit bars such claims.[55]

(2) Nonmonetary Relief.

(a) General. Until 1976, the doctrine of sovereign immunity was a major limitation on the power of the federal courts to entertain nonmonetary claims

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[53]United States v. Testan, 424 U.S. 392, 400-01 (1976); Garcia v. United States, 666 F.2d 960, 966 (5th Cir. 1982), cert. denied, 459 U.S. 832 (1983); Jaffee v. United States, 592 F.2d 712, 717-18 (3d Cir.), cert. denied, 441 U.S. 961 (1979); Kentucky ex rel. Hancock v. Ruckelshaus, 362 F. Supp. 360, 368 (W.D. Ky. 1973), aff'd, 497 F.2d 1172 (6th Cir. 1974), aff'd sub nom. Hancock v. Train, 426 U.S. 167 (1976); Phillips v. Perry, 883 F. Supp. 539 (W.D. Wash. 1995) (granting summary judgment to defendants as to claims that separation for engaging in homosexual acts violate the plaintiff's rights to equal protection, due process, and free speech).

[54]Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971); Davis v. Passman, 442 U.S. 228 (1979); Carlson v. Green, 446 U.S. 14 (1980). See infra ch. 9.

[55]Bivens, 403 U.S. at 410 (Harlan, J., concurring); Arnsberg v. United States, 757 F.2d 971, 980 (9th Cir. 1985), cert. denied, 475 U.S. 1010 (1986); Laswell v. Brown, 683 F.2d 261, 268 (8th Cir. 1982), cert. denied, 459 U.S. 1210 (1983); United States v. Timmons, 672 F.2d 1373, 1380 (11th Cir. 1982); Brown v. United States, 653 F.2d 196, 199 (5th Cir. 1981), cert. denied, 456 U.S. 925 (1982); Association of Commodity Traders v. United States Dep't of the Treasury, 598 F.2d 1233, 1235 (1st Cir. 1979); Norton v. United States, 581 F.2d 390, 393 (4th Cir.), cert. denied, 439 U.S. 1003 (1978); Duarte v. United States, 532 F.2d 850, 852 (2d Cir. 1976). See also Dellinger, Of Rights and Remedies: The Constitution as a Sword, 85 Harv. L. Rev. 1532 (1972); Note, Rethinking Sovereign Immunity after Bivens, 57 N.Y.U. L. Rev. 596 (1982) (advocating abrogation of sovereign immunity for Bivens suits).

against the United States. The success of such claims depended on the application of various judicially-created fictions circumventing sovereign immunity. In 1976, Congress virtually eliminated this limitation through an amendment to the Administrative Procedure Act (APA). When applicable, the APA waives the sovereign immunity of the United States in all actions other than those for money damages.[56] Finally, a number of statutes, such as the Freedom of Information Act and the Privacy Act, waive the government's sovereign immunity from nonmonetary relief in special types of cases.

(b) Judicially-created exceptions. In the absence of express statutory waivers of sovereign immunity, the Supreme Court has fashioned two nonstatutory exceptions to the doctrine. Plaintiffs may sue federal officials for injunctive-type relief (1) where the officials have acted beyond their statutory powers (i.e., where the officials commit ultra vires acts); or (2) where the officials act within the scope of their statutory powers, but the powers themselves, or the manner in which they are exercised, are constitutionally void.[57] The rationale behind these

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[56]A court may appropriately decide whether the military followed procedures because by their nature the procedures limit the military's discretion. The court is not called on to exercise any discretion reserved to the military. Murphy v. United States, 933 F.2d 871, 873 (Fed. Cir. 1993); Smith v. CHAMPUS, 884 F. Supp. 303 (S.D. Ind. 1994) (granting summary judgment to a plaintiff who sought an order that CHAMPUS could not deny her treatment for breast cancer).

[57]Larson v. Domestic & Foreign Commerce Corp. 337 U.S. 682, 689-90 (1949). See Dugan v. Rank, 372 U.S. 609, 621-22 (1963); Malone v. Bowdoin, 369 U.S. 643, 647 (1962). An official does not act beyond the scope of authority by committing a mistake of fact or law. "Ultra
(continued...)

exceptions is that federal officials who act in excess of their statutory or constitutional authority cannot be acting on behalf of the sovereign.

> Of course, the action of an officer beyond his delegated [statutory] authority is not within the realm of the sovereign's business and thus the officer is subject to federal court jurisdiction as any other individual. See Larson v. Domestic & Foreign Commerce Corp., 337 U.S. at 689-90, 69 S. Ct. at 1461-62. Similarly, if the officer's action, or the statutory authority for his action, is unconstitutional, such action is invalid ab initio and is not within the power of the sovereign to sanction or delegate. Id. at 690, 69 S. Ct. at 1461. In both instances, i.e., action ultra vires or unconstitutional, a suit for specific relief may be maintained against the public official as an individual. See 14 C. Wright, A. Miller & E. Cooper [Federal Practice & Procedure] § 3655, at 184-187 ((1976)].[58]

These two judicially-created exceptions to sovereign immunity only allow suits for specific injunctive-type relief against federal officials.[59] The exceptions do not permit the award of affirmative relief--such as money damages--against the government.[60]

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[57](...continued)
vires claims rest on the official's lack of delegated power." United States v. Yakima Tribal Court, 806 F.2d 853, 859-60 (9th Cir. 1986).

[58]Helton v. United States, 532 F. Supp. 813, 819-20 (S.D. Ga. 1982). See also Engdahl, supra note 14, at 48.

[59]Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 691 n.11 (1949); Bunch v. United States, 33 Fed. Cl. 337 (1995).

[60]Clark v. Library of Congress, 750 F.2d 89, 104 (D.C. Cir. 1984); New Mexico v. Regan, 745 F.2d 1318, 1320 (10th Cir. 1984), cert. denied, 471 U.S. 1065 (1985); (continued...)

(c) The Administrative Procedure Act (APA).

(i) General. By an amendment to the APA in 1976, Congress virtually eliminated the bar of sovereign immunity in lawsuits for nonmonetary relief against the government.[61] The Act provides in relevant part:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, that any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute

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[60](...continued)
Glines v. Wade, 586 F.2d 675, 681-82 (9th Cir. 1978), rev'd on other grounds sub nom. Brown v. Glines, 444 U.S. 348 (1980); Ogletree v. McNamara, 449 F.2d 93, 99-100 (6th Cir. 1971).

[61]Act of Oct. 21, 1976, Pub. L. No. 94-574, § 1, 90 Stat. 2721 (1976) (codified as 5 U.S.C. § 702).

> that grants consent to suit expressly or impliedly forbids the relief which is sought.[62]

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Although at one time there was some doubt,[63] it is now well-settled that section 702 waives sovereign immunity in cases where plaintiffs seek equitable, nonmonetary relief from the government.[64] The APA does not waive sovereign immunity as to claims for monetary damages.[65] However, monetary relief, other than damages, may be

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[62]5 U.S.C. § 702.

[63]See Estate of Watson v. Blumenthal, 586 F.2d 925, 932 (2d Cir. 1978).

[64]See, e.g., Clark v. Library of Congress, 750 F.2d 89, 102 (D.C. Cir. 1984); Ghandi v. Police Dept., 747 F.2d 338, 343 (6th Cir. 1984); Minnesota v. Heckler, 718 F.2d 852, 858 (8th Cir. 1984); B. K. Instruments, Inc. v. United States, 715 F.2d 713, 724-25 (2d Cir. 1983) (holding Estate of Watson v. Blumenthal was incorrectly decided); Food Town Stores, Inc. v. EEOC, 708 F.2d 920, 922 (4th Cir. 1983), cert. denied, 465 U.S. 1005 (1984); Beller v. Middendorf, 632 F.2d 788, 796-97 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981); Sheehan v. Army & Air Force Exchange Serv., 619 F.2d 1132, 1139 (5th Cir. 1980), rev'd on other grounds, 456 U.S. 728 (1982); Jaffee v. United States, 592 F.2d 712, 718-19 (3d Cir.), cert. denied, 441 U.S. 961 (1979).

[65]5 U.S.C. § 702. See, e.g., Rhodes v. United States, 760 F.2d 1180, 1184 (11th Cir. 1985); Ghandi, 747 F.2d at 343; Doe v. Civiletti, 635 F.2d 88, 94 (2d Cir. 1981); Jaffee, 592 F.2d at 718-19; Medina v. O'Neill, 589 F. Supp. 1028, 1035 (S.D. Tex. 1984). But cf. Smith v. CHAMPUS, 884 F. Supp. 303 (S.D. Ind. 1994) (CHAMPUS ordered to provide certain medical treatment to plaintiff); Maryland Dep't of Human Resources v. United States Dep't of Health & Human Services, 763 F.2d 1441, 1446-48 (D.C. Cir. 1985) (APA authorizes suits for specific relief that are monetary in character, but not relief in the form of damages); compare Massachusetts v. Departmental Grant Appeals Bd., 815 F.2d 778, 782-83 (1st Cir. 1987) (disagreeing with Maryland Dep't of Human Resources).

awarded incident to specific equitable relief.[66] Moreover, section 702 "does not affect other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate or equitable ground" such as justiciability, exhaustion of administrative remedies, reviewability, and the like.[67]

(ii) Applicability of the APA to the Armed Forces. The APA is generally applicable to the military departments.[68] The APA does not apply, however, to courts-martial and military commissions or to military authority exercised in the field in time of war or in occupied territories.[69] Moreover, certain agency decisions are exempt from review under the APA. Examples include decisions committed to agency discretion by law and those arising under a statute that precludes judicial review.[70]

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[66]See Bowen v. Massachusetts, 487 U.S. 905 (1988); see also supra § 3-3c.(3).

[67]14 C. Wright et al., supra note 2, at 2430; H.R. Rep. No. 1656, 94th Cong., 2d Sess. 9-10, 12, reprinted in 1976 U.S.C.C.A.N. 6121, 6129-30, 6132-33.

[68]See Dronenburg v. Zech, 741 F.2d 1388, 1390 (D.C. Cir.), reh'g denied, 746 F.2d 1579 (D.C. Cir. 1984) (en banc); Beller v. Middendorf, 632 F.2d 788, 796-98 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981); Sheehan v. Army & Air Force Exchange Serv., 619 F.2d 1132, 1139 (5th Cir. 1980), rev'd on other grounds, 456 U.S. 728 (1982); Jaffee v. United States, 592 F.2d 712, 719-20 (3d Cir.), cert. denied, 441 U.S. 961 (1979); Ornato v. Hoffman, 546 F.2d 10 (2d Cir. 1976).

[69]5 U.S.C. § 701(b)(1).

[70]Id. § 701(a). See infra § 6.2.

(d) Other Statutes. In addition to the APA, Congress has waived sovereign immunity as to nonmonetary relief under specialized circumstances. Examples include the Freedom of Information Act[71] and the Privacy Act.[72]

## 4.3 Types of Remedies.

a. Introduction. The primary remedies sought in civil actions against the military in federal district courts are money damages, mandamus, habeas corpus, injunctions, and declaratory judgments. Modern procedure allows the district court judge considerable flexibility in the remedies that may be applied in a given case regardless of what the plaintiff requests. For example, in an action seeking mandamus to compel a federal official to do his duty, the judge may well issue an injunction if that remedy best serves justice.

b. Monetary Relief. The two principal statutes providing monetary relief against the United States are the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-80, and the Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491.

(1) Federal Tort Claims Act. A detailed analysis of the FTCA is beyond the scope of this text; other works cover the topic thoroughly.[73] It bears noting again, however, that members of the military may

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[71] Id. § 552. See, e.g., Chrysler v. Brown, 441 U.S. 281 (1979).

[72] 5 U.S.C. § 552a.

[73] See, e.g., L. Jayson, Handling Federal Tort Claims (1988).

not bring actions under the FTCA for injuries sustained incident to their military service.[74]

(2) Tucker Act.

(a) Scope of the Tucker Act--Absence of Substantive Rights. Under the Tucker Act, the United States Court of Federal Claims has jurisdiction over suits for money damages based on the Constitution, a statute, or an express or implied contract with the United States. The district courts have concurrent jurisdiction with the Court of Federal Claims to the extent a claim does not exceed $10,000.[75] The Tucker Act is a jurisdictional basis for suits in the federal courts,[76] and a waiver of the government's sovereign immunity from certain nontort money claims.[77] Jurisdiction under the Tucker Act is limited to claims that are principally for money damages; the Act will not support other forms of relief, such as mandamus or declaratory judgment.[78] Moreover, the Tucker Act does

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[74]United States v. Johnson, 481 U.S. 681 (1987); United States v. Shearer, 473 U.S. 52 (1985); Feres v. United States, 340 U.S. 135 (1950).

[75]28 U.S.C. §§ 1346(a)(2), 1491. See supra § 3.2.

[76]United States v. Testan, 424 U.S. 392, 398 (1976).

[77]United States v. Mitchell, 463 U.S. 206, 212 (1983).

[78]United States v. King, 395 U.S. 1 (1969); Austin v. United States, 206 Ct. Cl. 719, 723, cert. denied, 423 U.S. 911 (1975); Willis v. United States, 600 F. Supp. 1407, 1412 (N.D. Ill. 1985); Travelers Idem. Co. v. United States, 593 F. Supp. 625, 626 (N.D. Ga. 1984); Georgia Gazette Publ. Co. v. United States Dep't of Defense, 562 F. Supp. 1000, 1002-03 (S.D. Ga. 1983). The Claims Court may, however, award limited equitable relief that is incidental to a money judgment. 28 U.S.C. § 1491(b).

not create any substantive rights enforceable against the United States for money damages; rather, a plaintiff must base its claim on a contract, or on the Constitution, statute, or regulatory provision that grants the plaintiff a right to monetary relief. In United States v. Testan, the Supreme Court explored the need for a substantive basis for money damages against the United States under the Tucker Act.

UNITED STATES v. TESTAN

424 U.S. 392 (1976)

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This is a suit for reclassification of federal civil service positions and for backpay. It presents a substantial issue concerning the jurisdiction of the Court of Claims and the relief available in that tribunal.

I

The plaintiff-respondents, Herman R. Testan and Francis L. Zarrilli, are trial attorneys employed in the Office of Counsel, Defense Personnel Support Center, Defense Supply Agency, in Philadelphia. They represent the Government in certain matters that come before the Armed Services Board of Contract Appeals of the Department of Defense. Their positions are subject to the Classification Act, 5 U.S.C. § 5101 et seq., and they are presently classified at civil service grade GS-13.

In December 1969 respondents, through their Chief Attorney, requested their employing agency to reclassify their positions to grade GS-14. The asserted ground was that their duties and responsibilities met the requirements for the higher grade under standards promulgated by the Civil Service Commission in General Attorney Series GS-905-0. In addition, they contended that their

duties were identical to those of other trial attorneys in positions classified as GS-14 in the Contract Appeals Division, Office of the Staff Judge Advocate, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Dayton, Ohio, and that under the principle of "equal pay for substantially equal work," prescribed in § 5101(1)(A), they were entitled to the higher classification.

The agency, after an audit by a position classification specialist, concluded that the respondents' assigned duties were properly classified at the GS-13 level under the Commission's classification standards. On appeal, the Commission reached the same conclusion and denied reclassification. The Commission also ruled that comparison of the positions held by the respondents with those of attorneys employed by the referenced logistics Command was not a proper method of classification.

The two respondents then instituted this suit in the Court of Claims. Each sought an order directing reclassification of his position as of the date (May 8, 1970) of the first administrative denial of his request, and backpay, computed at the difference between his salary and grade GS-14 (and the claimed appropriate within-grade step), from that date. . . .

The Court of Claims considered the case en banc and divided 4-3. . . . The majority felt . . . that if the Commission were to determine that it had made an erroneous classification, that determination "could create a legal right which we could then enforce by a money judgment.". . .

The majority [held] that the Commission's failure to compare respondents' positions with those of the Logistics Command attorneys was arbitrary and capricious. . . . The court ruled that it had the power under the remand statute, 86 Stat. 652, now codified as part of 28 U.S.C. § 1491 (1970 ed. Supp. IV), to order the Commission to reconsider its classification decision "under proper directions." Accordingly, and pursuant to its Rule 149(b), the court remanded the case to

the Commission to make the comparison and to report the result to the court.

. . . .

We granted certiorari because of the importance of the issue in the measure of the Court of Claims' statutory jurisdiction, and because of the significance of the court's decision upon the Commission's administration of the civil service classification system. 420 U.S. 923 (1975).

II

We turn to the respective statutes that are advanced as support for the action taken by the Court of Claims.

A. The Tucker Act. The central provision establishing the jurisdiction of the court is that part of the Tucker Act now codified as 28 U.S.C. § 1491:

> "The Court of Claims shall have 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, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

This Court recently had occasion to examine the jurisdiction of the Court of Claims under this statutory formulation. In United States v. King, 395 U.S. 1 (1969), the Court reviewed a decision (182 Ct. Cl. 631, 390 F.2d 894) in which the Court of Claims had concluded that it was empowered to exercise jurisdiction under the Declaratory Judgment Act, 28 U.S.C. § 2201. This Court observed that the Court of Claims was established by Congress in 1855; that "[t]hroughout its entire history," until the King case was filed, "its jurisdiction has been limited to money claims against the United States Government"; that decided cases in this Court had "reaffirmed this view of the limited jurisdiction of the Court of Claims," and "the passage of the Tucker Act in 1887 had not

expanded that jurisdiction to equitable matters"; that "neither the Act creating the Court of Claims nor any amendment to it granted that court jurisdiction of the case before it because King's claim was "not limited to actual, presently due money damages from the United States"; and that what King was requesting was "essentially equitable relief of a kind that the Court of Claims has held throughout its history. . . it does not have the power to grant." 395 U.S., at 2-3. The Court then went on to hold that the Declaratory Judgment Act did not grant the Court of Claims authority to issue declaratory judgments. Cited in support of all this were Glidden Co. v. Zdanok, 370 U.S. 530, 557 (1962) (Harlan, J.) (plurality opinion); United States v. Jones, 131 U.S. 1 (1889); and United States v. Alire, 6 Wall. 573, 575 (1868). See Lee v. Thornton, 420 U.S. 139 (1975); Richardson v. Morris, 409 U.S. 464 (1973); United States v. Sherwood, 312 U.S. 584, 589-591 (1941).

The Tucker Act, of course, is itself only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages. The Court of Claims has recognized that the Act merely confers jurisdiction upon it whenever the substantive right exists. Eastport S. S. Corp. v. United States, 178 Ct. Cl. 599, 605-607, 372 F.2d 1002, 1007-1009 (1967). We therefore must determine whether the two other federal statutes that are invoked by the respondents confer a substantive right to recover money damages from the United States for the period of their allegedly wrongful civil service classifications.

B. The Classification Act. Inasmuch as the trial judge proposed, App. 57, that the respondents were not entitled to backpay under the Back Pay Act, 5 U.S.C. § 5596, and the Court of Claims held that there was no need for it to reach and construe that Act, 205 Ct. Cl., at 333, 499 F.2d, at 691, it is implicit in the court's decision in favor of respondents that a violation of the Classification Act gives rise to a claim for money damages for pay lost by reason of the allegedly wrongful classifications.

It long has been established, of course, that the United States, as sovereign, "is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." United States v. Sherwood, 312 U.S., at 586. And it has been said, in a Court of Claims context, that a waiver of the traditional sovereign immunity "cannot be implied but must be unequivocally expressed." United States v. King, 395 U.S., at 4; Soriano v. United States, 352 U.S. 270, 276 (1957). Thus, except as Congress has consented to a cause of action against the United States, "there is no jurisdiction in the Court of Claims more than in any other court to entertain suits against the United States." United States v. Sherwood, 312 U.S., at 587-588.

We find no provision in the Classification Act that expressly makes the United States liable for pay lost through allegedly improper classifications. To be sure, in the "purpose" section of the Act, 5 U.S.C. § 5101(1)(A), Congress stated that it was "to provide a plan for classification of positions whereby . . . the principle of equal pay for substantially equal work will be followed." And in subsequent sections, there are set forth substantive standards for grading particular positions, and provisions for procedures to ensure that those standards are met. But none of these several sections contains an express provision for an award of backpay to a person who has been erroneously classified.

In answer to this fact, the respondents and the amici make two observations. They first argue that the Tucker Act fundamentally waives sovereign immunity with respect to any claim invoking a constitutional provision or a federal statute or regulation, and makes available any and all generally accepted and important forms of redress, including money damages. It is said that the Government has confused two very different issues, namely, whether there has been a waiver of sovereignty, and whether a substantive right has been created, and it is claimed that where

there has been a violation of a substantive right, the Tucker Act waives sovereign immunity as to all measures necessary to redress that violation.

The argument does not persuade us. As stated above, the Tucker Act is merely jurisdictional, and grant of a right of action must be made with specificity. The respondents do not rest their claims upon a contract; neither do they seek the return of money paid by them to the Government. It follows that the asserted entitlement to money damages depends upon whether any federal statute "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." Eastport S. S. Corp. v. United States, 178 Ct. Cl., at 607, 372 F.2d at 1009; Mosca v. United States, 189 Ct. Cl. 283, 290, 417 F.2d 1382, 1386 (1969), cert. denied, 399 U.S. 911 (1970). We are not ready to tamper with these established principles because it might be thought that they should be responsive to a particular conception of enlightened governmental policy. See Brief for Amici Curiae 9-11. In a suit against the United States, there cannot be a right to money damages without a waiver of sovereign immunity, and we regard as unsound the argument of amici that all substantive rights of necessity create a waiver of sovereign immunity such that money damages are available to redress their violation.

We perceive nothing in the Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974), cited by the amici with other cases centering in the Just Compensation Clause of the Fifth Amendment ("nor shall private property be taken for public use, without just compensation"), that lends support to the respondents. These Fifth Amendment cases are tied to the language, purpose, and self-executing aspects of that constitutional provision, Jacobs v. United States 290 U.S. 13, 16 (1933), and are not authority to the effect that the Tucker Act eliminates from consideration the sovereign immunity of the United States.

The respondents and the amici next argue that the violation of any statute or regulation relating to federal employment automatically creates a cause of action against the United States for money damages because if this were not so, the employee would then have a right without a remedy, inasmuch as he is denied access to the one forum where he may seek redress.

Here again we are not persuaded. Where the United States is the defendant and the plaintiff is not suing for money improperly exacted or retained, the basis of the federal claim--whether it be the Constitution, a statute, or a regulation--does not create a cause of action for money damages unless, as the Court of Claims has stated, that basis "in itself . . . can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." Eastport S. S. Corp. v. United States, 178 Ct. Cl., at 607, 372 F.2d, at 1008, 1009. We see nothing akin to this in the Classification Act or in the context of a suit seeking reclassification.

The present action, of course, is not one concerning a wrongful discharge or a wrongful suspension. In that situation, at least since the Civil Service Act of 1883, the employee is entitled to the emoluments of his position until he has been legally disqualified. United States v. Wickersham, 201 U.S. 390 (1906). There is no claim here that either respondent has been denied the benefit of the position to which he was appointed. The claim, instead, is that each has been denied the benefit of a position to which he should have been, but was not, appointed. The established rule is that one is not entitled to the benefit of a position until he has been duly appointed to it. United States v. McLean, 95 U.S. 750 (1878); Ganse v. United States, 180 Ct. Cl. 183, 186, 376 F.2d 900, 902 (1967). The Classification Act does not purport by its terms to change that rule, and we see no suggestion in it or in its legislative history that Congress intended to alter it.

. . . .

The situation, as we see it, is not that Congress has left the respondents remediless, as they assert, for their allegedly wrongful civil service classification, but that Congress has not made available to a party wrongfully classified the remedy of money damages through retroactive classification. There is a difference between prospective reclassification, on the one hand, and retroactive reclassification resulting in money damages, on the other. See Edelman v. Jordan, 415 U.S. 651 (1974). Respondents, of course, have an administrative avenue of prospective relief available to them under the elaborate and structured provisions of the Classification Act, 5 U.S.C. §§ 5101-5115. The amici so recognize. Brief for Amici Curiae 13-15. Among the Act's provisions along this line are those requiring the Civil Service Commission to engage in supervisory review of an agency's classifications, and, where necessary, to review and reclassify individual positions, 5 U.S.C. § 5110; allowing the Commission to reclassify, § 5112; and allowing the Commission even to revoke or suspend the agency's authority to classify its own positions, § 5111. Indeed, as the amici describe it: "[T]he Act is not merely a hortatory catalogue of high principles." Brief for Amici Curiae 15. The built-in avenue of administrative relief is one response to these statutory requirements. Review and reclassification may be brought into play at the request of an employee. 5 U.S.C. § 5112(b). And respondents, as has been noted, did just that. A second possible avenue of relief--and it, too, seemingly, is only prospective--is by way of mandamus, under 28 U.S.C. § 1361, in a proper federal district court. In this way, also, the respondents have asserted their claims. See n.5, supra.

The respondents, thus, are not entirely without remedy. They are without the remedies in the Court of Claims of retroactive classification and money damages to which they assert they are entitled. Additional remedies of this kind are for the Congress to provide and not for the courts to construct.

Finally, we note that if the respondents were correct in their claims to retroactive classification and money damages, many of the federal statutes--such as the Back Pay Act--that expressly provide money damages as a remedy against the United States in carefully limited circumstances would be rendered superfluous.

The Court of Claims, in the present case, sought to avoid all this by its remand to the Civil Service Commission for further proceedings. If, then, the Commission were to find that the respondents were entitled to a higher grade, the Court of Claims announced that it would be prepared on appropriate motion to enter an award of money damages for the respondents for whatever backpay they lost during the period of their wrongful classifications. See Chambers v. United States, 196 Ct. Cl. 186, 451 F.2d 1045 (1971). The remand statute, Pub. L. 92-415, 86 Stat. 652, now codified as part of 28 U.S.C. § 1491 (1970 ed., Supp. IV), authorizes the Court of Claims to "issue orders directing restoration to . . . position, placement in appropriate duty . . . status, and correction of applicable records" in order to complement the relief afforded by a money judgment, and also to "remand appropriate matters to any administrative . . . body" in a case "within its jurisdiction." The remand statute, thus, applies only to cases already within the court's jurisdiction. The present litigation is not such a case.

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C. The Back Pay Act. This statute, which the Court of Claims found unnecessary to evaluate in arriving at its decision, does not apply, in our view, to wrongful classification claims. The Act does authorize retroactive recovery of wages whenever a federal employee has "undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of" the compensation to which the employee is otherwise entitled. 5 U.S.C. § 5596(b). The statute's language was intended to provide a monetary remedy for wrongful reductions in grade, removals, suspensions, and "other

unwarranted or unjustified actions affecting pay or allowances [that] could occur in the course of reassignments and change from full-time to part-time work." S. Rep. No. 1062, 89th Cong., 2d Sess., 3 (1966). The Commission consistently has so construed the Back Pay Act. See 5 C.F.R. § 550.803(e) (1975). So has the Court of Claims. See Desmond v. United States, 201 Ct. Cl. 507, 527 (1973).

For many years federal personnel actions were viewed as entirely discretionary and therefore not subject to any judicial review, and in the absence of a statute eliminating that discretion, courts refused to intervene where an employee claimed that he had been wrongfully discharged. Compare Keim v. United States, 177 U.S. 290, 293-296 (1900), with United States v. Wickersham, 201 U.S. 390 (1906). See Sampson v. Murray, 415 U.S. 61, 69-70 (1974). Relief was invariably denied where the claim was that the employee had been denied a promotion on improper grounds. See Keim v. United States, 177 U.S., at 296; United States v. McLean, 95 U.S., at 753.

Congress, of course, now has provided specifically in the Lloyd-LaFollette Act, 5 U.S.C. § 7501, for administrative review of a claim of wrongful adverse action, and in the Back Pay Act for the award of money damages for a wrongful deprivation of pay. But federal agencies continue to have discretion in determining most matters relating to the terms and conditions of federal employment. One continuing aspect of this is the rule, mentioned above, that the federal employee is entitled to receive only the salary of the position to which he was appointed, even though he may have performed the duties of another position or claims that he should have been placed in a higher grade. Congress did not override this rule, or depart from it, with its enactment of the Back Pay Act. It could easily have so provided had that been its intention.

. . . .

III

We therefore conclude that neither the Classification Act nor the Back Pay Act creates a substantive right in the respondents to backpay for the period of their claimed wrongful classifications. This makes it unnecessary for us to consider the additional argument advanced by the United States that the Classification Act does not require that positions held by employees of one agency be compared with those of employees in another agency.

The Court of Claims was in error when it remanded the case to the Civil Service Commission for further proceedings. That court's judgment is therefore reversed, and the case is remanded with directions to dismiss the respondent's suit.

It is so ordered.[79]

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(b) Back Pay Claims. One of the most common suits under the Tucker Act is the suit for back pay. As noted in Testan, however, to recover back pay under the Tucker Act claimants must establish a contract or a constitutional, statutory, or regulatory provision that entitles them to money damages from the United

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[79]See Army & Air Force Exchange Serv. v. Sheehan, 456 U.S. 728 (1982); Guercio v. Brody, 884 F.2d 1372, 1734 (Fed. Cir. 1989); Maryland Dep't of Human Resources v. Department of Health & Human Serv., 763 F.2d 1441, 1449-50 (D.C. Cir. 1985); Eastport S. S. Corp. v. United States, 372 F.2d 1002, 1007-09 (Ct. Cl. 1967); Beaumont v. Orr, 601 F. Supp. 121 (D.D.C. 1985); Willis v. United States, 600 F. Supp. 1407 (N.D. Ill. 1985); Yocum v. United States, 589 F. Supp. 706, 709 (E.D. Pa. 1984); Lunetto v. United States, 560 F. Supp. 712 (N.D. Ill. 1983).

States. The following are some of the more commonly-asserted bases for back pay claims.

(i) Civilian Employee Pay Claims. The Back Pay Act[80] authorizes the recovery of wages whenever a federal civilian employee has been found by an "appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee. . . ." When applicable, the Back Pay Act provides a substantive basis for the recovery of back wages and allowances by federal civilian employees under the Tucker Act jurisdiction.[81]

(ii) Military Pay Claims. Servicemembers and former servicemembers are not subject to the Back Pay Act.[82] Claims of members and former members of the military for lost pay and allowances are based on their statutory entitlement to pay.[83] The claims are predicated on the theory that until a servicemember's active duty status or entitlement to pay has been legally terminated, by expiration of the term of enlistment or as otherwise prescribed by law, he or she has a statutory right to receive the monetary

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[80]5 U.S.C. § 5596(b).

[81]United States v. Testan, 424 U.S. 392, 405-06 (1976).

[82]Sanders v. United States, 594 F.2d 804, 810 (Ct. Cl. 1979).

[83]37 U.S.C. § 204.

benefits of his or her service.[84] Additionally, the courts generally treat the back pay claims of officers and enlisted persons differently. Officers who serve indefinitely are deemed to serve in an active duty status until legally separated. Thus, officers who are unlawfully discharged are entitled to recover back pay from the date of their illegal separation to the date they are lawfully discharged--usually after final judgment is rendered in their case.[85] Enlisted personnel, on the other hand, serve under contract for a term of years. If unlawfully separated, they are entitled to back pay only until the date their enlistment would have otherwise terminated.[86] The difference in the resolution of enlisted and officer back pay claims is best illustrated in O'Callahan v.

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[84]Sanders, 594 F.2d at 804. See Harmel, Military Pay Cases Before the Court of Claims, 55 Geo. L.J. 529, 532 (1966). Cf. Sawyer v. United States, 930 F.2d 1577 (Fed. Cir. 1991) (claims court has jurisdiction over former servicemember's challenge to decision denying him disability retirement because servicemember is entitled to disability pay under 10 U.S.C. § 1201 unless it is lawfully withheld).

[85]See, e.g., Werner v. United States, 642 F.2d 404 (Ct. Cl. 1981); Hamlin v. United States, 391 F.2d 941 (Ct. Cl. 1968); Egan v. United States, 158 F. Supp. 377 (Ct. Cl. 1958); Boruski v. United States, 155 F. Supp. 320 (Ct. Cl. 1957).

[86]See, e.g., Dodson v. United States, 988 F.2d 1199 (Fed. Cir. 1993); Maier v. Orr, 754 F.2d 973 (Fed. Cir. 1985); Austin v. United States, 206 Ct. Cl. 719, cert. denied, 423 U.S. 911 (1975); Kirk v. United States, 164 Ct. Cl. 738 (1964).

United States,[87] which involved the back pay claim of the habeas corpus petitioner of O'Callahan v. Parker,[88] fame.

O'CALLAHAN v. UNITED STATES

451 F.2d 1390 (Ct. Cl. 1971)

Before COWEN, Chief Judge, and LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON and NICHOLS, Judges.

ON DEFENDANT'S MOTION AND PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT

NICHOLS, Judge.

In this action under 28 U.S.C. § 1491, plaintiff seeks payment of military pay and allowances for the entire period from the date of his illegal discharge to the date of decision in this court. On October 11, 1956, while serving an enlistment due to expire on March 8, 1961, plaintiff was convicted by general court-martial of attempted rape, housebreaking, and assault with intent to rape, and sentenced to ten years confinement, dishonorable discharge, and forfeiture of all pay and allowances. On June 2, 1969, the Supreme Court, on writ of habeas corpus, reversed the conviction in O'Callahan v. Parker, 395 U.S. 258, 89 S. Ct. 1683, 23 L.Ed.2d 291 (1969), holding that the jurisdiction of military courts-martial could not constitutionally extend to the alleged criminal conduct which was not "service-connected," and was committed out of uniform, on leave, off the military base and in a district, Hawaii, where civil courts were open. It held that plaintiff was denied his right to trial in such a civilian tribunal with the attendant rights of an indictment by a grand jury and a trial by jury. This

[87]451 F.2d 1390 (Ct. Cl. 1971).

[88]395 U.S. 258 (1969). See Groves v. United States, 47 F.3d 1140 (Fed. Cir 1995) (Army Reserve officer's back pay claims should have been decided based on when he was sentenced, not when he was released from confinement).

decision voided the conviction and sentence, including plaintiff's dishonorable discharge.

On October 6, 1969, plaintiff commenced this action, proceedings in which were stayed in order for plaintiff to seek a review by the Board For The Correction of Military Records (hereafter Board) to settle plaintiff's military status. The Under Secretary of the Army, under date of January 12, 1971, and pursuant to Board recommendation, has nullified plaintiff's dishonorable discharge; discharged him honorably as of March 8, 1961, the expiration date of his enlistment contract in force at the time of his purported conviction; and denied him any connection with the Army after March 8, 1961.

Plaintiff says the Under Secretary of the Army abused his discretion in backdating the discharge to the end of the enlistment, and urges that he had never been properly discharged from the service until the time of action of the Board. The Government insists that the Secretary acted wholly within his discretion and, in any event, any cause of action accrued more than six years before this action was filed. Thus, the Government argues, the six-year statute of limitations on actions in this court, 28 U.S.C. § 2501 (1970), precludes this claim.

In order to reach the statute of limitations issue we must dispose of the threshold question of the time of accrual of the cause of action which requires analysis of the decisions of the Board and the Secretary.

The plaintiff's position proceeds as follows: when the Board replaced his dishonorable discharge with an honorable one, it attempted to make the discharge retroactive to March 8, 1961. Plaintiff says it can do the first but not the second. Since he had never been properly discharged before the date of the correction, that date should be the effective date of his new discharge. Thus, plaintiff continues, he is entitled to all pay and allowances for the intervening time. This line of logic has been argued before this court on many occasions and it has been consistently rejected, the court uniformly

limiting recovery for unlawful discharge to the period between the date of the discharge and the date of the expiration of the enlistment contract had the prior defective discharge not occurred. E.g., Middleton v. United States, 170 Ct. Cl. 36 (1965); Sofranoff v. United States, 165 Ct. Cl. 470 (1964); Clackum v. United States, 161 Ct. Cl. 34 (1963); Smith v. United States, 155 Ct. Cl. 682 (1961); Murray v. United States, 154 Ct. Cl. 185 (1961). This disposition is based on sound, time-honored contract principles, namely that neither party to a contract is bound beyond that for which he has bargained. Cases cited by plaintiff support this view. In Garner v. United States, 161 Ct. Cl. 73 (1963), the enlistment in question was indefinite, having no expiration date; therefore the date of the second, proper honorable discharge was used as the benchmark for determining the amount of recovery due.

Officers' commissions are generally of indefinite duration. Shaw v. United States, 357 F.2d 949, 174 Ct. Cl. 899 (1966), indicates that an officer remains an officer indefinitely, despite an invalid conviction and discharge. In Motto v. United States, 172 Ct. Cl. 192, 348 F.2d 523 (1965), and again in Hamlin v. United States, 183 Ct. Cl. 137, 391 F.2d 941 (1968), the claimants also held commissions of indefinite duration. We determined, for reasons that will appear, that the Board review was a mandatory step, without which plaintiffs had no cause of action and therefore that the date of the Board's decision was the date of accrual of the action since no other reasonable one was available. One judge in Hamlin would have predicated the result on different grounds, not here applicable. A distinguishing fact in Motto and Hamlin we think, is the different status of persons in the Armed Forces, who have indefinite commissions.

The Motto and Hamlin plaintiffs were Army officers who had been civilly convicted for bribery. Later the Secretary of the Army dismissed them, because 18 U.S.C. § 202 automatically forfeits offices such as theirs in case of conviction for that kind of offense. Still later the District Court

voided their convictions, but McMullen v. United States, 100 Ct. Cl. 323 (1943), cert. denied, 321 U.S. 790, 64 S. Ct. 786, 88 L. Ed. 1080 (1944), stood as authority that the forfeiture remained effective despite such voidance, and without administrative correction, it follows that a suit here would not lie. The Secretary corrected their records, giving honorable discharges, effective the dates of dismissal, but a majority of this court held that plaintiffs could simultaneously take advantage of the new discharge and repudiate the effective date the Secretary had selected. The cases turned on the unique legal situation presented and do not establish any general rule that corrective honorable discharges cannot be backdated when it is reasonable and not arbitrary or capricious to backdate.

. . . .

Plaintiff asks this court to find the actions of the Board and the Secretary in "backdating" his discharge to the date of enlistment expiration to be arbitrary, capricious and outside the discretion vested with their offices. The issue, most clearly stated, is whether the Secretary of any service arm is required to postulate a re-enlistment without exercise of discretion in individual cases. We think that he is not. The principles of efficient management, maintenance of morale, and the continued public trust in our Armed Services require that more substantial discretion be left in the hands of those who manage and maintain the Armed Services. Assume for the moment that plaintiff's conviction had been voided prior to the end of his enlistment and that he were free at that time to apply for re-enlistment, and that he actually harbored the intent to do so. We may note that in O'Callahan the Supreme Court does not pretend to be correcting an unjust conviction. It starts right out by reciting that he committed the offenses charged. Would the Secretary have been compelled to accept plaintiff's enlistment, knowing what he had done? Again, we think not. Cf. Davis v. United States, Ct. Cl. (decided November 12, 1971).

. . . .

> The issue of when an action based on alleged illegal discharge accrues is not new to this court. In Mathis v. United States, 183 Ct. Cl. 145, 391 F.2d 938 (1968), we held it accrued all at once on the date of discharge. . . .

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(iii) Nonappropriated Fund (NAFI) Employees. Absent a contract, nonappropriated fund employees are generally precluded from seeking back pay from the United States under the Tucker Act, as they are expressly excluded from coverage under the Back Pay Act.[89] Nor were there any other constitutional, statutory, or regulatory provisions that entitled such employees to recover back pay from the government. The absence of a back pay remedy for nonappropriated fund employees was the subject of the Supreme Court's decision in Army & Air Force Exchange Service v. Sheehan.

ARMY AND AIR FORCE EXCHANGE SERVICE v. SHEEHAN

456 U.S. 728 (1982)

> JUSTICE BLACKMUN delivered the opinion of the Court.
>
> The issue presented by this case is whether the federal courts have jurisdiction over a civil action for monetary damages brought by a former military exchange employee who contests the validity of his discharge. The employee claims that federal jurisdiction exists under the Tucker Act, 28 U.S.C. § 1346(a)(2) (1976 ed., Supp. IV).

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[89] See 5 U.S.C. § 2105(c)(1).

I

A

In 1962, respondent, Arthur Edward Sheehan, was selected for a data processing position with petitioner Army and Air Force Exchange Service (AAFES or Service). Five years later, respondent was designated by the AAFES commander for participation in the Service's Executive Management Program (EMP); this program is "intended to fulfill the continuing requirement of AAFES for highly qualified and dedicated executive employees who will be readily available to meet the worldwide executive personnel requirements of AAFES." Army Regulation (AR) 60-21/Air Force Regulation (AFR) 145-15, ch. 5, § 11, para. 5-6 (1 Aug. 1979). Employees in the program enjoy special retention, insurance, and retirement benefits. On the other hand, those employees are subject to certain obligations, a principal one being that EMP personnel must accept transfer to any AAFES facility in this country or abroad. Para. 5-9(a)(2). EMP status may be withdrawn for, among other things, "conduct off the job reflecting discredit upon AAFES." Para. 5-9(c). Pursuant to the regulations governing the EMP, respondent was required to "acknowledg[e] in writing that he underst[ood] and accept[ed] the conditions of the EMP as prescribed by the Commander, AAFES." Para. 5-7(b).

In 1975, while respondent was serving as a shopping center manager at Fort Jackson, S.C., he was arrested off the base for possession of controlled substances. Pursuant to a plea bargain, respondent pleaded guilty to four misdemeanor counts of violating state drug laws. He was sentenced to 18 months probation and a $1,000 fine was imposed.

[On April 19, 1976, respondent was separated from the service for cause. Ultimately, his appeals were denied. Pending resolution of his appeals, respondent filed suit against AAFES in the District Court for the Northern District of Texas. He sought reinstatement and damages, including backpay.]

The District Court, without opinion, dismissed the complaint for want of subject-matter jurisdiction. App. to Pet. for Cert. 17a.

The United States Court of Appeals for the Fifth Circuit reversed. It concluded that the Tucker Act, 28 U.S.C. § 1346(a)(2), which gives the federal courts jurisdiction over certain suits against the United States founded upon express or implied contracts, provided a basis for jurisdiction over respondents claims for monetary relief. 619 F.2d 1132 (1980). Whether respondent's employment was initiated by appointment or by contract, the court held, the AAFES regulations providing for separation for cause only under certain conditions and guaranteeing an administrative appeal "manifest[ed] the understanding of the parties concerning discharge procedures while Sheehan continued in AAFES employment." Id., at 1138 (emphasis in original). Accordingly, the court considered those regulations to be "part of a collateral implied-in-fact contract between Sheehan and the AAFES that the AAFES would adhere to the regulations in its dealings with him." Ibid. In the court's view, the understanding of the parties was reinforced by the well-established legal principle that a federal agency must comply with its own regulations. The court concluded that respondent's allegation that his dismissal violated applicable regulations was "equivalent to an allegation of breach of an implied-in-fact contract," ibid., and that the District Court therefore had erred in ruling that it had no jurisdiction to award respondent monetary relief.

Because this ruling appeared to be in conflict with our precedents, we granted certiorari. 454 U.S. 813 (1981).

II

The AAFES, like other military exchanges, is an "'ar[m] of the government deemed by it essential for the performance of governmental functions . . . and partake[s] of whatever immunities it may have under the constitution and federal statues."' United States v.

Mississippi Tax Comm'n, 421 U.S. 599, 606 (1975), quoting, with approval, language of the District Court in the same case, 378 F. Supp. 558, 562-563 (SD Miss. 1974). As a result, the federal courts may entertain actions against the Service only if Congress has consented to suit; "a waiver of the traditional sovereign immunity 'cannot be implied but must be unequivocally expressed.'" United States v. Testan, 924 U.S. 392, 399 (1976), quoting United States v. King, 395 U.S. 1, 4 (1969).

The Tucker Act effects one such explicit waiver when it provides in pertinent part:

> "The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> ". . . Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . . For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service . . . shall be considered an express or implied contract with the United States." 28 U.S.C. § 1346(a)(2) (1976 ed., Supp. IV) (emphasis added).

Respondent does not assert Tucker Act jurisdiction on the basis of the Constitution or a specific statute or regulation. He claims only that the Tucker Act affords him a remedy because of an "express or implied contract with the United States" agreed to by the parties. Specifically, respondent urges that he became an AAFES employee, or at least entered the EMP, by virtue of an employment contract, not by appointment, and that the AAFES regulations governing dismissal of

employees created an implied contract. We must reject both contentions.

A

In determining whether respondent's employment was the result of appointment or contract, we look to United States v. Hopkins, 427 U.S. 123 (1976), a wrongful-discharge action brought by an AAFES employee who alleged that his separation from the Service constituted a breach of an employment contract. The Court in its per curiam opinion in Hopkins noted that Tucker Act jurisdiction may be premised on an employment contract, as well as on one for goods or other services, id., at 126, and that the AAFES regulations authorize the Service to enter into service contracts. Id., at 127-128. But the Court also observed that many AAFES employees are appointed to their positions, and it remanded the case for consideration of the question whether the plaintiff had been employed by contract or by appointment, a determination dependent upon "an analysis of the statutes and regulations previously described in light of whatever evidence is adduced on remand as to plaintiff's particular status in this case." Id., at 130.

Although respondent alleges that he was employed, both initially and upon entering EMP, by express employment contracts, he points to nothing in the record or in the relevant AAFES regulations that substantiates that claim. In fact, his complaint supports the contrary view. The complaint observes that respondent was first "employed" by the AAFES in 1962, App. 3; the regulations pertaining to "employees" refer to Service personnel as "Federal employees of an instrumentality of the United States" who are appointed to their positions. AR 60-21/AFR 147-15, ch. 1, § 1, para. 1-6(a); ch. 2, § 1, paras. 2-2, 2-3 (1 Aug. 1979). Moreover, if, as respondent alleges, he was "employed" in a data processing position, AAFES regulations prohibit the Service from negotiating a contract with him. See AR 60-20/AFR 147-14, ch. 3, § III, para. 3-26(d) (15 Nov. 1978).

Respondent's selection to the EMP plainly was pursuant to appointment. The regulations governing the EMP appear in the provision entitled "Exchange Service Personnel Policies," AR 60-21/AFR 147-15, ch. 5, § II, rather than in the regulation providing for service contracts, AR 60-20/AFR 147-14, ch. 3, §§ II, III. And, in language that connotes appointment rather than contract, the EMP regulations refer to one's "nomination, selection, and designation to EMP status," AR 60-21/AFR 147-15, ch. 5, § II, para. 5-8. Furthermore, respondent complains that he was separated from the EMP in violation of discharge procedures described in the regulation applicable to appointed employees, not to those who have contracted with the AAFES to provide services. App. 4-5, 7; see AR 60-21/AFR 147-15, ch.3

. . . .

B

The Court of Appeals' decision rests on a different theory--that, whether or not respondent was initially employed by virtue of a contract or by appointment, the AAFES regulations governing separation procedures created an implied-in-fact contract that the Service would adhere to those regulations while respondent continued in AAFES employment. This approach, however, is foreclosed by our prior decisions.

In United States v. Testan, 424 U.S. 392 (1976), the Court concluded, without dissent, that the Tucker Act did not confer jurisdiction over a complaint filed by civil service employees who claimed that they were entitled to reclassification at a higher grade. The Act, the Court observed, "is itself only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages." Id., at 398. Rather, a plaintiff's "asserted entitlement to money damages depends upon whether any federal statute 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" Id., at 400, quoting Eastport S. S. Corp. v.

United States, 178 Ct. Cl. 599, 607, 372 F.2d 1002, 1009 1967). The Court explicitly rejected the argument that "the violation of any statute or regulation relating to federal employment automatically creates a cause of action against the United States for money damages." 424 U.S., at 401; see also United States v. Hopkins, 427 U.S., at 130.

As Testan makes clear, jurisdiction over respondent's complaint cannot be premised on the asserted violation of regulations that do not specifically authorize awards of money damages." Respondent cannot escape the force of Testan by relying on the Court's observation that plaintiffs in that case did not "rest their claims upon a contract," 424 U.S., at 400, and distinguishing this case on the ground that the regulations effected an implied contract. To accept this reasoning would be to undermine the Court's ruling in Testan that the Tucker Act provides a remedy only where damages against the United States have been authorized explicitly. Admittedly, the Testan plaintiffs did not assert the existence of an employment contract, but neither did respondent until very late in the litigation. And if employment statutes and regulations create an implied-in-fact contract, surely the Court would have so noted in Testan instead of directing that the complaint be dismissed. See id., at 408. Moreover, the plaintiff in Hopkins did claim that he had been employed pursuant to a contract; the Court's remand for consideration of the plaintiff's status as an appointed or contract employee, despite a claim that his discharge contravened applicable regulations, clearly suggests that employment regulations do not automatically give rise to an implied in fact contract.

In addition to mandating different results in Testan and Hopkins, the Court of Appeals' approach would "rende[r] superfluous" "many of the federal statutes--such as the Back Pay Act--that expressly provide money damages as a remedy against the United States in carefully limited circumstances." United States v. Testan, 424 U.S., at 404. The Back Pay Act, which permits an employee to recover lost wages due to "an unjustified or

unwarranted personnel action which has resulted in the withdrawal or reduction of all or part" of the compensation to which he was otherwise entitled, 5 U.S.C. § 5596(b)(1) (1976 ed., Supp. IV), expressly denies that cause of action to AAFES personnel. See 5 U.S.C. § 2105(c)(1) (1976 ed., Supp. IV). Congress' intent to prohibit a backpay claim by a Service employee would obviously be subverted if the employee could sue under the Tucker Act whenever he asserted a violation of the Service's regulations governing termination. And the impact of the Court of Appeals' decision would not be limited to such circumstances: as counsel for respondent appeared to concede at oral argument, the Court of Appeals' reasoning would extend Tucker Act jurisdiction to reach any complaint filed by a federal employee alleging the violation of a personnel statute or regulation. Tr. of Oral Arg. 20-21.

We therefore conclude that Testan is controlling, and we hold that the Court of Appeals erred in implying a contract based solely on the existence of AAFES personnel regulations and in premising Tucker Act jurisdiction on those regulations, which do not explicitly authorize damage awards. Because the court's judgment may not be sustained on the ground that respondent was hired pursuant to an express employment contract, we find that the Tucker Act did not confer jurisdiction over respondent's claim for monetary relief.

The judgment of the Court of Appeals is therefore reversed.

It is so ordered.[90]

Following the Sheehan decision, the Army and Air Force Exchange Service (AAFES) adopted the provisions of

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[90]See Lunetto v. United States, 560 F. Supp. 712 (N.D. Ill. 1983) (Navy Exchange Service).

the Back Pay Act by regulation.[91] This regulatory provision now provides the AAFES employee a substantive basis for relief under the Tucker Act.

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(c) Other Issues.

(i) Statute of Limitations. An action under the Tucker Act must be filed within six years of the date on which it accrues.[92] Generally, "a claim against the United States first accrues on the date when all events have occurred which fix the liability of the Government and entitle the claimant to institute an action."[93] In cases where a plaintiff's claim is based on an alleged illegal discharge from the military, the claim normally first accrues on the date of separation from the service.[94] Where former military personnel challenge putatively illegal court-martial convictions, the statute begins to run on the date of conviction.[95] And in cases involving purportedly unlawful promotion passovers, the claims accrue on the

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[91]Dep't of Army, Reg. No. 60-21, para. 1-7g; Dep't of Air Force, Reg. No. 147-15, para. 1-7g.

[92]28 U.S.C. §§ 2401(a), 2501 (1982).

[93]Oceania Steamship Co. v. United States, 165 Ct. Cl. 217, 225 (1964). See Kirby v. United States, 201 Ct. Cl. 527, 532-33 (1973).

[94]Mathis v. United States, 391 F.2d 938 (Ct. Cl.), vacated on other grounds, 394 F.2d 519 (Ct. Cl. 1968); Walter v. Secretary of Defense, 725 F.2d 107, 114 (D.C. Cir. 1983).

[95]Calhoun v. Lehman, 725 F.2d 115, 117 (D.C. Cir. 1983); Brewster v. Sec'y of Army, 489 F. Supp. 85 (E.D.N.Y. 1980).

date promotion is denied.[96] Failure to bring an action within the statute of limitations is a jurisdictional bar to suit.[97]

(ii) Appeals in Tucker Act Cases. The United States Court of Appeals for the Federal Circuit has exclusive jurisdiction over appeals from the Court of Federal Claims and from a district court if the jurisdiction of the district court was based, in whole or in part, on the Tucker Act.[98] The appeal of Tucker Act cases is discussed in greater detail in chapter 3.[99]

c. Mandamus. "Historically, as well as under § 1361, the writ of mandamus [has] been considered an extraordinary remedy, to be issued only under extraordinary circumstances."[100] To demonstrate the right to mandamus relief, a plaintiff must establish three elements: (1) a clear right to the relief sought; (2)

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[96]Brownfield v. United States, 589 F.2d 1035 (Ct. Cl. 1978).

[97]United States v. Sams, 521 F.2d 421, 429 (3d Cir. 1975); United States v. One 1961 Red Chevrolet Impala Sedan, 457 F.2d 1353, 1357 (5th Cir. 1972); Mann v. United States, 399 F.2d 672, 673 (9th Cir. 1968); Konecny v. United States, 388 F.2d 59, 62 (8th Cir. 1967); Bruno v. United States, 556 F.2d 1104, 1105 (Ct. Cl. 1977). See § 3.1(d) (effect of exhaustion of remedies on the statute of limitations).

[98]28 U.S.C. §§ 1295(a)(2), (3).

[99]See supra § 3.3c(5).

[100]Cook v. Arentzen, 582 F.2d 870, 876 (4th Cir. 1978). See also Smith v. Northern La. Medical Review Ass'n, 735 F.2d 168, 172 (5th Cir. 1984); Haneke v. Secretary of Health, Educ., & Welfare, 535 F.2d 1291, 1296 (D.C. Cir. 1976); In re Cessna Distributorship Antitrust Litigation, 532 F.2d 64, 68 (8th Cir. 1976); Atwell v. Orr, 589 F. Supp. 511, 516 (D.S.C. 1984).

a clear duty on the part of the defendant to do the act in question; and (3) no other adequate remedy available.[101] Carter v. Seamans best illustrates the application of these prerequisites to mandamus relief, especially the availability of other adequate remedies.

CARTER v. SEAMANS

411 F.2d 767 (5th Cir. 1969),
cert. denied, 397 U.S. 941 (1970)

. . . .

> The Plaintiff, Albert H. Carter, was discharged from the United States Air Force "under other than honorable conditions" on December 29, 1960. His discharge was purportedly effected pursuant to the provisions of 10 U.S.C. Sec. 1163(a) as implemented by Air Force Regulation 36-2. At the time of the discharge, Plaintiff held the rank of Captain and he had over three years of active commissioned service. Contending that his discharge was in violation of his constitutional rights and/or was contrary to law, and hence a legal nullity, Carter brought this action against the Secretary of the Air Force in order to have it set aside. The specific relief sought includes, inter alia, a declaratory judgment that the discharge was illegal and invalid and that Plaintiff has continued to hold his office and commission at all times since December 29, 1960. Carter also asks the court to find that he is entitled to have his military records

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[101]Matthews v. United States, 810 F.2d 109, 113 (6th Cir. 1987); Fallini v. Hodel, 783 F.2d 1343, 1345 (9th Cir. 1986); Turner v. Weinberger, 728 F.2d 751, 755 (5th Cir. 1984); Cook v. Arentzen, 582 F.2d 870, 876 (4th Cir. 1978); City of Milwaukee v. Saxbe, 546 F.2d 693, 700 (7th Cir. 1976); Lovallo v. Froehlke, 468 F.2d 340, 343 (2d Cir. 1972), cert. denied, 411 U.S. 918 (1973); National Treasury Employees Union v. Bush, 715 F. Supp. 405 (D.D.C. 1989); Atwell v. Orr, 589 F. Supp. 511, 516 (D.S.C. 1984). See also Jacoby, The Effect of Recent Changes in the Law of "Nonstatutory" Judicial Review, 53 Geo. L.J. 19, 25 (1964).

corrected so as to reflect that he has been promoted at regular intervals and that he now holds the rank of Colonel. Finally, he seeks an injunction restraining the defendant from further withholding all pay and allowances he would have earned during the relevant period and which may accrue in the future. It has been estimated that the claim, if paid in full, would involve approximately $135,000.

It is noteworthy that Carter is the plaintiff in an action in the United States Court of Claims styled Albert H. Carter v. United States which was filed on April 14, 1966. The action in the Court of Claims arose out of the same factual situation as the case at bar and it seeks similar relief. On April 26, 1968, the seven judges of the court, in a per curiam order, denied the government's motion to dismiss and ordered, sua sponte, that all proceedings be stayed pending this court's disposition of the instant case.

. . . .

The defendant's second and more substantial jurisdictional objection is premised on the notion that insofar as the instant case represents a claim for monetary relief, the court is without jurisdiction to grant such relief by reason of the fact that the amount claimed exceeds $10,000. Pointing to the Tucker Act (28 U.S.C. Sec. 1346(a)(2)), defendant argues that exclusive jurisdiction of this case is lodged in the Court of Claims.

In assaying this contention the initial inquiry must be to what extent, if at all, this case represents a claim for monetary relief. The pivotal theory around which Plaintiff's entire case revolves is that his separation from the Air Force was so fundamentally defective as to be a complete legal nullity. Plaintiff, thus, is challenging the fact of discharge rather than merely its character. Inherent in this theory is the contention that Plaintiff has been, in contemplation of law at least, an officer on active duty status at all times since December, 1960. If this theory is accepted and carried to its logical consequence, as Plaintiff insists it must, the result would be

that Carter is entitled to full pay and allowances from the last day of 1960 to the present. Hence, by virtue of Plaintiff's theory of the case, a decision by this court concerning the validity of the discharge necessarily involves an adjudication of the claim for back wages. This view of the case is buttressed by the nature of the relief prayed for. In paragraph "19" of the prayer for judgment, as amended, Carter asks for an order:

> "* * * permanently enjoining the defendant from * * * withholding * * * any privilege, benefit, right, property, pay, and allowance to which Plaintiff might lawfully be entitled as an incident to his military office, grade and status."

Under the circumstances the court must conclude that the claim for back pay and allowances constitutes the keystone of this entire law suit. That the complaint is cast in terms of a declaratory judgment action cannot alter the fact that what in substance is sought is a money judgment against the United States for back pay in excess of $10,000.

Simply stated the issue now becomes whether this court has jurisdiction of such a cause of action.

If, as the defendant contends, jurisdiction of the case sub judice is available only under the aegis of Section 1346, Title 28, U.S.C., there can be no doubt that this court is without power to resolve the controversy. Prior to 1964, Subsection (d)(2) of Section 1346 barred the district courts from adjudicating any civil action brought by an officer of the United States to recover fees, salary or compensation. See, e.g., Bruner v. United States, 343 U.S. 112, . . . (1952). At that time the Court of Claims had exclusive jurisdiction of such cases regardless of the amount claimed. In 1964, however, Subsection (d)(2) was deleted by Congress and as a consequence Subsection (a)(2) is now applicable to cases involving claims by officers for back pay. The present

status of the law is that the district courts have concurrent jurisdiction with the Court of Claims over such cases, provided that the amount of the claim does not exceed $10,000. Since both parties admit that the claim in the instant case does exceed $10,000, it would seem that the Court of Claims is the only forum having jurisdiction unless there is some jurisdictional fount other than Section 1346.

In rejoinder the Plaintiff asserts that Section 1361, Title 28, U.S.C., provides the requisite alternate jurisdictional basis. In disarmingly simplistic language Section 1361 provides:

> "The district court shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

Using this statute as his starting point, Carter argues that 10 U.S.C. Sec. 1552 imposes on the Secretary of the Air Force an absolute duty to correct an applicant's military records where this is necessary to "correct an error or remove an injustice." Since, Plaintiff continues, his entitlement to correction of his military records is unequivocally demonstrated by the pleadings and stipulation, and since the Secretary wrongly refused to grant such relief, an action will lie under Section 1361 to remedy the defendant's abuse of discretion.

Assuming arguendo that Plaintiff's discharge was illegal, the argument recited by Plaintiff is incontrovertible as far as it goes. Ashe v. McNamara, 355 F.2d 277 (1st Cir. 1965), teaches that Section 1361 gives the district courts jurisdiction to review and correct administrative action taken pursuant to Section 1552 where it is alleged and proved that the discharge in question was a legal nullity. Accord, Van Bourg v. Nitze, 128 U.S. App. D.C. 301, 388 F.2d 557 (1967); Smith v. United States Air Force, 280 F. Supp. 478 (E.D. Pa. 1968).

On the basis of the foregoing authorities the court has jurisdiction but the Ashe, Van Bourg, and Smith cases are not entirely dispositive since, unlike Carter, each involved plaintiffs who were challenging only the character of their discharges. While Section 1361 confers jurisdiction as such, the question whether it authorizes this court to effect the Plaintiff's de jure reinstatement into the Air Force and to award him monetary relief in excess of $10,000 remains unanswered.

The courts that have construed Section 1361 have uniformly held that its sole function was merely to extend to all district courts the mandamus jurisdiction formerly exercised only by the District Court for the District of Columbia. The same authorities also emphasize that the provision in question did not make any substantive change in the law of mandamus. The prevailing interpretation of Section 1361 was concisely summarized by Judge Conner in Dover Sand & Gravel, Inc. v. Jones, 227 F. Supp. 88 (D.N.H. 1963), when he wrote:

> "Therefore, if the plaintiff could not have obtained relief before the enactment of § 1361, he is in no better position now."

Id. at 90. The determinative issue, then, is whether under general principles of law mandamus provides an appropriate means for obtaining the relief prayed for in this case.

It is hornbook law that mandamus is an extraordinary remedy which should be utilized only in the clearest and most compelling of cases. Though it is a legal remedy, it is largely controlled by equitable principles and its issuance is a matter of judicial discretion. Generally speaking, before the writ of mandamus may properly issue three elements must coexist: (1) a clear right in the plaintiff to the relief sought; (2) a clear duty on the part of the defendant to do the act in question; and (3) no other adequate remedy available. In connection with the last requirement, it is important to bear in mind that mandamus does not supersede other remedies, but rather comes into play where

there is a want of such remedies. Admittedly the alternative remedy must be adequate, i.e., capable of affording full relief as to the very subject matter in question.

After giving the matter careful study, I am constrained to hold that an alternate remedy is available to the Plaintiff in the form of an action in the Court of Claims. Certain it is that 28 U.S.C. Sec. 1491 empowers the Court of Claims to declare a serviceman's discharge legally inoperative and to award him back pay when this is the case. And, the court has, in fact, done just this a number times. In his brief Plaintiff suggests that he is entitled to a disability retirement. The Court of Claims may grant this type of relief. Finally, Carter prays for a declaration that he was promoted to the rank of Colonel on November 24, 1967. This relief is likewise available in the Court of Claims in the proper circumstances. Thus, even the most cursory examination of the foregoing authorities evidences that not only is an adequate remedy available to Plaintiff in the Court of Claims, but also that that court has acquired considerable expertise in this type of litigation. This court would do well to defer to such expertise. . . .

. . . .

The court therefore concludes that it would be improper to grant relief in this case by way of mandamus because the Plaintiff has another adequate remedy.[102]

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Even where no other adequate remedy is available, the plaintiff still must establish a clear right to the

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[102]See Matthews v. United States, 810 F.2d 109, 113 (6th Cir. 1987); Towers v. Horner, 791 F.2d 1244, 1247 (5th Cir. 1986); Fairview Township v. United States EPA, 773 F.2d 517, 528 (3d Cir. 1985); Borntrager v. Stevas, 772 F.2d 419, 420 (8th Cir.), cert. denied, 474 U.S. 1008 (1985); United States v. O'Neil, 767 F.2d 1111, 1113 (5th Cir. 1985).

relief sought and a clear duty on the part of the defendant to do the act in question. In this regard, mandamus generally will issue only in cases in which the act sought to be compelled is "ministerial," rather than "discretionary," in character.[103] This "ministerial-discretionary" dichotomy has been the subject of intense academic criticism.[104] Moreover, especially in cases involving review of military correction board decisions, in the past 20 years courts have become more willing to use mandamus to determine the existence of an abuse of discretion.[105]

d. Habeas Corpus. As noted previously,[106] habeas corpus is the principal means of challenging unlawful custody or confinement. Two

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[103]E.g., Work v. United States ex rel. Rives, 267 U.S. 175, 177 (1925); Wilbur v. United States ex rel. Kadrie, 281 U.S. 206 (1930); Harris v. Birmingham Bd. of Educ., 817 F.2d 1525, 1526 (5th Cir. 1987); Harmon Cove Condominium Ass'n, Inc. v. Marsh, 815 F.2d 949, 951 (3d Cir. 1987); Maczko v. Joyce, 814 F.2d 308, 310 (6th Cir. 1987); Fallini v. Hodel, 783 F.2d 1343, 1345 (9th Cir. 1986); Pescosolido v. Block, 765 F.2d 827, 829 (9th Cir. 1985); Smith v. Grimm, 534 F.2d 1346, 1351 (9th Cir.), cert. denied, 429 U.S. 980 (1976); McGaw v. Farrow, 472 F.2d 952 (4th Cir. 1973); Riphenburg v. United States, 631 F. Supp. 1230 (W.D. Mich. 1986).

[104]E.g., 4 K. Davis, Administrative Law Treatise §§ 23:12-23:13 (1983); Byse & Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action, 81 Harv. L. Rev. 308, 331-36 (1967).

[105]E.g., Homcy v. Resor, 455 F.2d 1345, 1348-49 (D.C. Cir. 1971); Haines v. United States, 453 F.2d 233, 236 (3d Cir. 1971); Angle v. Laird, 429 F.2d 892, 893 (10th Cir. 1970), cert. denied, 401 U.S. 918 (1971); Ragoni v. United States, 424 F.2d 261, 263 (3d Cir. 1970); Ashe v. McNamara, 355 F.2d 277, 282 (1st Cir. 1965); Mulvaney v. Stetson, 544 F. Supp. 811, 814-15 (N.D. Ill. 1982).

[106]See supra § 3.3.

jurisdictional prerequisites exist for habeas relief. First, the petitioner must be in custody.[107] Both court-martial sentences of confinement and involuntary military service provide the necessary custody for habeas corpus.[108] Second, the petition must be filed in the judicial district where the custodian and the servicemember are located.[109] The custodian of servicemembers will vary depending on the type of custody being challenged--imprisonment or military service--and, if military service is at issue, the military component--Regular or Reserve--of the petitioner. The following cases illustrate this issue well.

(1) Imprisonment.

SCOTT v. UNITED STATES

586 F. Supp. 66 (E.D. Va. 1984)

MEMORANDUM OPINION

RICHARD L. WILLIAMS, District Judge.

I. Factual Background

From October 3 through October 12, 1983, Petitioner Lindsey Scott was tried by general court martial in Quantico, Virginia, and convicted of four charges involving rape, sodomy, and attempted murder. Scott was sentenced to have his pay grade reduced to E-1, to be confined to hard labor for thirty years, to forfeit $500.00 pay per month for thirty-six months, and to be dishonorably

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[107] Id.

[108] Id.

[109] See, e.g., Hajduk v. United States, 764 F.2d 795, 796 (11th Cir. 1985); Centa v. Stone, 755 F. Supp. 197 (N.D. Ohio 1991).

discharged from the United States Marine Corps. He was sent to the U.S. Disciplinary Barracks, Fort Leavenworth, Kansas for confinement pending completion of appellate review. Petitioner Scott's record is presently before the U.S. Navy-Marine Corps Court of Military Review (NMCMR) pursuant to the mandatory review procedures established by Article 65(a) and 66(b), Uniform Code of Military Justice, 10 U.S.C. §§ 865(a), 866(b).

On March 13, 1984, the Petitioner filed this action requesting a writ of habeas corpus from this Court. Petitioner contends that he did not receive effective assistance of counsel at his general court martial. Scott alleges that his counsel was totally unprepared for trial. He claims that neither his counsel nor co-counsel interviewed key defense witnesses prior to putting them on the stand. The Petitioner has attached the affidavits of seven defense witnesses (two of whom are allegedly alibi witnesses) who categorically state that counsel for defendant Scott did not interview them before trial.

This matter comes before the Court on the Government's Motion to Dismiss either for lack of jurisdiction or for petitioner's failure to exhaust his military appellate remedies. For reasons stated in more detail below, this Court grants the Government's Motion to Dismiss.

II. Legal Analysis

A. Motion to Dismiss for Lack of Jurisdiction.

In his complaint, Petitioner Scott alleges 28 U.S.C. § 2255 as the jurisdictional basis for asserting his claims in this Court. That statute grants jurisdiction over a criminal defendant's challenges to his conviction through a habeas corpus petition to the court that sentenced that criminal defendant. Since this Court did not sentence Petitioner Scott, 28 U.S.C. § 2255 is not a proper jurisdictional basis for the instant habeas corpus petition.

In the alternative, Petitioner Scott requests leave to amend his Complaint in order to allege 28 U.S.C. § 2241 as the proper ground for this Court's jurisdiction over the case. That statute establishes jurisdiction in federal courts to hear those habeas corpus petitions "within their respective jurisdictions." 28 U.S.C. § 2241(a). Under this provision, a habeas corpus petition is within a court's jurisdiction if either the petitioner or his custodian is within the court's district. 28 U.S.C. § 2241(a); Rules 2 and 3 following 28 U.S.C. 2254. See also Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 495, 93 S. Ct. 1123, 1129, 35 L. Ed.2d 443 (1972); U.S. v. Monteer, 556 F.2d 880, 881 (8th Cir. 1977); Andrino v. U.S. Board of Parole, 550 F.2d 519, 520 (9th Cir. 1977). While it is true that in the present case, Petitioner Scott's court martial took place in Quantico, Virginia, an area within this Court's district, the Petitioner himself is presently confined in Fort Leavenworth, Kansas, a location outside the district governed by this Court. See Local Rule 3(B)(1). The bone of contention between the two parties is whether petitioner's custodian is within this Court's district. The Government claims that the Petitioner's custodian is the warden of the facility at which Petitioner Scott is incarcerated. Petitioner Scott argues that his custodian is either the Secretary of the Navy or the Commandant of the Marine Corps since each has authority over the "mitigation, remission and suspension of sentences, parole, restoration to duty, and transfer to Federal institutions." See Statement of Understanding Concerning Disposition of Corrections Matters Relating to Marine Corps Prisoners Confined at the U.S. Disciplinary Barracks, Exhibit A to Petitioner's Opposition to the Government's Motion for Summary Judgment filed May 9, 1984. If the Government is correct that the Petitioner's custodian is the warden of the U.S. Disciplinary Barracks of Fort Leavenworth, Kansas, then this Court does not have jurisdiction to entertain the instant habeas corpus petition since neither the petitioner nor his custodian are within this Court's district. However, if Petitioner Scott is correct that his custodian is either

the Secretary of the Navy or the Commandant of the Marine Corps, then this Court has jurisdiction over the present petition since both of these individuals are located within the district governed by this Court.

The appropriate respondent in a habeas corpus petition is the petitioner's immediate custodian, the warden or superintendent of the facility in which the petitioner is incarcerated. Just as the state itself, its attorney general, and its director of corrections are not considered custodians of state prisoners for habeas corpus purposes, neither are the Secretary of the Navy and the Commandant of the Marine Corps considered custodians of individuals convicted of crimes by the military justice system. Instead, the warden or superintendent of the Disciplinary Barracks in which the military prisoner is incarcerated is the legal custodian under federal habeas corpus principles.

As a result, this Court finds that it does not have jurisdiction to consider Petitioner Scott's habeas corpus petition since neither Scott nor his custodian, the warden of the U.S. Disciplinary Barracks in Fort Leavenworth, Kansas, are within the jurisdiction of this Court.

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(2) Military Service--Active Duty.

SCHLANGER v. SEAMANS

401 U.S. 487 (1971)

The sole question in this case is whether the District Court for the District of Arizona had jurisdiction to entertain on the merits petitioner's application for a writ of habeas corpus. He is an enlisted man who was accepted in the Airman's Education and Commissioning Program, an officer training project, and was assigned to Wright-Patterson Air Force Base (AFB), Ohio, "with duty at

Arizona State University" for training. While studying in Arizona and before completion of the course, he was removed from the program, allegedly for engaging in civil rights activities on the campus.

While he was seeking administrative relief through command channels, he was reassigned to Moody AFB, Georgia, to complete the remainder of his six year re-enlistment in a noncommissioned status. After exhausting those remedies he was given permissive temporary duty to attend Arizona State for study, this time by his superiors at Moody AFB under a different program called Operation Bootstrap, and at his own expense.

Thereafter he filed his application for habeas corpus in Arizona alleging that his enlistment contract had been breached and that he was being detained unlawfully. The District Court denied the application. The Court of Appeals affirmed on the basis of Jerrett v. Resor, 426 F.2d 213. The case is here on a petition of certiorari which we granted. 400 U.S. 865 . . . .

The respondents to this suit are the Secretary of the Air Force, the Commander of Moody AFB, and the Commander of the AF ROTC program on the Arizona State campus. The last respondent was the only one of the three present in Arizona and he had no control over petitioner who concededly was not in his chain of command, since petitioner was not in the AF ROTC program, but in Operation Bootstrap. The commanding officer at Moody AFB in Georgia did have custody and control over petitioner; but he was neither a resident of the Arizona judicial district nor amenable to its process.

It is true, of course, that the commanding officer at Moody AFB exerted control over petitioner in the sense that his arm was long and petitioner was effectively subject to his orders and directions. There are cases which suggest that such control to establish custody may be adequate for habeas corpus jurisdiction even though the control is exercised from a point located outside the State, as long as the petitioner is in the district or the State. Doniqian v. Laird, 308

F. Supp. 449. For reasons to be stated, we do not reach that question.

The procedure governing issuance of the writ is provided by statute. The federal courts may grant the writ "within their respective jurisdictions." 28 U.S.C. § 2241(a). While the Act speaks of "a prisoner" (28 U.S.C. § 2241(c)), the term has been liberally construed to include members of the armed services who have been unlawfully detained, restrained, or confined. Eagles v. Samuels, 329 U.S. 304, 312, 91 L.Ed. 308, 314, 67 S. Ct. 313. The Act extends to those "in custody under or by color of the authority of the United States." 28 U.S.C. § 2241(c)(1). The question in the instant case is whether any custodian, or one in the chain of command, as well as the person detained, must be in the territorial jurisdiction of the District Court. In Ahrens v. Clark, 335 U.S. 188, . . . we held that it was not sufficient if the custodian alone be found in the jurisdiction where the persons detained were outside the jurisdiction and that jurisdiction over the respondent was territorial. The dissent in that case thought that the critical element was not where the applicant was confined but where the custodian was located; that if the custodian were in the territorial jurisdiction of the District Court, then appropriate relief could be effected.

Whichever view is taken of the problem in Ahrens v. Clark, the case is of little help here. For while petitioner is within the territorial jurisdiction of the District Court, the custodian--the Commander of Moody AFB--is not. In other words, even under the minority view in Ahrens v. Clark, the District Court in Arizona has no custodian within its reach against whom its writ can run. Hence, even if we assume that petitioner is "in custody" in Arizona in the sense that he is subject to military orders and control which act as a restraint on his freedom of movement (Jones v. Cunningham, 371 U.S. 236, 240, 9 L.Ed.2d 285, 289, 83 S. Ct. 373, 92 A.L.R.2d 675) the absence of his custodian is fatal to the jurisdiction of the Arizona District Court. Cf. Rudick v. Laird, 412 F.2d 16, 21.

Had petitioner, at the time of the filing of the petition, been under the command of the Air Force officer assigned as liaison officer at Arizona State to supervise the Education and Commissioning Program, we would have a different question. We do not reach it nor do we reach any aspects of the merits, viz., whether, if petitioner is right in contending that his contract of enlistment was breached, habeas corpus is the appropriate remedy.

Affirmed.

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(3) Military Service--Reservists.

STRAIT v. LAIRD

406 U.S. 341 (1972)

Petitioner is an Army Reserve officer not on active duty. His active duty obligations were deferred while he went to law school after graduating from college. During the period of deferment and at the time this action was commenced, his military records were kept at Fort Benjamin Harrison, Indiana. His nominal commanding officer was the Commanding Officer of the Reserve Officer Components Personnel Center at Fort Benjamin Harrison. Petitioner was, however, at all times domiciled in California and was never in Indiana or assigned there. On finishing law school he took the California Bar examination and on March 5, 1970, he was ordered to report for active duty at Fort Gordon, Georgia, beginning April 13, 1970. Before that time, however, he had filed an application for discharge as a conscientious objector. That application was processed at Fort Ord, California, where hearings were held. Fort Ord recommended his discharge and review of that recommendation was had in Indiana. The result was disapproval of the application.

Petitioner thereupon filed a petition for writ of habeas corpus in California. The District Court denied a motion to dismiss, holding that it had jurisdiction . . ., but

ruled against petitioner on the merits. On appeal the Court of Appeals agreed with the District Court as to jurisdiction but disagreed with it on the merits and granted the writ. Shortly thereafter our decision in Schlanger v. Seamans, 401 U.S. 487, 28 L. Ed. 2d 251, 91 S. Ct. 995, was announced. Thereupon the Court of Appeals granted a petition for rehearing and dismissed the action, holding that the District Court had no jurisdiction under the habeas corpus statutes. 445 F.2d 843. The case is here on a petition for certiorari, which we granted. We reverse the judgment below.

In Schlanger the serviceman--on active duty in the Air Force--was studying in Arizona on assignment from Ohio. There was no officer in Arizona who was his custodian or one in his chain of command, or one to whom he was to report. While the Habeas Corpus Act extends to those "in custody under or by color of the authority of the United States," 28 USC § 2241(c)(1), we held in Schlanger that the presence of the "custodian" within the territorial jurisdiction of the District Court was a sine qua non. In Schlanger the only "custodian" of the serviceman was in Moody AFB, Georgia. While there were Army officers in Arizona, there were none to whom the serviceman was reporting and none who were supervising his work there, though he was on active duty. Moreover, the serviceman in that case was in Arizona only temporarily for an educational project.

In the present case California is Strait's home. He was commissioned in California. Up to the controversy in the present case he was on reserve duty, never on active duty, and while he had gone east for graduate work in law, California had always been his home. Fort Ord in California was where his application for conscientious objector discharge was processed and where hearings were held. It was in California where he had had his only meaningful contact with the Army; and his superiors there recommended his discharge as a conscientious objector.

Thus, the contention in the dissent that we "abandon Schlanger" by the approach we took today is incorrect. Sergeant Schlanger was on permissive temporary duty. While his stay in Arizona was thus not charged to his leave time, it was primarily for his own benefit, he paid his own expenses, and he was as much on his own as any serviceman on leave. We held in Schlanger that, while an active-duty serviceman in such a status might be in military "custody," see Donigan v. Laird, 308 F. Supp. 449 (Md. 1969), his custodian may not be deemed present wherever the serviceman has persuaded the service to let him go. The jurisdictional defect in Schlanger, however, was not merely the physical absence of the Commander of Moody AFB from the District of Arizona, but the total lack of formal contacts between Schlanger and the military in that district.

Strait's situation is far different. His nominal custodian, unlike Schlanger's, has enlisted the aid and directed the activities of armed forces personnel in California in his dealings with Strait. Indeed, in the course of Strait's enlistment, virtually every face-to-face contact between him and the military had taken place in California. In the face of this record, to say that Strait's custodian is amenable to process only in Indiana--or wherever the Army chooses to locate its record keeping center, would be to exalt fiction over reality.

In a closely parallel case the Court of Appeals for the Second Circuit held that an unattached reserve officer who lived in New York and whose application for discharge as a conscientious objector was processed in New York could properly file for habeas corpus in New York, even though the commanding officer of the reservists was in Fort Benjamin Harrison, Indiana. Arlen v. Laird, 451 F.2d 684. The court held that the only contacts the serviceman had had with his commanding officer were through the officers he dealt with in New York. Those contacts, it concluded, were sufficient to give the commanding officer "presence" in New York. It concluded:

> "Quite unlike a commanding officer who is responsible for the day to day control of his subordinates, the commanding officer of the Center is the head of a basically administrative organization that merely keeps the records of unattached reservists. To give the commanding officer of the Center 'custody' of the thousands of reservists throughout the United States and to hold at the same time that the commanding officer is present for habeas corpus purposes only within one small geographical area is to ignore reality." Id. at 687.

We agree with that view. Strait's commanding officer is "present" in California through the officers in the hierarchy of the command who processed this serviceman's application for discharge. To require him to go to Indiana where he never has been or assigned to be would entail needless expense and inconvenience. It "would result in a concentration of similar cases in the district in which the Reserve Officer Components Personnel Center is located." Donigian v. Laird, 308 F. Supp. at 453. The concepts of "custody" and "custodian" are sufficiently broad to allow us to say that the commanding officer in Indiana, operating through officers in California in processing petitioner's claim, is in California for the limited purposes of habeas corpus jurisdiction.

We intimate no opinion on the merits of the controversy--whether petitioner is entitled to a discharge or whether by denying that relief the Army has acted in accordance with the prescribed procedures. We hold only that there is jurisdiction under 28 U.S.C § 2241(c)(1) for consideration of this habeas corpus petition and for decision on the merits.

Reversed.

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A servicemember overseas has access to the writ of habeas corpus in the United States District Court for the District of Columbia.[110] Moreover, jurisdiction attaches on the initial filing of a habeas corpus petition; it is not lost by a transfer of the petitioner and the accompanying custodial change,[111] or by an unconditional release of the petitioner.[112]

e. Injunctions.

(1) General. An injunction has been defined as "a writ framed according to the circumstances of the case commanding an act which the court regards as essential to justice, or restraining an act which it deems contrary to equity and good conscience."[113] This equitable remedy is frequently sought in cases involving the military, and it is potentially the most disruptive form of relief a court can render. An injunction can literally "stop the military in its tracks."[114] Injunctive relief can come in three forms: a temporary restraining order (TRO), a preliminary injunction, and a permanent injunction. The permanent injunction is issued only after a plaintiff's claim is heard on its merits. TROs and preliminary injunctions, on the other hand, are issued during the pendency of an action.

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[110]Ex parte Hayes, 414 U.S. 1327 (1973); Centa v. Stone, 755 F. Supp. 197 (N.D. Ohio 1991).

[111]See, e.g., Santillanes v. United States Parole Comm'n, 754 F.2d 887, 888 (10th Cir. 1985).

[112]Carafas v. LaVallee, 391 U.S. 234 (1968).

[113]43 C.J.S. Injunctions § 2 (1978).

[114]See generally Leubsdorf, The Standard for Preliminary Injunctions, 91 Harv. L. Rev. 525 (1978).

These latter forms of relief are the subjects of this section.

(2) Federal Rules of Civil Procedure, Rule 65. TRO's and preliminary injunctions are governed by Rule 65 of the Federal Rules of Civil Procedure.

(3) Temporary Restraining Orders (TROs).

(a) General. "A restraining order is a temporary order entered in an action, without notice, if necessary, . . . upon a showing of its necessity in order to prevent immediate and irreparable injury" until the court can consider the plaintiff's motion for a preliminary injunction.[115] The plaintiff usually seeks a TRO at the commencement of a lawsuit to preserve "a state of affairs in which the court can provide effective relief."[116]

(b) Procedure.

(i) Notice. Temporary restraining orders can be granted with or without notice.[117] Of course, some notice is better than no notice at all.[118] Where notice and a hearing are provided, the district

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[115]7 Moore's Federal Practice para. 65.05 (1984). See Granny Goose Foods, Inc. v. Brotherhood of Teamsters Local 70, 415 U.S. 423, 439 (1974); Pan American World Airways, Inc. v. Flight Eng'rs' Internat'l Ass'n, 306 F.2d 840, 842-43 (2d Cir. 1962).

[116]Developments in the Law--Injunctions, 78 Harv. L. Rev. 994, 1060 (1965).

[117]Fed. R. Civ. P. 65(b).

[118]Granny Goose, 415 U.S. at 438-39.

court may be able to treat a TRO motion as one for a preliminary injunction, and if warranted, grant preliminary injunctive relief.[119] If the TRO is sought without notice, the movant's attorney must certify in writing the efforts, if any, made to give notice and the reasons why the court should not require notice.[120] In geographic areas where United States attorneys or agency counsel are readily available, this may be a difficult burden to meet.[121] A movant's failure to furnish the necessary certification should result in the denial of temporary relief.[122] If the district court grants a TRO without notice, it must state in its order the reasons why it did not require notice.[123]

(ii) Term of Order. A TRO issued without notice expires by its own terms, not to exceed 10 days.[124] The court may extend the order for good cause for an additional 10 days.[125] Further extension of the

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[119]Levas and Levas v. Village of Antioch, 684 F.2d 446, 448 (7th Cir. 1982).

[120]Fed. R. Civ. P. 65(b)(2).

[121]See, e.g., Ziegman Productions, Inc. v. Milwaukee, 496 F. Supp. 965 (E.D. Wis. 1980) (burden not met in suit against city which had 25 attorneys available to receive notice).

[122]See, e.g., Thompson v. Ramirez, 597 F. Supp. 726 (D.P.R. 1984). See generally 11 C. Wright & A. Miller, Federal Practice and Procedure § 2952 (1973) [hereinafter 11 Wright & Miller].

[123]Fed. R. Civ. P. 65(b). But cf. Cenergy Corp. v. Bryson Oil & Gas P.L.C., 657 F. Supp. 867, 870 (D. Nev. 1987) (district court's failure to include explanation for grant of ex parte TRO does not vitiate order).

[124]Fed. R. Civ. P. 65(b).

[125]Id.

order could "ripen" the TRO into a preliminary injunction and enable the nonmoving party to bring an interlocutory appeal under 28 U.S.C. § 1292(a)(1).[126]

(iii) Bond. Rule 65(c) requires the posting of security before the issuance of a TRO or a preliminary injunction. The security will cover costs and damages that the nonmoving party might suffer as a consequence of the restraining order or the injunction. Some courts have held that a TRO or a preliminary injunction may not be entered without bond.[127] In practice, however, courts often forego the bond requirement in suits against the government. When the United States or one of its officers or agencies is seeking interlocutory relief, no bond is required.[128]

(iv) Appeal. As a general rule, orders granting, denying, or dissolving a TRO are not appealable as an interlocutory order under 28 U.S.C. § 1292(a).[129] Appellate review is generally not available

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[126]See infra § 4.3e(4)(b)(iii).

[127]E.g., Pioche Mines Consolidated, Inc. v. Dolman, 333 F.2d 257, 273-74 (9th Cir. 1964), cert. denied, 380 U.S. 956 (1965); Doe v. Mathews, 420 F. Supp. 865, 873-74 (D.N.J. 1976).

[128]Fed. R. Civ. P. 65(c).

[129]In re Lieb, 915 F.2d 180, 183 (5th Cir. 1990); Catholic Social Serv., Inc. v. Meese, 813 F.2d 1500, 1503 (9th Cir. 1987); Fernandez-Roque v. Smith, 671 F.2d 426, 429 (11th Cir. 1982); Hoh v. Pepsico, Inc., 491 F.2d 556, 560 (2d Cir. 1974); Drudge v. McKernon, 482 F.2d 1375, 1376 (4th Cir. 1973); Maine v. Fri, 483 F.2d 439, 440-41 (1st Cir. 1973); Leslie v. Penn Central R.R. Co., 410 F.2d 750, 751 (6th Cir. 1969).

through mandamus.[130] Two reasons justify the nonappealability of district court decisions on TROs:

> Under Rule 65(b), F.R. Civ. P., such an order expires not later than twenty days after issuance during which time an appeal is not normally feasible; and the trial judge has not normally had the advantage of a hearing on the facts and the applicable law. Orderly procedure requires that the trial judge be permitted to pass on the question before his decision is reviewed by a higher court.[131]

Circumstances arise, however, under which parties may appeal orders pertaining to temporary relief. For example, the nonmoving party may appeal a TRO extended, without consent, substantially beyond the time limits of Rule 65(b).[132] In this regard, the label attached by the district court to the order is not decisive.[133] An appellate court may also entertain an appeal from an order granting or denying temporary relief when the court issued the order following notice and a hearing. In such cases, the orders are treated as denying or granting preliminary injunctive relief.[134] Finally, where

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[130]Pennsylvania R.R. Co. v. Transportation Workers Union of America, 278 F.2d 693, 694 (3d Cir. 1960).

[131]Dilworth v. Riner, 343 F.2d 226, 229 (5th Cir. 1965). See Connell v. Dulien Steel Products, Inc., 240 F.2d 414, 418 (5th Cir. 1957), cert. denied, 356 U.S. 968 (1958).

[132]International Primate Protection League v. Administrators of Tulane Educ. Fd., 500 U.S. 72 (1991); Chatman v. Spillers, 44 F.3d 923 (11th Cir. 1995).

[133]E.g., Fernandez-Roque v. Smith, 671 F.2d 426, 429-30 (11th Cir. 1982); Morning Telegraph v. Powers, 450 F.2d 97, 99 (2d Cir. 1971), cert. denied, 405 U.S. 954 (1972); 7 Moore's, para. 65.07 (1984).

[134]See, e.g., Environmental Defense Fund, Inc. v. Andrus, 625 F.2d 861, 862 (9th Cir. 1980); Levesque v. State of (continued...)

the grant or denial of a TRO would effectively moot the case, the order may be appealable.[135]

(c) Burden of Proof. The party applying for a TRO has the burden of convincing the court that the motion should be granted.[136] The most important prerequisite to temporary relief is a demonstration of irreparable injury--that is, harm that cannot be rectified by a later judgment in favor of the movant.[137] The concept of irreparable injury is discussed in greater detail below.[138] In addition to irreparable harm, the court will also consider the likelihood that the movant will succeed on the merits of the case, the harm

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[134](...continued)
Maine, 587 F.2d 78, 79-80 (1st Cir. 1978); Reed v. Cleveland Bd. of Educ., 581 F.2d 570, 573 (6th Cir. 1978); Morning Telegraph v. Powers, 450 F.2d 97, 99 (2d Cir. 1971), cert. denied, 405 U.S. 954 (1972).

[135]See, e.g., Romer v. Green Point Savings Bank, 27 F.3d 12 (2d Cir. 1994) (TRO had effect of final permanent injunction); Jacksonville Port Auth. v. Adams, 556 F.2d 52, 57 (D.C. Cir. 1977) (denial of motion for TRO to acquire impounded funds immediately before the end of fiscal year); United States v. Washington Post Co., 446 F.2d 1322 (D.C. Cir. 1971) (denial of TRO to prohibit publication of "Pentagon Papers").

[136]Crowther v. Seaborg, 415 F.2d 437, 439 (10th Cir. 1969); Minneapolis Urban League, Inc. v. City of Minneapolis, 650 F. Supp. 303, 305 (D. Minn. 1986); Thompson v. Ramirez, 597 F. Supp. 726 (D.P.R. 1984); Ragold, Inc. v. Ferrero, U.S.A., Inc., 506 F. Supp. 117, 123 (N.D. Ill. 1980).

[137]Fed. R. Civ. P. 65(b)(1). See Granny Goose Foods, Inc. v. Brotherhood of Teamsters Local 70, 415 U.S. 423, 438-39 (1974); 11 Wright & Miller, supra note 122, § 2951.

[138]See infra § 4.3e(4)(c)(iii).

to the nonmoving party from the TRO, and the public interest.[139]

(4) Preliminary Injunctions.

(a) General. The most troublesome form of injunctive relief is the preliminary injunction. Its purpose is to preserve the status quo during the pendency of a lawsuit.[140] Because litigation can proceed for years before being resolved, the preliminary injunction can "tie the hands" of the military for a long period of time before a court ever fully considers the merits of its defense to the action. An injunction should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiff.[141]

(b) Procedure.

(i) Notice and Hearing. Unlike a TRO, a court may not issue a preliminary injunction without notice to the adverse party.[142] The term

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[139]Minneapolis Urban League, Inc. v. City of Minneapolis, 650 F. Supp. 303, 305 (D. Minn. 1986).

[140]See, e.g., Amoco Oil Company v. Rainbow Snow, Inc., 809 F.2d 656 (10th Cir. 1987).

[141]Meinhold v. Department of Defense, 34 F.3d 1469, 1479 (9th Cir. 1993) (reversing a DOD-wide injunction on the discharge of servicemembers based on sexual orientation); Ausable Manistee Action Council, Inc. v. Stump, 883 F. Supp. 1112 (D. Mich. 1995) (refusing to enjoin the National Guard Bureau from constructing a gunnery range).

[142]Fed. R. Civ. P. 65(a)(1). See, e.g., Sims v. Greene, 161 F.2d 87, 88-89 (3d Cir. 1947); Inland Empire Enterprises, Inc. v. Morton, 365 F. Supp. 1014, 1018 (C.D. Calif. 1973).

"'notice' implies a hearing."[143] While a court may decide a motion for a preliminary injunction on the basis of affidavits alone,[144] an evidentiary hearing is required where there are disputed issues of fact.[145] A district court may consolidate the trial on the merits of a lawsuit with the hearing on the application for a preliminary injunction, provided it gives notice to the parties that it is doing so.[146] A district court's order of consolidation will not be overturned on appeal "absent a showing of substantial prejudice in the sense that a party was not allowed to present material evidence."[147]

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[143]7 Moore's, supra note 115, para. 65.04[3] (1984). See Reed v. Cleveland Bd. of Educ., 581 F.2d 570, 573 (6th Cir. 1978); Consolidated Coal Co. v. Disabled Miners of S.W. Va., 442 F.2d 1261, 1269 (4th Cir.), cert. denied, 404 U.S. 911 (1971); Sims v. Greene, 161 F.2d 87, 88-89 (3d Cir. 1947).

[144]San Francisco-Oakland Newspaper Guild v. Kennedy ex rel. N.L.R.B. 412 F.2d 541 (9th Cir. 1969).

[145]Fingler v. Numismatic Americana, Inc., 832 F.2d 745 (2nd Cir. 1987); Aguirre v. Chula Vista Sanitary Serv., 542 F.2d 779, 781 (9th Cir. 1976); Dopp v. Franklin Nat'l Bank, 461 F.2d 873, 879 (2d Cir. 1972); Carter-Wallace, Inc. v. Davis-Edward Pharmacal Corp., 443 F.2d 867, 872 n.5 (2d Cir. 1971). But cf. International Molders' & Allied Workers' Local Union No. 164 v. Nelson, 799 F.2d 547, 555 (9th Cir. 1986) (where evidentiary hearing impractical because of magnitude of inquiry, it is not required).

[146]Fed. R. Civ. P. 65(a)(2); Gellman v. Maryland, 538 F.2d 603 (4th Cir. 1976); Dry Creek Lodge, Inc. v. United States, 515 F.2d 926, 936 (10th Cir. 1975). Cf. Berry v. Bean, 796 F.2d 713, 719 (4th Cir. 1986) (consolidation of appeal from grant of preliminary injunction and the merits).

[147]Abraham Zion Corp. v. Lebow, 761 F.2d 93, 101 (2d Cir. 1985).

(ii) Security. Although courts should not issue preliminary injunctions without a bond,[148] courts often ignore this requirement in suits against the government.

(iii) Appeal. Orders granting, continuing, modifying, refusing, or dissolving preliminary injunctions are appealable.[149] The standard used in reviewing a grant or denial of a preliminary injunction is whether the district court's decision constituted an "abuse of discretion."[150] The standard is a deferential one. The court of appeals may not simply substitute its judgment for that of the district court: "The question for [the appellate court] is whether the [district] judge exceeded the bounds of permissible

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[148]Fed. R. Civ. P. 65(c).

[149]28 U.S.C. § 1292(a)(1) (1982); Carson v. American Brands, Inc., 450 U.S. 79, 83-84 (1981). See Centurion Reinsurance, Co. v. Singer, 810 F.2d 140, 143 (7th Cir. 1987); Sims Varner & Assoc., Inc. v. Blanchard, 794 F.2d 1123, 1126-27 (6th Cir. 1986); Gjertsen v. Board of Election Comm'rs, 751 F.2d 199, 201 (7th Cir. 1984); Professional Plan Examiners of New Jersey, Inc. v. Lefante, 750 F.2d 282, 287 (3d Cir. 1984); Overton v. City of Austin, 748 F.2d 941, 949 (5th Cir. 1984); Fernandez-Roque v. Smith, 671 F.2d 426, 429 (11th Cir. 1982).

[150]Wagner v. Taylor, 836 F.2d 566, 576 (D.C. Cir. 1987); Calvin Klein Cosmetics Corp. v. Lenox Laboratories, Inc., 815 F.2d 500, 503 (8th Cir. 1987); Hale v. Department of Energy, 806 F.2d 910, 914 (9th Cir. 1986); Foxboro Co. v. Arabian American Oil Co., 805 F.2d 34, 36 (1st Cir. 1986); Anthony v. Texaco, Inc., 803 F.2d 593, 599 (10th Cir. 1986); Abbott Labs. v. Meade Johnson & Co., 971 F.2d 6, 12 (7th Cir. 1992); Britt v. United States Army Corps of Eng'rs, 769 F.2d 84, 88 (2d Cir. 1985); Zardui-Quintana v. Richard, 768 F.2d 1213, 1216 (11th Cir. 1985); Mississippi Power & Light Co. v. United Pipe Line Co., 760 F.2d 618, 621 (5th Cir. 1985); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley, 756 F.2d 1048, 1055 (4th Cir. 1985).

choice in the circumstances, not what [the appellate court] would have done if [it] had been in his shoes."[151] Although the scope of appellate review is normally a narrow one, because the Supreme Court grants considerable leeway in deciding whether restrictions on free speech are justified,[152] by analogy the same leeway may be afforded to review grant or denial of preliminary injunctive relief based on alleged infringements of free speech.[153]

(c) Elements and Burden of Proof.

(i) General. A preliminary injunction is an extraordinary remedy.[154] The movant bears the burden of proving an entitlement to preliminary relief.[155] As a general rule, a movant must establish four elements: (1) that there is a

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[151]Roland Machinery Co. v. Dresser Indus., Inc., 749 F.2d 380, 390 (7th Cir. 1984). See American Hosp. Supply Corp. v. Hospital Products Ltd., 780 F.2d 589 595 (7th Cir. 1985) ("To reverse an order granting or denying a preliminary injunction . . . it is not enough that we think we would have acted differently in the district judge's shoes; we must have a strong conviction that he exceeded the permissible bounds of judgment").

[152]See Bose Corp. v. Consumers Union, 466 U.S. 485, 499 (1984) ("in cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to make an independent examination of the whole record").

[153]Lindsay v. City of San Antonio, 821 F.2d 1103, 1108 (5th Cir. 1987).

[154]See, e.g., Zardui-Quintana, 768 F.2d at 121; Mississippi Power, 760 F.2d at 621.

[155]Granny Goose Foods, Inc. v. Brotherhood of Teamsters Local 70, 415 U.S. 423, 442-43 (1974); Triebwasser and Katz v. American Telephone and Telegraph Co., 535 F.2d 1356, 1358 (2d Cir. 1976); Pride v. Community School Bd., 482 F.2d 257 (2d Cir. 1973).

substantial likelihood that the movant will succeed on the merits of his claim; (2) that the movant will suffer irreparable injury if preliminary relief is not granted; (3) that the injury movant will suffer outweighs the harm to the adverse party if injunctive relief is granted; and (4) that the public interest will not be harmed by the issuance of a preliminary injunction.[156] An injunction will not issue when the relief sought is moot.[157]

(ii) Likelihood of Success. A movant for preliminary relief generally must demonstrate that there is a reasonable possibility of success on the claim.[158] Although the movant need not show he is certain to win the case, he must at least present a prima facie case.[159] In most cases, this element is balanced against

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[156]Walmer v. Department of Defense, 52 F.3d 851 (10th Cir. 1995) (affirming district court's refusal to enjoin the discharge of an officer who admitted having engaged in homosexual acts); Able v. Perry, 44 F.3d 128 (2d Cir. 1995) (preliminary injunction prohibiting the investigation or the initiation of discharge proceedings based on self-identification as a gay or lesbian remanded with instructions to combine the preliminary injunction hearing with the trial on the merits applying a more rigorous likelihood of success standard); Meinhold v. Department of Defense, 34 F.3d 1469 (9th Cir. 1994).

[157]See, e.g., Nation Magazine v. United States Dep't of Defense, 762 F. Supp. 1558 (S.D.N.Y. 1991) (plaintiffs' application to enjoin DOD from using a press pool and denying correspondents' access to the Gulf War theater of operations was denied as the conclusion of the war rendered the issue moot).

[158]Able v. Perry, 44 F.3d 128 (2d Cir. 1995).

[159]See Curtis v. Thompson, 840 F.2d 1291, 1297 (7th Cir. 1988) (the plaintiff must at least demonstrate a negligible chance of success on the merits to obtain injunctive relief, if not the court need not consider the (continued...)

the other elements for preliminary relief, especially the nature of the irreparable injury.[160]

(iii) Irreparable Injury. Of all the prerequisites of preliminary relief, the requirement that a movant show irreparable injury is the most important.[161] "The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies."[162] Irreparable injury is harm that cannot be rectified by a later final judgment in favor of a movant on the merits of the case.[163] A mere loss of money or income, or termination of employment or

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[159](...continued)
remaining factors); Giron v. Acevedo-Ruiz, 834 F.2d 238, 240 (1st Cir. 1987); Brunswick Corp. v. Jones, 784 F.2d 271, 275 (7th Cir. 1986) ("'It is enough that the plaintiff's chances are better than negligible'"); Aleknagik Natives Ltd. v. Andrus, 648 F.2d 496, 502 (9th Cir. 1980); Benda v. Grand Lodge of Internat'l Ass'n of Machinists & Aerospace Workers, 584 F.2d 308, 315 (9th Cir. 1978), cert. dismissed, 441 U.S. 937 (1979).

[160]Roland Machinery Co. v. Dresser Indus., Inc., 749 F.2d 380, 387-88 (7th Cir. 1984).

[161]See Leubsdorf, supra note 114, at 544-45.

[162]Beacon Theatres v. Westover, 359 U.S. 500, 506-07 (1959). See Rondeau v. Mosinee Paper Corp., 422 U.S. 49 (1975); Arcamuze v. Continental Air Lines, Inc., 819 F.2d 935 (9th Cir. 1987); Wisconsin Gas Co. v. F.E.R.C., 758 F.2d 669, 674 (D.C. Cir. 1985); Interco, Inc. v. First Nat'l Bank, 560 F.2d 480 (1st Cir. 1977). But see United States v. Odessa Union Warehouse Co-Op, 833 F.2d 172, 175 (9th Cir. 1987) (where an injunction is authorized by statute and where the statutory conditions are met, irreparable harm is assumed and need not be independently established).

[163]ECRI v. McGraw-Hill, Inc., 809 F.2d 223, 226 (3d Cir. 1987); Cunningham v. Adams, 808 F.2d 815, 821 (11th Cir. 1987); Foxboro Co. v. Arabian American Oil Co., 805 F.2d 34, 36 (1st Cir. 1986); Roland Machinery, 749 F.2d at 386.

service, or harm to reputation caused by such a separation does not constitute irreparable harm. All of these injuries can be cured by a final judgment that awards money or back pay, reinstatement, and a correction of records.[164] Hartikka v. United States illustrates the role of irreparable injury in the quest for a preliminary injunction.

HARTIKKA v. UNITED STATES
754 F.2d 1516 (9th Cir. 1985)

Before SNEED, ANDERSON and FERGUSON, Circuit Judges.

J. BLAINE ANDERSON, Circuit Judge:

The Air Force appeals the district court's issuance of a preliminary injunction. It contends that the district judge based his ruling on the application of an erroneous legal standard. Specifically, appellants argue that the standard enunciated in Sampson v. Murray, 415 U.S. 61, 94 S. Ct. 937, 39 L.Ed.2d 166 (1974), governs cases where military personnel seek preliminary injunctive relief prohibiting a discharge. We agree and hold that the district court's judgment must be reversed and its order vacated.

BACKGROUND

The appellee Dale M. Hartikka, is a captain in the United States Air Force. With the exception of a three-year period in which he served in the Air Force Reserve, Hartikka has continuously served as a pilot with the Air Force since entering active duty as a commissioned officer on January 3, 1978.

On March 8, 1983, an Air Force Board of Inquiry was convened to consider certain charges of drunk and disorderly conduct

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[164]Sampson v. Murray, 415 U.S. 61 (1974). See Wisconsin Gas Co. v. F.E.R.C., 758 F.2d 669, 674 (D.C. Cir. 1985); Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958).

against Hartikka. Following a hearing on the charges, Hartikka was found, on two occasions, too intoxicated to perform his duties and, on a third occasion, he was found to have wrongfully discharged a semi-automatic weapon in the direction of a neighbor's house while highly intoxicated. The Board recommended that Hartikka be discharged for committing these acts. The Secretary of the Air Force followed this recommendation and approved a discharge "under honorable conditions (general)." Such a discharge is "[a]ppropriate when a member's military record is not sufficiently meritorious to warrant an honorable characterization." 32 C.F.R. § 41.9(a)(2).

Hartikka immediately applied for administrative review of the Secretary's decision with the Air Force Board for Correction of Military Records. He also filed a complaint in United States District Court seeking injunctive and declaratory relief, alleging certain procedural irregularities in the processing of his discharge.

The district court granted Hartikka's motion for preliminary injunction, finding that he had "demonstrated that he has a fair chance on the merits of his claim" and that "[t]he balance of hardships tips sharply in [Hartikka's] favor." E.R. at 4-5 (emphasis added).

On appeal, the sole issue is whether the district court erred in issuing the preliminary injunction, thereby prohibiting the Air Force from discharging appellee, pending administrative review of Hartikka's discharge.

## DISCUSSION

The grant of a preliminary injunction will be reversed where the district court has abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact. Sierra On-Line, Inc. v. Phoenix Software, Inc., 739 F.2d 1415, 1421 (9th Cir. 1984).

The crucial inquiry in this matter concerns the appropriate standard for granting injunctive relief. "'The critical element in determining the test to be applied is the relative hardship to the parties.'" Id. (citing Benda v. Grand Lodge of the International Association of Machinists), 584 F.2d 308, 315 (9th Cir. 1978), cert. denied, 441 U.S. 937, 99 S. Ct. 2065, 60 L.Ed.2d 667 (1979)). The usual standard, applied by the district court, requires that the moving party show either (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in favor of the moving party. See, e.g., William Inglis & Sons Baking Co. v. I.T.T. Continental Banking Co., Inc., 526 F.2d 86, 88 (9th Cir. 1975).

Application of the standard enunciated by the Supreme Court in Sampson would, however, require that the moving party make a much stronger showing of irreparable harm than the ordinary standard for injunctive relief. 415 U.S. at 84, 91-92 n. 68, 94 S. Ct. at 950, 953-954 n. 68. That is, where the balance of harm tips less decidedly toward a plaintiff, he must make a greater showing of a likelihood of success on the merits than where the balance tips decidedly in his favor. Benda v. Grand Lodge, supra, 584 F.2d at 315. The necessity of making this stronger showing is implicit in the magnitude of the interests weighing against judicial interference in the internal affairs of the armed forces. See, e.g., Sampson, 415 U.S. at 83-84, 94 S. Ct. at 949-950, and Orloff v. Willoughby, 345 U.S. 83, 93-94, 73 S. Ct. 534, 539-540, 97 L.Ed. 842 (1953). While we realize that the rule in Sampson concerned the rights of civilian employees, we agree that it should also be applied to military personnel. See Chilcott v. Orr, 747 F.2d 29, 32-34 (1st Cir. 1984). See also Peeples v. Brown, 444 U.S. 1303, 1305, 100 S. Ct. 381, 383, 62 L.Ed.2d 300 (1979). Consequently, we conclude that the district court erred in application of the traditional standard for injunctive relief.

We next examine whether Hartikka has demonstrated sufficient irreparable injury to

satisfy the test. Although the Sampson court did not specify what type of irreparable injury would satisfy its higher standard, it indicated that the circumstances must be "genuinely extraordinary;" that is, they must be a "far depart[ure] from the normal situation" of employment discharge. Sampson, supra, 415 U.S., at 91-92 and n. 68, 94 S. Ct. at 953-954 and n. 68.

Hartikka's claims of irreparable injury are based on assertions of loss of income, loss of retirement and relocation pay, and damage to his reputation resulting from the stigma attaching to a less than honorable discharge. ER at 84-85. Our review leads us to conclude that these alleged injuries are insufficient under the Sampson standard to justify injunctive relief. The loss of income, the ensuing collateral effects thereof, and the possibility of stigma are "external factors common to most discharged employees and not attributable to any unusual actions relating to the discharge itself [and] will not support a finding of irreparable injury, however severely they may affect a particular individual." Sampson, 415 U.S. at 92 n. 68, 94 S. Ct. at 953 n. 68.

CONCLUSION

For the foregoing reasons, the judgment of the district court, granting preliminary injunctive relief, is

Reversed and its order

VACATED.[165]

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[165]See Sebra v. Neville, 801 F.2d 1135, 1139 (9th Cir. 1986); Stewart v. United States Immigration & Naturalization Serv., 762 F.2d 193, 199 (2d Cir. 1985); Harris v. United States, 745 F.2d 535 (8th Cir. 1984); Moteles v. University of Penn., 730 F.2d 913 (3d Cir. 1984), cert. denied, 469 U.S. 855 (1985); Levesque v. State of Maine, 587 F.2d 78 (1st Cir. 1978); Diliberti v. Brown, 583 F.2d 950 (7th Cir. 1978); Simmons v. Brown, 497 F. Supp. 173 (D. Md. 1980); Jamison v. Stetson, 471 F. Supp. 48 (N.D.N.Y. 1978). Cf. Martin v. Stone, 759 F. Supp. 19, 21 (D.D.C. 1991) (fact that separated cadet (continued...)

While injury that courts can rectify through the payment of money damages is not irreparable, courts may grant preliminary relief to preserve a damages remedy. In other words, if a plaintiff will not be able to collect a judgment because of the events he or she seeks to enjoin, injunctive relief may be warranted.[166] For example, a court may grant a preliminary injunction to prevent a defendant from dissipating assets to become judgment proof.[167]

Although discharge from military service or government employment usually does not constitute irreparable harm, involuntary military service is per se irreparable. It is harm that cannot be rectified by a later money judgment.[168]

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[165](...continued)
is falling behind peers at service academy does not present the kind of irreparable harm that warrants premature judicial review of military personnel actions). But cf. Tully v. Orr, 608 F. Supp. 1222, 1225-26 (E.D.N.Y. 1985) (adverse effects of disenrollment from service academy constitute irreparable harm).

[166]Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc., 805 F.2d 351 (10th Cir. 1986); Anthony v. Texaco, Inc., 803 F.2d 593 (10th Cir. 1986); Teradyne, Inc. v. Mostek Corp., 797 F.2d 43 (1st Cir. 1986).

[167]Teradyne, 797 F.2d at 43.

[168]Patton v. Dole, 806 F.2d 24 (2d Cir. 1986).

Finally, a number of courts have held that a violation of a movant's constitutional rights is irreparable injury per se.[169]

(iv) Balance of Injuries and the Public Interest. A movant for preliminary relief must show that the injury he will suffer if injunctive relief is not granted outweighs the harm the nonmoving party will suffer if relief is granted, and that the public interest will be served (or at least not be jeopardized) by a preliminary injunction.[170] In cases involving the military, courts often combine these two elements and equate harm to the military from preliminary relief with

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[169]See Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality opinion); American Postal Workers Union v. United States Postal Serv., 766 F.2d 715, 721 (2d Cir. 1985), cert. denied, 475 U.S. 1046 (1986); Planned Parenthood of Minn., Inc. v. Citizens for Community Action, 558 F.2d 861 (8th Cir. 1977); Covino v. Patrissi, 967 F.2d 731 (2d Cir. 1992); Gay Veterans Ass'n, Inc. v. American Legion, 621 F. Supp. 1510, 1515 (S.D.N.Y. 1985).

[170]See 11 Wright & Miller, supra note 122, § 2948; American Hosp. Supply Corp. v. Hospital Products Ltd., 780 F.2d 589, 593-94 (7th Cir. 1986); see also Chalk v. United States Dist. Court Cent. Dist. of Col., 840 F.2d 701 (9th Cir. 1988) (parents' and students' fear of AIDS was not sufficient to outweigh the harm suffered by a teacher with AIDS who was removed from the classroom). Pruner v. Department of the Army, 755 F. Supp. 362, 364 (D. Kan. 1991) (injunctive relief pending military's processing of conscientious objector application "would seriously interfere with the public interest in the efficient deployment of troops in connection with Operation Desert Shield.").

harm to the public interest.[171] Pauls v. Secretary of the Air Force illustrates such harm.

PAULS v. SECRETARY OF THE AIR FORCE
457 F.2d 294 (1st Cir. 1972)

> The Secretary of the Air Force and named Air Force officer defendants have taken this timely appeal from judgment entered by the District Court, filed December 31, 1970, adjudging the plaintiffs in these consolidated cases, Captain Pauls and Captain Criscuolo, be retained in active duty in the United States Air Force pending final disposition of this litigation; that the case be remanded to the Air Force Board for the Correction of Military Records; that disclosure be made of pertinent statistical data requested by plaintiffs to the extent that it is unclassified; and that the Board make detailed findings of fact. The court retained jurisdiction "for review of final determination by the Secretary of the Air Force of plaintiffs' administrative petitions."
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> Since, as will hereinafter appear, we dispose of this appeal on jurisdictional grounds, a detailed statement of the voluminous factual matter disclosed by the record is not required. Pauls and Criscuolo were captains in the Air Force stationed in Puerto Rico. Pauls was initially scheduled to be released from duty on June 30, 1967, and Criscuolo on June 30, 1968, in accordance with Air Force Regulation 36-12 since they had been considered and passed over for promotion to major on at least two occasions. Due to the needs in Southeast Asia, both officers were retained in the Air Force at the pleasure of the Secretary. During the period of extension both officers were again considered for promotion and passed over.

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[171] See, e.g., Schneble v. United States, 614 F. Supp. 78, 84 (S.D. Ohio 1985); Simmons v. Brown, 497 F. Supp. 173 (D. Md. 1980); Jamison v. Stetson, 471 F. Supp. 48 (N.D.N.Y. 1978); but see Haitian Centers Council, Inc. v. McNary, 969 F.2d 1326 (2d Cir. 1992) (the government may not assume that the public interest lies solely with it).

In 1969 the Secretary of Defense announced the implementation of Project 703 under which passed-over officers such as plaintiffs who had not served eighteen years were to be separated from service on March 31, 1970. At the request of each of the plaintiffs, the Air Force extended their service to June 30, 1970. Six hundred officers have been released under Project 703. On the critical date for determining length of service, Criscuolo had active duty of fourteen years and five months and Pauls of seventeen years and eight months.

These actions were commenced on June 26, 1970. An order was entered in each case on June 29, 1970, restraining the release of each plaintiff from the Air Force. Hearing was set on plaintiffs' motion for temporary injunction of July 6. The hearing was continued. The temporary restraining order was extended by stipulation. Defendants have filed motion to vacate the temporary restraining order and have resisted the application for temporary injunction.

Defendants urge, among other grounds, that the court acquired no jurisdiction over the plaintiffs' action and thus had no authority to issue a restraining order or a temporary injunction. On August 13, 1970, a hearing was held on the application for a temporary injunction and defendants' motion to vacate the temporary restraining order. The order entered on December 31, 1970, heretofore referred to, in effect grants the temporary injunction.

Plaintiffs' basic contention is that their supervisory officers in making periodic Officer Effectiveness Reports (O.E.R.s) strictly followed the regulations relating to the rating system and gave plaintiffs ratings which under the regulations would put them in the top 15% of the officers eligible for promotion, while other reviewing officers in disregard of the regulations gave their personnel inflated ratings. The O.E.R. rating reports are placed in each officer's military records and are part of the record considered by officer promotion boards in determining

which officers are entitled to promotion. The number of officers given promotion depends on the number of officers needed in each officer category and the quota of officers needed in the higher grades is generally considerably less than the available supply with the result that many loyal and capable officers cannot be promoted or retained in the service. Plaintiffs' contention is that the inflated ratings given other officers in violation of the regulations resulted in placing the plaintiffs well below the top 15% of officers eligible to be considered for promotion.

Affidavits of many of the officers making plaintiffs' O.E.R.s were filed to support plaintiffs' contentions that they were capable officers entitled to promotion and that affiants' strict adherence to the regulations placed plaintiffs in an unfavorable position compared to some other officers who had received inflated ratings from other rating officers.

After exhausting available administrative procedures within the service to correct their records, plaintiffs sought correction of their records by the Air Force Board for the Correction of Military Records pursuant to 10 U.S.C.A. § 1552. The Board afforded plaintiffs a full evidentiary hearing and denied relief. The suits now before us followed.

The relief sought is to enjoin defendants (1) from releasing plaintiffs from active service, (2) from refusing to correct plaintiffs' military records to show that they had not been passed over for promotion, and (3) from refusing to delete certain unfair O.E.R.s from their military records.

Defendants' present appeal is from the District Court's order of December 31, 1970, enjoining plaintiffs' release from active service during the pendency of this litigation and remanding the case to the Board directing discovery and detailed findings of fact. The defendants upon appeal present the following questions for review:

. . . .

4. Whether the district court had any basis upon which it could properly enjoin plaintiffs' release from active duty.

. . . .

As heretofore stated, the issue of the validity of the trial court's order granting temporary injunctive relief against the termination of plaintiffs' services is properly before us. A large discretion rests in the trial court in determining whether temporary injunctive relief is warranted.

"The standards which should guide the decision to grant a preliminary injunction have been often stated. The movant must show a substantial likelihood of success on the merits, and that irreparable harm would flow from the denial of an injunction. In addition, the trial court must consider the inconvenience that an injunction would cause the opposing party, and must weigh the public interest as well." Quaker Action Group v. Hickel, 137 U.S.App.D.C. 176, 421 F.2d 1111, 1116.

Plaintiffs have failed to show any substantial likelihood of ultimate success in this litigation. Plaintiff's evidence in support of their correction of O.E.R.s is principally based upon a contention that they have been discriminated against because their rating officers have strictly followed the regulations whereas other rating officers have given inflated ratings to officers similarly situated. The records reflect that the Air Force and the Promotion Board were aware of the lack of perfection in the rating system but were unable to devise a better one. The O.E.R. is only one of many factors considered by the Promotion Board. The discrimination, if any exists, could only be corrected by reviewing the multiple ratings given all officers eligible for promotion in the plaintiffs' class. This would be an almost impossible task which would consume a tremendous amount of time which could better be used for other purposes. There is no certainty that any revision in ratings that might be accomplished would result in

plaintiffs' promotions. The cases heretofore cited holding promotions to be discretionary and not subject to court review clearly minimize any chance of the plaintiffs to ultimately succeed in their efforts to be promoted.

The detriment to the Air Force in retaining officers it desires to retire is at least as great as that of the officers retired. Services of officers chosen for retirement will likely be of little benefit to the Air Force and will hamper the promotion of officers the Air Force desires to promote and may well impair the efficiency of the Air Force. In the event plaintiffs should ultimately prevail in this litigation, they can be compensated by back pay and restoration of full seniority rights. The public interest will not be adversely affected by denying injunctive relief.

The injunctive relief has now been in effect for some twenty-one months. Considerable additional time will elapse before the issues presented by this litigation are finally adjusted. We hold that the court erred in continuing the restraining order and in granting temporary injunctive relief.

. . . .

. . . The order insofar as it keeps in force the temporary restraining order, and insofar as it grants temporary injunctive relief is reversed and vacated.

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(v) Some courts balance the four elements for a preliminary injunction differently. Usually, as the harm to the movant increases, the standard for establishing likelihood of success on the merits of the case decreases. The following list contains variations of the balancing test adopted by some courts of appeals:

(A) D.C. Circuit: "Under the well known standard set forth in this Circuit, four factors control the Court's discretion to grant a motion for a preliminary injunction: the likelihood that the plaintiff will prevail on the merits, the degree of irreparable injury that the plaintiff will suffer if the injunction is not issued, the harm to the defendant if the motion is granted, and the interest of the public. . . . In the event the last three factors favor the issuance of an injunction, a movant can satisfy the first factor by raising a serious question on the legal merits of the case."[172]

(B) 1st Circuit: "We recognize that a finding attributing great weight to one of the four components might make up for a relatively weak finding as to another. If the chances of success are good, but not the highest, and the adverse effect on the public interest is very serious should the prognostication prove mistaken, the public interest might require that the injunction be denied."[173]

(C) 2d Circuit: Where the moving party seeks to stay government action taken in the public interest pursuant to a statutory or regulatory scheme, the district court should not apply the less rigorous fair-ground-for-litigation standard

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[172]Massachusetts Law Reform Inst. v. Legal Serv. Corp., 581 F. Supp. 1179, 1184 (D.D.C.), aff'd, 737 F.2d 1206 (D.C. Cir. 1984), citing Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir 1977).

[173]Mariane Giron v. Acevedo-Ruiz, 834 F.2d 238, 240 (1st Cir. 1987); cf. Lancor v. Lebanon Hous. Auth., 760 F.2d 361, 363 (1st Cir. 1985); Auburn News Co. v. Providence Journal Co., 659 F.2d 273, 276 (1st Cir. 1981).

and should not grant the injunction unless the moving party establishes, along with irreparable injury, a likelihood that he will succeed on the merits of his claim. This exception reflects the idea that governmental policies implemented through legislation or regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly.[174]

(D) 4th Circuit: Four factors enter into the determination of whether a court should grant interim injunctive relief: (1) whether the plaintiff will suffer irreparable injury if interim relief is not granted; (2) the injury to the defendant if an injunction is issued; (3) the plaintiff's likelihood of success in the underlying dispute between the parties; and (4) the public interest.[175]

(E) 5th Circuit: The four prerequisites for the relief of a preliminary injunction are as follows: (1) a substantial likelihood that plaintiff will prevail on the merits; (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted; (3) the threatened injury to plaintiff must outweigh the threatened harm the injunction may do to defendant; and (4) granting the preliminary injunction will not disserve the public interest.[176]

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[174]Able v. United States, 44 F.3d 128, 130 (2d Cir. 1995). See Britt v. United States Army Corps of Eng'rs, 769 F.2d 84, 88 (2d Cir. 1985).

[175]Guerra v. Scruggs, 942 F.2d 270 (4th Cir. 1991).

[176]Wiggins v. Sec'y of Army, 751 F. Supp. 1238 (W.D. Tex. 1990), aff'd, 946 F.2d 892 (5th Cir. 1991).

(F) 6th Circuit: Where factors other than likelihood of success on the merits all are strongly in favor of a preliminary injunction, a court may issue an injunction if the merits present a sufficiently serious question to justify further investigation.[177]

(G) 7th Circuit: "P x Hp (1-P) x Hd" -- "A district judge asked to decide whether to grant or deny a preliminary injunction must choose the course of action that will minimize the costs of being mistaken. . . . [A preliminary injunction should be granted] only if the harm to the plaintiff [$H_p$] if the injunction is denied, multiplied by the probability [P] that the denial would be an error (that the plaintiff, in other words, will win at trial), exceeds the harm to the defendant [$H_d$] if the injunction is granted, multiplied by the probability that granting the injunction would be an error."[178]

(H) 9th Circuit: "In this circuit, a preliminary injunction is properly granted if the moving party has demonstrated 'either a combination of probable success on the merits and a possibility of irreparable injury, or that serious questions are raised

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[177] In re DeLorean Motor Co., 755 F.2d 1223, 1230 (6th Cir. 1985).

[178] American Hosp. Supply Corp. v. Hospital Products Ltd., 780 F.2d 589, 593 (7th Cir. 1986). See Schultz v. Frisby, 807 F.2d 1339, 1343 (7th Cir. 1986) (explains American Hosp. Supply algebraic formula); Brunswick Corp. v. Jones, 784 F.2d 271, 274 n.1 (7th Cir. 1986).

and the balance of hardships tips sharply in the moving party's favor.'"[179]

(I) 10th Circuit: "Where the movant for a preliminary injunction prevails on the factors other than likelihood of success on the merits, it is ordinarily sufficient that the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation."[180]

(d) Preliminary Injunctions and Bid Protests.

(i) Introduction. One aspect of preliminary relief of particular interest to the military lawyer is its use in the context of bid protests. In these cases, an unsuccessful bidder for a government contract will attempt to enjoin the award or performance of the contested contract in the hope that it will ultimately be successful in acquiring the contract for itself. While the basic rules for preliminary relief apply to bid protest litigation, the forums for the litigation and the scope of the inquiry differ. This section will provide a brief overview of preliminary relief in bid protest litigation.[181]

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[179]Beltram v. Meyers, 677 F.2d 1317, 1320 (9th Cir. 1982). See Hale v. Department of Energy, 806 F.2d 910, 914 (9th Cir. 1986).

[180]City of Chanute v. Kansas Gas and Electric Co., 754 F.2d 310, 314 (10th Cir. 1985); Lundgrin v. Claytor, 619 F.2d 61, 63 (10th Cir. 1980).

[181]For a more detailed description of contract award litigation, see, e.g., J. Cibinic & R. Nash, Formation (continued...)

(ii) Historical Development of the Remedy. The Supreme Court, in Perkins v. Lukens Steel,[182] took a narrow view of standing in bid protest cases, holding that the statutes and regulations governing procurement were for the benefit of the government and not the contract bidders. Thus, bid protesters were without standing to challenge a contract awarded in contravention of the statutes and regulations under which the procurement was bid. The Perkins decision served as an effective bar to judicial review of bid protests for a number of years.[183]

The first break from the confines of Perkins came in the Court of Claims. In Heyer Products Co. v. United States,[184] the court held that the government implicitly promises to honestly and fairly consider all bids for contracts. And if the bid is not evaluated in good faith, the government breaches its implied promise and

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[181](...continued)
of Government Contracts 1005-46 (2d ed. 1986) [hereinafter J. Cibinic & R. Nash]; Simmons & Dzialo, Choosing the Best Forum for Protesting a Federal Contract Award, 31 Prac. Law. 29 (1985); Comment, Injunctive Relief in the United States Claims Court; Does a Bid Protester Have Standing?, 1985 B.Y.U. L. Rev. 803 [hereinafter Comment, Does a Bid Protester Have Standing?]; Comment, Equitable Relief Over Government Contract Claims Brought Before the Contract Is Awarded, 56 U. Colo. L. Rev. 655 (1985) [hereinafter Comment, Equitable Relief Over Government Contract Claims].

[182]310 U.S. 113 (1940).

[183]See Comment, Does a Bid Protester Have Standing?, supra note 181, at 805. The only forum available to consider contract award controversies was the General Accounting Office. J. Cibinic & R. Nash, supra note 181, at 1006.

[184]140 F. Supp. 409 (Ct. Cl. 1956).

is liable for damages measured by the plaintiff's bid preparation costs.[185]

The seminal case of Scanwell Laboratories, Inc. v. Shaffer,[186] provided the basis for the federal courts to award equitable relief in bid protest cases. In Scanwell, the court held that disappointed bidders had standing to challenge the award of government contracts under the Administrative Procedure Act.[187] While the Supreme Court has never addressed the Scanwell holding, most of the other courts of appeals have followed the decision.[188]

As part of the Federal Courts Improvement Act of 1982, Congress gave the Claims Court jurisdiction to render equitable relief in bid protest litigation.[189] Moreover, the Competition in Contracting Act of 1984[190] afforded the General Services Board of Contract Appeals (GSBCA) limited equitable jurisdiction over contract

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[185]After Heyer, the court broadened the circumstances under which bid preparation costs were recoverable beyond simply those instances in which the government acts in bad faith. See, e.g., CACI, Inc.--Fed. v. United States, 719 F.2d 1567, 1573 (Fed. Cir. 1983); Keco Indus., Inc. v. United States, 492 F.2d 1200, 1205-06 (Ct. Cl. 1974). See generally J. Cibinic & R. Nash, supra note 181, at 1035-36.

[186]424 F.2d 859 (D.C. Cir. 1970).

[187]Id. at 869.

[188]J. Cibinic & R. Nash, supra note 177, at 1007.

[189]Pub. L. No. 97-164, Title I § 133(a), 96 Stat. 25, Oct. 29, 1992 (codified at 28 U.S.C. § 1491(a)(3)).

[190]The Competition in Contracting Act is Title VII of the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (1984).

award controversies and included provisions for the automatic stay of contract awards pending General Accounting Office (GAO) resolution of bid protests.[191]

(iii) Forums. In most federal litigation, plaintiffs can obtain injunctive relief from only one forum--the district courts. By contrast, in contract award controversies four different forums can provide some form of preliminary relief: (A) the Court of Federal Claims; (B) the district courts; (C) the GAO; and (D) the GSBCA.

(A) The Court of Federal Claims. As noted above, the Federal Courts Improvement Act of 1982 gave the Claims Court limited authority to enter equitable relief in bid protest cases. 28 U.S.C. § 1493(a)(3) codifies the Court of Federal Claims equitable jurisdiction. This statute provides as follows:

> To afford complete relief on any contract claim brought before the contract is awarded, the court shall have exclusive jurisdiction to grant declaratory judgments and such equitable relief as it deems proper, including but not limited to injunctive relief. In exercising this jurisdiction, the court shall give due regard to the interests of national defense and national security.

The scope of the Court of Federal Claims jurisdiction to award injunctive relief in bid protest cases is limited both temporally and by the relationship between the plaintiff and the government. The court has jurisdiction to award such relief only in those cases in

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[191] See infra notes 199-204 and accompanying text.

which the plaintiff files suit before the contract is awarded and where an implied-in-fact contract exists between the plaintiff and the United States.

First, by the terms of the statute, the authority of the Court of Federal Claims to render injunctive relief is restricted to those cases in which the plaintiff files suit before contract award. The court is without jurisdiction to give equitable relief if the plaintiff files suit after contract award.[192] If, however, the plaintiff sues before contract award, a subsequent award of the contract does not divest the Claims Court of its jurisdiction.[193]

The second prerequisite for the Court of Federal Claims exercise of equitable jurisdiction is the existence of a contractual relationship between the plaintiff and the federal government. The statute provides that the authority of the Court of Federal Claims to render injunctive relief extends to contract claims, and the contractual relationship between the plaintiff and the government in a bid protest setting usually arises from the implied promise the United States makes to fairly and honestly consider all bids in accordance with applicable law.[194] Thus, the Court of

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[192]United States v. John C. Grimberg Co., 702 F.2d 1362 (Fed. Cir. 1983). Actions to enjoin the exercise of contract options are post-award lawsuits and the Claims Court lacks jurisdiction to grant equitable relief in them. C.M.P., Inc. v. United States, 8 Cl. Ct. 743 (1985).

[193]F. Alderete Gen. Contractors, Inc. v. United States, 715 F.2d 1477 (Fed. Cir. 1983).

[194]Ingersoll-Rand Co. v. United States, 2 Cl. Ct. 373, 375 (1983); J. Cibinic & R. Nash, supra note 181, at 1020-
(continued...)

Federal Claims generally will not enter injunctive relief in lawsuits brought by disappointed bidders for subcontracts on government contracts,[195] nonbidders,[196] nonresponsive bidders,[197] and potential bidders challenging the terms of bid invitations.[198] Moreover, the Court of Federal Claims usually will not review the suspension or debarment of a government contractor, unless the sanctions are somehow related to the bid process.[199]

(B) The District Courts. The federal question statute, 28 U.S.C. § 1331, provides the jurisdictional basis for the district courts award of

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[194](...continued)
22; Comment, Does a Bid Protester Have Standing?, supra note 181, at 805. In Busby School v. United States, 8 Cl. Ct. 588 (1985), the court held that its jurisdiction was limited to contracts involving the procurement process. It refused to grant equitable relief to an Indian reservation school board that had sought to force the government to fund a contract for renovations to a reservation school.

[195]Ingersoll-Rand, 2 Cl. Ct. at 375. The court might consider such protests, however, where government control of the award of the subcontracts is so great that the prime contractor is simply a conduit between the government and the subcontractors. See generally Ocean Enterprises, Inc., 65 Comp. Gen. 585, 86-1 CPD para. 479 (1986).

[196]Hero, Inc. v. United States, 3 Cl. Ct. 413 (1983).

[197]Yachts America, Inc. v. United States, 3 Cl. Ct. 447 (1983). The court will review the solicitation and the bid to determine whether the bid was responsive. Olympia USA, Inc. v. United States, 6 Cl. Ct. 550 (1984).

[198]Ingersoll-Rand, 2 Cl. Ct. at 375.

[199]Sterlingwear of Boston, Inc. v. United States, 11 Cl. Ct. 517 (1987); J. Cibinic & R. Nash, supra note 191, at 1022.

equitable relief in contract award controversies; the APA, 5 U.S.C. § 702, furnishes the waiver of sovereign immunity and the remedy.[200] While the courts unanimously recognize the jurisdiction of the district courts to award such relief in post-award cases,[201] the courts disagree about whether the district courts have the power to award equitable relief before the contract is awarded.[202] The source of the controversy is the use of the term "exclusive jurisdiction" in § 1493(a)(3) in describing the authority of the Court of Federal Claims to award equitable relief.

(C) GSBCA. As a general rule, the boards of contract appeals have no jurisdiction to act in bid protest cases. The government's implied-in-fact contract to treat all bids honestly and fairly is not a contract falling under the Contract Disputes Act of 1978.[203] The exception to the general rule is the jurisdiction of the GSBCA to consider bid protests in cases involving automated data processing equipment (ADPE) procurements under the Brooks Act, which assigns

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[200]Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1969).

[201]See, e.g., United States v. John C. Grimberg Co., 702 F.2d 1362 (Fed. Cir. 1983).

[202]Compare In re Smith & Wesson, 757 F.2d 431 (1st Cir. 1985); Coco Bros., Inc. v. Pierce, 741 F.2d 675 (3d Cir. 1984); John C. Grimberg Co. v. United States, 702 F.2d 1362 (Fed. Cir. 1983) (dicta), with B.K. Instruments, Inc. v. United States, 715 F.2d 713 (2d Cir. 1983) (dicta), Opal Mfg. Co. v. U.M.C. Indus., Inc., 553 F. Supp. 131 (D.D.C. 1982). See generally Comment, Equitable Relief Over Government Contract Claims, supra note 181.

[203]Coastal Corp. v. United States, 713 F.2d 728 (Fed. Cir. 1983).

to the General Services Administration the authority to make ADPE purchases for the federal government.[204] The jurisdiction of the GSBCA is limited. If a procurement of ADPE is not made under the Brooks Act, even though it should have been, the GSBCA lacks jurisdiction over any resulting bid protests.[205]

(D) GAO. The GAO traditionally has resolved bid protests. Until relatively recently, it was the only forum that could do so.[206] Before 1984, however, GAO was without the authority to stay the award of a contract pending its resolution of the award controversy.[207] The Competition in Contracting Act of 1984 provided for an automatic 90-day stay of contract awards during which time the GAO can consider the protest.[208]

(iv) Scope of Inquiry. Both the Court of Federal Claims and the district court use the standard four-part test for preliminary injunctive relief in adjudicating contract award controversies.[209]

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[204]40 U.S.C. § 759(h).

[205]Electronic Data Sys. Fed. Corp. v. General Serv. Bd. of Contract Appeals, 792 F.2d 1569 (Fed. Cir. 1986).

[206]J. Cibinic & R. Nash, supra note 181, at 1006.

[207]Ameron, Inc. v. United States Army Corps of Eng'rs, 809 F.2d 979, 985 (3d Cir. 1986).

[208]31 U.S.C. §§ 3553-54. The constitutionality of these provisions was upheld in Ameron, 809 F.2d at 985, and Universal Shipping Co. v. United States, 652 F. Supp. 668 (D.D.C. 1987).

[209]See generally James A. Merritt & Sons v. Marsh, 791 F.2d 328 (4th Cir. 1986); Design Pak, Inc. v. Sec'y of Treasury, 801 F.2d 525 (1st Cir. 1985); Dynalectron Corp. (continued...)

Both the scope of the courts' inquiry and the relevant factors considered vary, however, from other types of cases.

(A) Likelihood of Success on the Merits. As in other cases, an applicant for preliminary relief in a bid protest must show a likelihood of success on the merits. The scope of the court's review, however, is circumscribed. The sole inquiry is whether the agency's determination lacked a rational or reasonable basis or violated applicable statutes or regulations to the bidder's prejudice.[210] In the district courts, the plaintiff has the burden of showing a likelihood of success by a preponderance of the evidence.[211] The judges of the Court of Federal Claims are split over the appropriate quantum of proof, some holding that clear and convincing evidence is required, while others adhere to the preponderance standard.[212]

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[209](...continued)
v. United States, 659 F. Supp. 64 (D.D.C. 1987); Olympia USA, Inc. v. United States, 6 Cl. Ct. 550 (1984).

[210]M. Steinthal & Co. v. Seamans, 455 F.2d 1289 (D.C. Cir. 1971); Action Mfg. Co. v. United States, 10 Cl. Ct. 474 (1986); Baird Corp. v. United States, 1 Cl. Ct. 662 (1983).

[211]J. Cibinic & R. Nash, supra note 181, at 1009. See, e.g., Advanced Seal Technology, Inc. v. Perry, 873 F. Supp. 1144 (N.D. Ill. 1994) (preliminary injunction denied where plaintiff had little likelihood of success on the merits).

[212]Compare Isometrics, Inc. v. United States, 11 Cl. Ct. 346 (1986); Baird Corp. v. United States, 1 Cl. Ct. 662 (1983), with Quality Transport Serv., Inc. v. United States, No. 165-87C (Cl. Ct. April 28, 1987); DLM & A, Inc. v. United States, 6 Cl. Ct. 329 (1984).

(B) Irreparable Harm. In most bid protest cases, courts will find that either the loss of the contract or the loss of the opportunity to compete for the contract constitutes sufficient irreparable harm for preliminary relief.[213] Courts will not permit unsuccessful bidders to recover their anticipated profits,[214] nor will the courts order a contract awarded to a particular plaintiff.[215] Once lost, a government contract or the opportunity to compete for it is lost forever. Thus, an unsuccessful bidder cannot be made whole by a favorable judgment at the end of the case.[216]

(C) Relative Harm and the Public Interest. In bid protest litigation, the relative harm to the government from the imposition of injunctive relief and the public interest play an especially important role. The impact of an injunction in a contract award case is usually easy to see: it

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[213]See M. Steinthal, 455 F.2d at 1289.

[214]Keco Indus., Inc. v. United States, 428 F.2d 1233 (Ct. Cl. 1970); DLM & A, Inc. v. United States, 6 Cl. Ct. 329 (1984).

[215]Delta Data Sys. Corp. v. Webster, 744 F.2d 197 (D.C. Cir. 1984); Golden Eagle Refining Co. v. United States, 4 Cl. Ct. 613 (1984); see Ulstein Maritime, Ltd. v. United States, 833 F.2d 1052, 1058 (9th Cir. 1987) (the court order can, however, undo an illegal action and require the agency to proceed with the procurement which is in progress, technically leaving the grant of the government contract to the discretion of the agency while in effect directing the award of the contract itself).

[216]The courts are split over whether the recovery of bid preparation costs can remedy the loss of the contract. Compare Ainslie Corp. v. Middendorf, 381 F. Supp. 305 (D. Mass. 1974), with Cincinnati Electronics Corp. v. Kleppe, 509 F.2d 1080 (6th Cir. 1975).

includes all of the ramifications inherent in the government's inability to award the contract. The effects of equitable relief may include such consequences as harm to the national defense (if the contract is particularly sensitive),[217] the expiration of the bids,[218] the impairment of a government program dependent on the contract, injury to third-parties (particularly the successful bidder), and the loss of money already expended on the contract if the suit comes post-award.

f. Declaratory Judgment.

(1) Statute and Rule. The Federal Declaratory Judgment Act of 1934,[219] is codified at 28 U.S.C. §§ 2201-02. The Act states as follows:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes . . ., any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.
>
> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

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[217]28 U.S.C. § 1491(a)(3).

[218]See Sterlingwear of Boston, Inc. v. United States, 11 Cl. Ct. 517 (1987).

[219]48 Stat. 955.

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Federal Rule of Civil Procedure 57 provides that actions under the Declaratory Judgment Act are subject to the Federal Rules.

> The procedure for obtaining a declaratory judgment pursuant to Title 28, USC, § 2201, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

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The Act is purely procedural in character; it neither waives the government's sovereign immunity nor creates an independent basis for jurisdiction in the federal courts.[220]

(2) Historical Origins. While declaratory judgment actions have served as procedural devices in civil law systems for centuries, they did not become a part of the English law until the mid-19th Century and were unknown in America until well into the 20th

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[220]See Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671 (1950); Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240 (1937); Marathon Oil Co. v. United States, 807 F.2d 759, 763 (9th Cir. 1986); Janakes v. United States Postal Serv., 768 F.2d 1091, 1093 (9th Cir. 1985); Mitchell v. Riddell, 402 F.2d 842, 846 (9th Cir. 1968), cert. denied, 394 U.S. 456 (1969).

century.[221] Following World War I, a number of states began enacting statutes providing a broad-based declaratory judgment remedy,[222] and by World War II, most states had adopted such laws.[223]

Fears that declaratory judgments contravened the Article III proscription against advisory opinions inhibited their development in the federal courts.[224] Moreover, several Supreme Court decisions early in the century evinced hostility towards declaratory judgments and reinforced the reluctance to adopt the device at the federal level.[225] In Nashville, Cincinnati and St. Louis Railway v. Wallace,[226] however, the Court, reviewing a state declaratory judgment for the first time, held that it met the elements of a "case or controversy" under Article III.

After Wallace, doubts about the constitutionality of the declaratory judgment faded, and Congress passed

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[221]Developments in the Law--Declaratory Judgments, 62 Harv. L. Rev. 787, 790 (1949). See 1 Anderson, Actions for Declaratory Judgments 3 (2d ed. 1951).

[222]Although declaratory judgments, as broad procedural tools, are of relatively recent origin, declaratory relief has been available with respect to certain disputed rights for some time (e.g., quiet title actions, interpleader. Developments in the Law--Declaratory Judgments, supra note 221, at 787.

[223]Id. at 791; E. Borchard, Declaratory Judgments 132-33 (2d ed. 1941).

[224]G. Gunther, Constitutional Law 1538 (11th ed. 1985).

[225]See Willing v. Chicago Auditorium Ass'n, 277 U.S. 274 (1928); Liberty Warehouse Co. v. Grannis, 273 U.S. 70 (1927); Muskrat v. United States, 219 U.S. 346 (1911).

[226]288 U.S. 249 (1933).

the Federal Declaratory Judgment Act the following year.[227] Three years later, the Supreme Court unanimously upheld the Act's constitutionality in Aetna Life Insurance Co. v. Haworth.[228]

(3) The Nature of the Remedy. A declaratory judgment is an instrument by which a court can adjudicate the rights of parties to a controversy without directing any coercive relief.[229] "[I]n form [the declaratory judgment] differs in no essential respect from any other action, except that the prayer for relief does not seek execution or performance from the defendant or opposing party. It seeks only a final determination, adjudication, or judgment from the court."[230] The declaratory action provides a means by

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[227]G. Gunther, supra note 224, at 1539 n.11; P. Bator et al., Hart & Wechsler's The Federal Courts and the Federal System 129 (2d ed. 1973) [hereinafter Hart & Wechsler's Federal Courts].

[228]300 U.S. 227 (1937).

[229]Developments in the Law--Declaratory Judgments, supra note 221, at 787: "The declaratory judgment comprises an authoritative judicial statement of the jural relationships between parties to a controversy. It does not itself, however, have any direct coercive effect. Ernst and Young v. Depositors Economic Protection Corporation, 45 F.3d 530 (1st Cir. 1995) (the Act does not expand federal court jurisdiction). But cf. Doe v. United States Air Force, 812 F.2d 738, 740 (D.C. Cir. 1987) (court assumed defendant would respond to declaratory judgment as if it were coercive in character).

[230]E. Borchard, supra note 223, at 25-26. See Developments in the Law--Declaratory Judgments, supra note 221, at 788-89:

> There is only a difference of degree between ordinary legal or equitable remedies and the modern declaratory action both as to the

(continued...)

which a party can receive adjudication of a controversy to forestall, rather than merely repair, damage.[231] The party need not wait until the harm is imminent or has occurred before seeking judicial relief.

(4) Prerequisites for Relief. The Declaratory Judgment Act "creates a means by which rights and obligations may be adjudicated in cases involving an actual controversy that has not reached the stage at which either party may seek a coercive remedy, or in which the party entitled to such a remedy fails to sue for it."[232] To be entitled to declaratory relief, a plaintiff must demonstrate that an "actual controversy"

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[230](...continued)

> presence of declaratory relief and as to the absence of coercion. A coercive equitable decree necessarily includes a limited statement of rights to be enforced or respected. Similarly, a judgment at law involves a declaration of liability, resulting from a given course of conduct, to pay a sum as damages. Furthermore, since the "noncoercive" declaratory judgment is res judicata, it may serve as the basis for a subsequent equitable decree or judgment at law. This possibility of further relief gives, in practice, an immediate coercive effect to the declaratory judgment.

(footnotes omitted).

[231]Id. at 789. See Anderson, supra note 221, at 20; M. Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power 75 (1980); Note, Declaratory Judgment and Matured Causes of Action, 53 Colum. L. Rev. 1130 (1953).

[232]C. Wright et al., supra note 16, at 671. See United States v. Doherty, 786 F.2d 491, 498-99 (2d Cir. 1986).

exists between the parties.[233] The test is whether "there is a substantial controversy between the parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of declaratory judgment."[234] "A mere abstract question or hypothetical threat is not a sufficient basis for a declaratory judgment under the Act[,]"[235] however, a plaintiff need not prove irreparable injury or an entitlement to any other form of relief, such as damages.[236] Finally, declaratory relief is a discretionary remedy.[237] A court need not award a declaratory judgment and generally will only do so where the judgment will serve a "useful

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[233]E.g., American Fed'n of Gov't Employees v. O'Connor, 747 F.2d 748 (D.C. Cir. 1984), cert. denied, 474 U.S. 909 (1985); Windsurfing Intern. Inc. v. AMF Inc., 828 F.2d 755, 758 (Fed. Cir. 1987); Swanson v. United States, 600 F. Supp. 802, 805-06 (D. Idaho 1985), aff'd, 789 F.2d 1368 (9th Cir. 1986); Bellefonte Reins. Co. v. Aetna Cas. and Sur. Co., 590 F. Supp. 187, 190-91 (S.D.N.Y. 1984).

[234]Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941). See Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 506 (1972); Caldwell v. Gurley Refining Co., 755 F.2d 645, 649-50 (8th Cir. 1985).

[235]Long Island Lighting Co. v. County of Suffolk, 604 F. Supp. 759, 762 (E.D.N.Y. 1985), citing Golden v. Zwickler, 394 U.S. 103, 108 (1969); Stover v. Meese, 625 F. Supp. 1414 (S.D.W. Va. 1986).

[236]Steffel v. Thompson, 415 U.S. 452, 466-72 (1974); Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 241 (1937); Rushia v. Town of Ashburnham, 582 F. Supp. 900, 902 (D. Mass. 1983). Cf. Olagues v. Russonelli, 770 F.2d 791, 803 (9th Cir. 1985) ("Declaratory relief may be appropriate even when injunctive relief is not").

[237]See Tempco Electric Heater Corp. v. Omega Engineering, Inc., 819 F.2d 746 (7th Cir. 1987) (where a party files for declaratory judgment and the adverse party subsequently files a coercive action, the court retains the discretion to decline to hear the former action).

purpose."[238] The declaratory judgment remedy is illustrated by the following case:

CCCO-WESTERN REGION v. FELLOWS
359 F. Supp. 644 (N.D. Cal. 1972)

MEMORANDUM AND ORDER
PECKHAM, District Judge.

On July 25, 1972, five individuals, Kerry Berland, Carolyn Berland, Judith Clark, Raymond Johnson, and Vincent O'Connor, entered the Presidio on Lincoln Boulevard and began distributing leaflets which outlined ways that soldiers can leave active duty. All plaintiffs except Carolyn Berland are employees of CCCO-Western Region, an organization known for its research into and publications concerning the draft and military organization. The pamphlet plaintiffs handed out was a publication of CCCO-Western Region.

Three of the individuals were informed by military police that they were violating the Presidio commander's regulation 210-10 which requires that prior permission of the commander be obtained before any leafletting is done. At this point, Carolyn and Kerry Berland left the premises. The others remained and were arrested under 18 U.S.C. § 1382, which charge was subsequently dismissed (§ 1382 makes it a crime to enter a military base in violation of the commander's order that one stay off). Soon after this incident, the three plaintiffs who had stayed were given "bar letters" which are issued by Colonel Fellows, the Presidio commander, and state that their further entry on the Presidio could subject plaintiffs to prosecution under § 1382. The Berlands have not received such bar letters.

All plaintiffs now seek a declaratory judgment that the bar letters are

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[238]Hart and Wechsler's Federal Courts, supra note 227, at 133. The factors considered include whether the declaration will end the controversy, the convenience of the parties, the public interest, and the availability and relative convenience of other remedies. Id.

unconstitutionally issued and void; that the parts of rule 210-10 which require prior approval of leafletting are unconstitutional; that Army Regulation 210-10, which gives base commanders power to exercise prior restraint, is unconstitutional as applied to bases that have been opened to the public; and that § 1382 is similarly unconstitutional as applied to people on open bases, or that § 1382 does not apply to such people. Also, plaintiffs request preliminary and permanent injunctions restraining defendant from barring them from the Presidio for peaceful exercise of First Amendment rights. Defendants move for dismissal, or in the alternative summary judgment.

STANDING

Defendants contest the standing of plaintiffs CCCO-Western Region, and Kerry and Carolyn Berland to maintain suit at this time. They argue that CCCO has no direct interest in this litigation, and that the Berlands present no justiciable controversy because they have not been presented with a bar order. Defendants rely upon Sierra Club v. Morton, 405 U.S. 727, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972), and Laird v. Tatum, 408 U.S. 1, 92 S. Ct. 2318, 33 L. Ed. 2d 154 (1962). This court believes that CCCO and the Berlands may maintain this action under these holdings.

The test for CCCO, as stated by the United States Supreme Court in Sierra Club v. Morton, supra, is

> "whether the party had alleged such a 'personal stake in the outcome of the controversy,' Baker v. Carr, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663, as to ensure that the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." Flast v. Cohen, 392 U.S. 83, 88 S. Ct. 1942, 20 L. Ed. 2d 947.

. . . Id., 405 U.S. at 732, 92 S. Ct. at 1364, 31 L. Ed. 2d at 641. CCCO has a stake in the outcome of this controversy in that its members are being threatened with

prosecution for distributing leaflets of its own publication, and in furtherance of objectives it fosters. The effectiveness of CCCO's work is obviously at stake in an action seeking to vindicate the rights of its members to distribute its literature. CCCO has standing to sue.

Defendants quote from the decision in Laird v. Tatum, supra, to support their position regarding the Berlands:

> "Allegations of subjective 'chill' are not an adequate substitute for claim of specific present objective harm or a threat of specific future harm; . . . " Id., 408 U.S. at 13, 92 S. Ct. at 2326, 33 L. Ed. 2d at 163-164 (emphasis added).

They seem to overlook the italicized language, however, which recognizes that allegations of chilling effect based upon threats of specific future harm do present a justiciable question to the court. Here, the Berlands allege the incident leading to the issuance of bar letters to their friends. They allege that if they proceed to distribute leaflets on the Presidio, in accordance with what they perceive to be their constitutional rights, they too will receive bar letters and thereafter be subject to criminal prosecution on reentry. They are, in other words, one visit away from the immediate threat of criminal prosecution to which the other individual plaintiffs in this suit have been subjected. The Berlands are equally deterred with the other plaintiffs from entering the Presidio and distributing leaflets. It is no solace to them, in light of their objections, to say that the Berlands "are not chilled in the exercise of any First Amendment rights outside the Presidio." (Defendant's Memorandum in Support of Motion to Dismiss, p. 27). This court finds that the Berlands present a justiciable controversy and are properly parties to this action, under the holding in Laird v. Tatum, supra.

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## 4.4 Conclusion.

The remedies that may be sought by plaintiffs suing the Army are limited only by the imagination of their attorneys. It is incumbent on the military lawyer to analyze claims and sort out reality from imagination.

# CHAPTER 5

# THE DOCTRINE OF EXHAUSTION OF ADMINISTRATIVE REMEDIES

## 5.1 The Basic Concept.

a. General. If a remedy available within the military criminal justice system or an administrative remedy provided by statute or regulation is capable of providing a plaintiff with the relief he seeks, the federal courts have generally required, as a matter of judicial administration, that the plaintiff use the available remedy before seeking judicial relief.[1] The Supreme Court recently held, however, that federal courts

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[1] See, e.g., Navas v. Vales, 752 F.2d 765, 769 (1st Cir. 1985); Michaelson v. Herren, 242 F.2d 693 (2d Cir. 1957); Nelson v. Miller, 373 F.2d 474 (3d Cir.), cert. denied, 387 U.S. 924 (1967); Sanders v. McCrady, 537 F.2d 1199 (4th Cir. 1976); Von Hoffburg v. Alexander, 615 F.2d 633 (5th Cir. 1980); Seepe v. Department of the Navy, 518 F.2d 760 (6th Cir. 1975); Diliberti v. Brown, 583 F.2d 950 (7th Cir. 1978); Horn v. Schlesinger, 514 F.2d 549 (8th Cir. 1975); Patillo v. Schlesinger, 625 F.2d 262 (9th Cir. 1980); Thornton v. Coffey, 618 F.2d 686 (10th Cir. 1980); Linfors v. United States, 673 F.2d 332 (11th Cir. 1982); Knehans v. Alexander, 566 F.2d 312 (D.C. Cir. 1977), cert. denied, 435 U.S. 995 (1978). But cf. Heisig v. United States, 719 F.2d 1153 (Fed. Cir. 1983) (exhaustion of military administrative remedies only permissive, not mandatory).

As a general rule, plaintiffs need not exhaust remedies before filing a claim under 42 U.S.C. § 1983, Patsy v. Florida Bd. of Regents, 457 U.S. 496 (1982); see generally infra chapter 9. However, several courts have held that exhaustion is required in § 1983 suits against the military and its officials. Crawford v. Texas Army Nat'l Guard, 794 F.2d 1034 (5th Cir. 1986); Furman v. Edwards, 657 F. Supp. 1243 (D. Vt. 1987). See also Sandidge v. Washington, 813 F.2d 1025, 1026 n.1 (9th Cir. 1987); Penagaricano v. Llenza, 747 F.2d 55, 61 (1st Cir. 1984) (noting but not deciding question). See Wright v. Park, 5 F.3d 586 (1st Cir. 1993).

do not have the authority to require that plaintiffs exhaust available administrative remedies before seeking judicial review of agency administrative actions under the Administrative Procedure Act (APA), except where exhaustion is specifically mandated by statute or agency rule.[2] The Court relied on the language of section 10(c) of the APA to find that Congress had effectively codified the doctrine of exhaustion of administrative remedies where it provided that appeal to "superior agency authority" is a prerequisite to judicial review only when expressly required by statute or an agency rule. The impact of this precedent will probably be felt most in predischarge military personnel cases seeking equitable relief under the APA. This chapter considers the doctrine of exhaustion of remedies in military administrative cases; chapter 8 discusses the role of the exhaustion doctrine in military criminal cases.

b. Purposes of the Exhaustion Doctrine. The exhaustion of remedies requirement serves several purposes.[3] First, exhaustion may avoid burdening the courts with cases that can be resolved through the administrative process.[4] "A complaining party may be successful in vindicating his rights in the

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[2]Darby v. Cisneros, 113 S. Ct. 2539 (1993). See 95 Colum. L. Rev. 749, 755; 108 Harv. L. Rev. 27, 101; 93 Mich. L. Rev. 1, 3.

[3]See McCarthy v. Madigan, 112 S. Ct. 1081 (1992); Schlesinger v. Councilman, 420 U.S. 738, 756-57 (1975); McKart v. United States, 395 U.S. 185, 193-95 (1969); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938). See generally Sherman, Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement, 55 U. Va. L. Rev. 483, 497 (1969).

[4]Schlesinger, 420 U.S. at 756-57; McKart, 395 U.S. at 195.

administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene."[5] Second, completion of the full administrative review process focuses factual and legal arguments and provides a valuable written record in the event judicial review becomes necessary. "[W]hatever judicial review is available will be informed and narrowed by the agency's own decision."[6] Third, reliance on the administrative process allows full use of the expertise of military decisionmakers.[7] A federal district judge may consider one military case a year; a member of a military administrative board will consider hundreds.[8] Finally, the exhaustion doctrine removes the friction caused by judicial intrusion into military affairs. It permits the military to discover and correct its own errors, and it prevents the "deliberate flaunting of administrative processes [which] could weaken the effectiveness of an agency by encouraging people to ignore its procedures."[9]

c. Jurisdictional Nature of the Exhaustion Doctrine. The exhaustion doctrine is a judge-made rule

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[5]McKart, 395 U.S. at 195. See Lewis v. Reagan, 660 F.2d 124, 127 (5th Cir. 1981); Von Hoffburg, 615 F.2d at 637; Seepe, 518 F.2d at 764; Krudler v. United States Army, 594 F. Supp. 565, 568 (N.D. Ill. 1984).

[6]Schlesinger, 420 U.S. at 756. See McKart, 395 U.S. at 194; Von Hoffburg, 615 F.2d at 637; Hodges v. Callaway, 499 F.2d 417, 423 (5th Cir. 1974).

[7]Schlesinger, 420 U.S. at 756; Lewis, 660 F.2d at 127; Seepe, 518 F.2d at 764.

[8]See, e.g., Navas v. Vales, 752 F.2d 765, 769-70 (1st Cir. 1985).

[9]McKart, 395 U.S. at 195. See Von Hoffburg, 615 F.2d at 637; Hodges, 499 F.2d at 423.

that is generally not jurisdictional, but prudential.[10] "Only when Congress states in clear, unequivocal terms that the judiciary is barred from hearing an action until the administrative agency has come to a decision . . . has the Supreme Court held that exhaustion is a jurisdictional prerequisite."[11] The courts of appeals may split on the issue of whether exhaustion of administrative remedies is a jurisdictional prerequisite to suit under a particular statute.[12] Where jurisdictional, the district court must dismiss the action pending exhaustion. Alternatively, where courts consider exhaustion to be a nonjurisdictional requirement, they may retain jurisdiction and simply stay the proceedings until the plaintiff pursues administrative remedies.

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[10]McDonald v. CenTra, 946 F.2d 1059, 1063 (4th Cir. 1991).

[11]I.A.M. Nat'l Pension Fund v. Stockton TRI Indus., 727 F.2d 1204, 1208 (D.C. Cir. 1984). See Weinberger v. Salfi, 422 U.S. 749 (1975).

[12]While Darby v. Cisneros, 113 S. Ct. 2539 (1993) removed any doubt as to whether exhaustion is a jurisdictional prerequisite for suits brought under the APA's waiver of sovereign immunity, its reach is limited to those suits. Compare Linfors v. United States, 673 F.2d 332 (11th Cir. 1982); Seepe v. Department of the Navy, 518 F.2d 760 (6th Cir. 1975); Hodges v. Callaway, 499 F.2d 417 (5th Cir. 1974); Michaelson v. Herren, 242 F.2d 693 (2d Cir. 1957), with Montgomery v. Rumsfeld, 572 F.2d 250 (9th Cir. 1978); Nelson v. Miller, 373 F.2d 474 (3d Cir.), cert. denied, 387 U.S. 924 (1967); Sohm v. Fowler, 365 F.2d 915 (D.C. Cir. 1966); Reed v. Franke, 297 F.2d 17 (4th Cir. 1961). See Sherman, supra note 3, at 502.

d. The Exhaustion Doctrine and the Statute of Limitations.

(1) General. As a general rule, plaintiffs must commence a civil action against the United States within six years after the right of action first accrues or the suit is barred.[13] Moreover, both the Boards for Correction of Military (or Naval) Records and the Discharge Review Boards have their own limitation periods: three years for the correction boards,[14] and 15 years for the discharge review boards.[15] A failure to timely institute a civil action against the United States is a nonwaivable, jurisdictional bar to suit.[16] On the other hand, the limitations periods for the corrections boards and the discharge review boards are not jurisdictional and may be (and often are) waived.[17] Indeed, 10 U.S.C. § 1552(b) expressly provides that correction boards may excuse an untimely application "if it finds it to be in the interest of justice."

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[13]28 U.S.C. § 2401(a).

[14]10 U.S.C. § 1552(b).

[15]10 U.S.C. § 1553(a).

[16]See, e.g., Sisseton-Wahpeton Sioux Tribe v. U.S., 895 F.2d 588, 592 (9th Cir. 1990); United States v. Sams, 521 F.2d 421, 429 (3d Cir. 1975); United States v. One 1961 Red Chevrolet Impala Sedan, 457 F.2d 1353, 1357 (5th Cir. 1972).

[17]See, e.g., Guerrero v. Marsh, 819 F.2d 238, 241 (9th Cir. 1987); Nichols v. Hughes, 721 F.2d 657 (9th Cir. 1983); Long v. United States Dep't of Defense, 616 F. Supp. 1280 (E.D.N.Y. 1985); Yagjian v. Marsh, 571 F. Supp. 698 (D.N.H. 1983); Kaiser v. Sec'y of Navy, 525 F. Supp. 1226 (D. Colo. 1981); Mulvaney v. Stetson, 470 F. Supp. 725 (N.D. Ill. 1979).

(2) Accruals of actions and the exhaustion of administrative remedies. For purposes of the statute of limitations, "a claim against the United States first accrues on the date when all events have occurred which fix the liability of the Government and entitle the claimants to institute an action."[18] Put another way, "'a cause of action is deemed to have accrued when facts exist which enable one party to maintain an action against another.'"[19] Courts generally agree that challenges to adverse personnel actions -- such as involuntary discharges, court-martial convictions, and promotion passovers -- must be filed within six years of the date on which the adverse action is completed.[20] Courts do not agree, however, about what effect a plaintiff's application to a discharge review board or a correction board has on the statute of limitations. For example, does an application to a discharge review board or a correction board toll the running of the limitations period? And does an application to a

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[18]Oceania Steamship Co. v. United States, 165 Ct. Cl. 217, 225 (1964). See also June v. Sec'y of Navy, 557 F. Supp. 144, 148 (M.D. Pa. 1982).

[19]Victor Foods v. Crossroads Economic Development, 977 F.2d 1224, 1225 (8th Cir. 1992); Konecny v. United States, 388 F.2d 59, 65 (8th Cir. 1967), (quoted by, Pacyna v. Marsh, 617 F. Supp. 101, 102 (W.D.N.Y. 1984), aff'd, 809 F.2d 792 (Fed. Cir. 1986), cert. denied, 481 U.S. 1048 (1987)).

[20]Geyen v. Marsh, 775 F.2d 1303, 1307-08 (5th Cir. 1985); Willcox v. United States, 769 F.2d 743 (Fed. Cir. 1985); Walters v. Sec'y of Defense, 725 F.2d 107, 111-15 (D.C. Cir. 1983). But Kaiser v. Sec' of Navy, 525 F. Supp. 1226, 1228 (D. Colo. 1981); Wood v. Sec'y of Defense, 496 F. Supp. 192, 198 (D.D.C. 1980) (courts holding § 2401(a) inapplicable to adverse administrative separations). Cf. Guerrero, 819 F.2d at 238 (no statute of limitations prevents courts from ordering correction board to decide whether Board's limitation period should be waived).

discharge review board or a correction board more than six years after the challenged adverse action revive the statute of limitations? In the few courts that deem recourse to military administrative remedies to be permissive rather than mandatory, an application to a discharge review board or a correction board does not toll or revive the limitations period.[21] In jurisdictions that require exhaustion of military administrative remedies, however, most courts hold that applications to discharge review boards or correction boards both toll and revive the statute of limitations. For example, in Dougherty v. United States Navy Board for Correction of Naval Records,[22] the plaintiff received a general discharge for "unsuitability" in 1957. In 1983, Dougherty applied to the Board for Correction of Naval Records (BCNR) to change the character of his discharge. That same year, more than 26 years after his discharge (but while the BCNR was still considering the application), Dougherty filed suit in federal court, challenging the failure of the BCNR to give him relief. Following the BCNR's denial of Dougherty's application in 1984, the district court dismissed the lawsuit, reasoning that the statute of limitations barred the claim. The United States Court of Appeals for the Third Circuit, reversed. The circuit court differentiated a lawsuit challenging the refusal of a correction board to upgrade the discharge from one attacking the discharge itself; the latter action accrues when the discharge is received, the former when the correction board rules. Thus, Dougherty's action accrued in 1984, when the BCNR issued its decision denying relief.

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[21]See, e.g., Hurick v. Lehman, 782 F.2d 984, 986-87 (Fed. Cir. 1986).

[22]784 F.2d 499 (3d Cir. 1986).

After careful consideration of the case history and relevant cases in federal courts, we hold that the six-year statute of limitations for the instant action did not begin to run until the BCNR issued its final decision. Consequently, the instant actions is not time barred.

In applying the statute of limitations, we must determine what action the district court is being asked to review. Is it reviewing the 1957 discharge or the 1984 action of the BCNR refusing to correct the records relating to that discharge? The standard of review of the district court is instructive. The district court is to set aside the BCNR action if it finds it to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706 (1977). The review is generally limited to the administrative record. . . . The fact that the district court must base its decision on an administrative record compiled in 1984 relating to a proceeding in 1984 suggests that the statute of limitations should not begin running based on any other event. While the basic factual issue centers around something which occurred many years earlier, the wrong asserted in the district court is not the discharge itself but its treatment by the BCNR. . . .

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. . . In the instant case, the BCNR decided to waive the statute of limitations and address the merits of Dougherty's claim. Having done so, . . . we see no persuasive reason to cut off judicial review of the 1984 administrative action of the BCNR.[23]

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[23] Id. at 501. See Guitard v. United States Secretary of the Navy, 967 F.2d 737, 740 (2d Cir. 1992); Blassingame v. Sec'y of Navy, 811 F.2d 65, 70-73 (2d Cir. 1987); Smith v. Marsh, 787 F.2d 510, 511-12 (10th Cir. 1986); Geyen v. Marsh, 775 F.2d 1303, 1308-10 (5th Cir. 1985), reh'g denied, 782 F.2d 1351 (5th Cir. 1986); Vietnam Veterans v. Sec'y of Navy, 642 F. Supp. 154, 156-57 (D.D.C. 1986); Bittner v. Secretary of Defense, 625 F. (continued...)

## 5.2 What Remedies Must Be Exhausted?

a. Introduction. Servicemembers have several avenues of administrative recourse to challenge putatively unlawful or unjust military determinations. Most important among these are the Army Board for Correction of Military Records [ABCMR], the Army Discharge Review Board [ADRB], and article 138 of the Uniform Code of Military Justice [UCMJ].

b. Army Board for the Correction of Military Records (ABCMR).

(1) General. "Prior to 1946, disputes arising out of an individual's service to his country in times of war and peace were resolved by the passage of

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[23](...continued)
Supp. 1022, 1028-29 (D.D.C. 1985); White v. Sec'y of Army, 629 F. Supp. 64, 67-68 (D.D.C. 1984); Swann v. Garrett, 811 F. Supp. 1336, 1338 (N.D. Ind. 1992); Mahoney v. United States, 610 F. Supp. 1065, 1067-68 (S.D.N.Y. 1985); Yagjian v. Marsh, 571 F. Supp. 698, 706-07 (D. N.H. 1983); Kaiser v. Sec'y of Navy, 525 F. Supp. 1226, 1230 (D. Colo. 1981); Wood v. Secretary of Defense, 496 F. Supp. 192, 198 (D.D.C. 1980); Mulvaney v. Stetson, 470 F. Supp. 725, 730 (N.D. Ill. 1979). See also Guerrero v. Marsh, 819 F.2d 238 (9th Cir. 1987) (no statute of limitations prevents courts from ordering correction board to decide whether Board's limitation period should be waived). Cf. Ballenger v. Marsh, 708 F.2d 349, 351 (8th Cir. 1983); Pacyna v. Marsh, 617 F. Supp. 101, 103 (W.D.N.Y. 1984), aff'd, 809 F.2d 792 (Fed. Cir. 1986), cert. denied, 107 S. Ct. 2177 (1987); Bethke v. Stetson, 521 F. Supp. 488, 490 (N.D. Ga. 1979), aff'd, 619 F.2d 81 (5th Cir. 1980) (cases holding that multiple applications to correction boards do not each revive the statute of limitations).

private bills by Congress."[24] After World War II, the demands by servicemembers for private relief legislation increased dramatically.[25] To relieve itself of this burden, Congress authorized the secretary of each service to create administrative forums for considering such grievances. The result was the boards for the correction of military (or naval) records.[26] The legislation governing the correction boards is codified at 10 U.S.C. § 1552 and provides in part:

> (a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. Under procedures prescribed by him, the Secretary of the Treasury may in the same manner correct any military record of the Coast Guard. Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.
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> . . . .
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> (c) The department concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a

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[24]Glosser & Rosenberg, Military Correction Boards: Administrative Process & Review by the United States Court of Claims, 23 Am. U.L. Rev. 391, 392 (1973). See Strang v. Marsh, 602 F. Supp. 1565, 1569 (D.R.I. 1985).

[25]Kiddoo, Boards of Justice, Soldiers Mag., October 1982, at 34.

[26]Legislative Reorganization Act of 1946, ch. 743, § 207, 60 Stat. 812, 837. See Strang, 602 F. Supp. at 1569; Glosser & Rosenberg, supra note 24, at 392.

> record under this section, the amount is found to be due the claimant on account of his or another's service in the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be. . . .
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> . . . .
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> (f) With respect to records of courts-martial and related administrative records pertaining to court-martial cases tried or reviewed . . . , action under subsection (a) may extend only to--
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> (1) correction of a record to reflect actions taken by reviewing authorities . . . ; or
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> (2) action on the sentence of a court-martial for purposes of clemency.

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(2) Scope of Remedy. 10 U.S.C. § 1552 gives service secretaries, acting through their boards for correction of military records, plenary authority to afford relief to servicemembers injured by adverse or undesired personnel actions. The correction boards can void promotion passovers, reverse involuntary separations, upgrade less than honorable discharges, provide constructive service credit, remove adverse information from personnel files, make disability determinations, and award back pay and allowances, including retirement pay.[27] However, the Military Justice Act of 1983 limited the authority of the boards to review court-martial proceedings. The boards may now only make corrections necessary to reflect actions taken by reviewing authorities or actions on sentences for

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[27]See generally Glosser & Rosenberg, supra note 24 at 402-09.

purposes of clemency.[28] This legislation statutorily overruled the decision of the United States Court of Appeals for the District of Columbia Circuit, in Baxter v. Claytor,[29] which held that correction boards were obligated to review court-martial convictions on the application of affected servicemembers or former servicemembers. Despite this limitation, correction boards remain the key administrative remedy in military personnel litigation.

(3) Composition and Procedures. The ABCMR is governed by Army Regulation 15-185.[30] The board is composed of high-ranking Army civilian employees who sit on a rotating, additional-duty basis.[31] Three members constitute a quorum.[32] The board has jurisdiction to consider all applications properly before it for the purpose of determining the existence of an error or an injustice in military records.[33] As noted above, a claimant normally must file the application for correction within three years after discovery of a putative error or injustice; however, this limitation

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[28]Pub. L. No. 98-209, § 11(a), 97 Stat. 1407 (codified at 10 U.S.C.§ 1552(f)); Cooper v. Marsh, 807 F.2d 988, 990-91 (Fed. Cir. 1986). See Stokes v. Orr, 628 F. Supp. 1085, 1086 (D. Kan. 1985) (Military Justice Act of 1983 applies retroactively).

[29]652 F.2d 181 (D.C. Cir. 1981).

[30]Dep't of Army, Reg. 15-185, Army Board for Correction of Military Records (1 May 1982) [hereinafter AR 15-185].

[31]Id. para. 3b. See Kiddoo, supra note 25, at 34.

[32]AR 15-185, supra note 30, para. 3b.

[33]Id. paras. 4-5.

period can be waived in the "interest of justice."[34] Prior to seeking relief from the ABCMR, applicants must exhaust all other administrative remedies (such as the ADRB).[35] The board has the discretion to grant a hearing on an application;[36] this discretion is subject to judicial interference only if exercised arbitrarily and capriciously.[37] Following consideration of an application, the board makes findings and recommendations, which it forwards for approval to the Secretary of the Army or his delegee.[38] If the board denies relief, it must state the grounds for denial.[39] The ABCMR is not bound, however, by the doctrine of stare decisis.[40] The Secretary of the Army or his delegee will either approve or disapprove the board's recommendation, or remand the application for further consideration.[41]

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[34]Id. para. 7.

[35]Id. para. 8. See Sherengos v. Seamans, 449 F.2d 333 (4th Cir. 1971).

[36]AR 15-185, supra note 30, para. 11.

[37]See, e.g., Dodson v. U.S. Government, Dep't of Army, 988 F.2d 1199, 1204-05 (Fed. Cir. 1993); Marcotte v. Sec'y of Defense, 618 F. Supp. 756, 765 (D. Kan. 1985); Kalista v. Sec'y of Navy, 560 F. Supp. 608 (D. Colo. 1983), aff'd, No. 83-1531 (10th Cir. Mar. 15, 1984).

[38]AR 15-185, supra note 30, para. 19.

[39]Urban Law Inst. v. Sec'y of Defense, No. 76-0530 (D.D.C. Jan. 31, 1977) (settlement agreement), cited in Stichman, Developments in the Military Discharge Review Process, 4 Mil. L. Rptr. 6004, 6009 (1976).

[40]Strang v. Marsh, 602 F. Supp. 1565 (D.R.I. 1985).

[41]AR 15-185, supra note 30, para. 20. See, e.g., Kolesa v. Lehman, 597 F. Supp. 463 (N.D.N.Y. 1984).

(4) Necessity of Recourse to the ABCMR. Unless federal courts found that one of the exceptions to the exhaustion doctrine applies,[42] they almost uniformly required plaintiffs to seek relief from the ABCMR before they would review a military personnel determination.[43] An illustration of this requirement is the United States Court of Appeals for the Fifth Circuit's decision in Hodges v. Callaway.

HODGES v. CALLAWAY

499 F.2d 417 (5th Cir. 1974)

> On June 1, 1972, the Department of the Army directed the Commanding General of Fort Benning, Georgia, to grant Staff Sergeant (E-6) Kenneth L. Hodges an honorable discharge as soon as possible "for the convenience of the Government." Then midway through his second six-year period of enlistment in the Army, Sergeant Hodges was understandably unwilling to see his hopes for a military career so

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[42]See infra § 5.3.

[43]See, e.g., Guitard v. United States Sec'y of Navy, 967 F.2d 737, 741 (2d Cir. 1992); Woodrick v. Hungerford, 800 F.2d 1413, 1417-18 (5th Cir. 1986); Muhammad v. Sec'y of Army, 770 F.2d 1494, 1495 (9th Cir. 1985); Navas v. Vales, 752 F.2d 765 (1st Cir. 1985); Linfors v. United States, 673 F.2d 332 (11th Cir. 1982); Von Hoffburg v. Alexander, 615 F.2d 633 (5th Cir. 1980); Patillo v. Schlesinger, 625 F.2d 262 (9th Cir. 1980); Thornton v. Coffey, 618 F.2d 686 (10th Cir. 1980); Knehans v. Alexander, 566 F.2d 312 (D.C. Cir. 1977), cert. denied, 435 U.S. 995 (1978); Martin v. Stone, 759 F. Supp. 19 (D.D.C. 1991); Schaefer v. Cheney, 725 F. Supp. 40 (D.D.C. 1989); Furman v. Edwards, 657 F. Supp. 1243, 1245-46 (D. Vt. 1987); Ayala v. United States, 624 F. Supp. 259, 263 (S.D.N.Y. 1985); Steenson v. Marsh, 609 F. Supp. 800, 801-02 (N.D. Ala. 1985); White v. Sec'y of Army, 629 F. Supp. 64, 66-67 (D.D.C. 1984); Mozur v. Orr, 600 F. Supp. 772 (E.D. Pa. 1985); Covill v. United States, 596 F. Supp. 789 (E.D. Mich. 1984); Krudler v. United States Army, 594 F. Supp. 565 (N.D. Ill. 1984); Cody v. Scott, 565 F. Supp. 1031 (S.D.N.Y. 1983).

abruptly terminated, even for the price of an honorable discharge. Accordingly, on June 7, 1972, two days before the date set for his separation, Sergeant Hodges invoked the assistance of the United States District Court for the Middle District of Georgia.

As subsequent amendments to the pleadings made clear, the gravamen of Hodges' complaint was that though ostensibly ordered "for the convenience of the Government," the discharge was in fact designed as punishment for Hodges' participation in the tragic events at My Lai 4, Republic of South Vietnam, on March 16, 1968. Recognizing that the Army's actions did comply with the procedures established in Army Regulation [AR] 635-200 for discretionary "convenience discharges" and apparently conceding the constitutional validity of those procedures, Hodges insisted that in his case the Army should have followed the procedures outlined in AR 635-212 for discharges based on misconduct. Alleging that the pretextual "convenience" discharge contravened his right to due process of law, Hodges sought a temporary restraining order to halt his discharge pending a hearing on the merits of his claim and ultimately an injunction against his discharge pending compliance with the applicable regulations and "minimum concepts of fairness."

For over a year the district court stayed the Army's discharging hand in order to preserve the status quo pending disposition of the case on its merits. Following an evidentiary hearing in May 1973, however, the district court on June 20, 1973, granted a partial summary judgment for defendants-appellees and dismissed Hodges' complaint for failure to state a claim and for want of subject matter jurisdiction. Now a civilian, Hodges asked to reverse the district court and order the Army to follow the procedures set forth in AR 635-212. Notwithstanding the importance of Hodges' challenge to the action taken below, our attention to the merits of the appellant's position is deflected at the threshold by a jurisdictional problem not detected by either the parties or the district court.

Although federal courts are not totally barred from barracks rooms and billets, our access is restricted. Writing for this Court in Mindes v. Seaman, 5 Cir. 1971, 453 F.2d 197, 201, Judge Clark framed a general statement for our authority:

> a court should not review internal military affairs in the absence of (a) an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations, and (b) exhaustion of available intraservice corrective measures.

The first portion of this formula may often be the more difficult to apply, for not all allegations technically within its perimeters are reviewable. Thus the trial court must "examine the substance of [the] allegation in the light of the policy reasons behind nonreview of military matters," balancing inter alia, the nature and strength of the challenge to the military determination, the potential injury to the plaintiff if review is refused, the type and degree of anticipated interference with the military function, and the extent to which the exercise of military expertise or discretion is involved. Id. At the same time, concentration on the balancing act required to measure the sufficiency of the allegations should not obscure the importance of the second portion of the Mindes formula--the exhaustion requirement.

Beginning with McCurdy v. Zuckert, 5 Cir. 1966, 359 F.2d 491, . . . this Court has firmly adhered to the rule that a plaintiff challenging an administrative military discharge will find the doors of the federal courthouse closed pending exhaustion of available administrative remedies. Accord, Davis v. Secretary of the Army, 5 Cir. 1971, 440 F.2d 817; Stanford v. United States, 5 Cir. 1969, 413 F.2d 1048; Tuggle v. Brown, 5 Cir., 362 F.2d 801. . . . For the purposes of this requirement, two types of administrative bodies provide review of discharge decisions. The Army Discharge Review Board [ADRB], established pursuant to

10 U.S.C. § 1553 (1974 Supp.) and 32 C.F.R. § 581.2 (1973), has authority to review the type of discharge given and to direct the Adjutant General to "change, correct, or modify any discharge or dismissal, and to issue a new discharge. . . ." 32 C.F.R. § 581.2(a)(1) (1973). Established pursuant to 10 U.S.C. § 1552 (1970) and 32 C.F.R. § 581.2, the Army Board for Correction of Military Records [ABCMR] is to "consider all applications properly before it for the purpose of determining the existence of an error or injustice," 32 C.F.R. § 581.3(b)(2) (1973), and may "correct any military record . . . to correct an error or remove an injustice." 10 U.S.C. § 1552(a).

As previous decisions of this Court should have made clear, our basic exhaustion principle has two important corollaries. First, as with exhaustion of administrative remedies in other contexts, the exhaustion doctrine in review of military discharge decisions is subject to limitations or exceptions. The most important of these is that only those remedies which provide a real opportunity for adequate relief need be exhausted. Stated somewhat differently, exhaustion is inapposite and unnecessary when resort to the administrative reviewing body would be futile. For example, a plaintiff obviously need not appeal to the particular DRB or BCMR if the relief requested is not within the authority or power of those bodies to grant.

The second corollary to our basic exhaustion principle is that having once determined the applicability of the exhaustion doctrine, a district court generally may not further entertain a complaint until the requirement is satisfied. If the suit was filed after discharge, the court may not retain jurisdiction while the plaintiff resorts to administrative review. And if the suit was filed before discharge, the court may not stay the discharge pending exhaustion of administrative remedies. This latter result is required by the authorizing statute in cases in which the desired relief falls within the bailiwick of the DRB, for those bodies are limited to post-discharge reviews, 10 U.S.C.

§ 1553(a) (1974 Supp.). This Court has also directed this result when the requested relief lies within the competence of a BCMR, notwithstanding the statutory authority of BCMR's to entertain pre-discharge appeals and the willingness of some of those boards to do so if a court will stay discharge pending administrative review.

Examination of the case sub judice in light of these two corollaries to the exhaustion doctrine clearly reveals the error below. Although appellant initially alleged that he had exhausted available intraservice remedies, it is quite clear that he has not yet attempted appeal to either the ADRB or the ABCMR. Appellees have conceded that Hodges need not approach the ADRB since that body deals only with changes in the type of discharge, whereas Hodges is complaining basically of the fact of discharge. They stoutly insist, however, that he should be required to appeal to the ABCMR. Unable to see any compelling reason to place this case within the category of cases generally excepted from the exhaustion requirement, we agree.

It seems quite clear to us that the ABCMR can, if it determines that Hodges has been illegally discharged, grant him full reinstatement and restoration of all rights, thus in effect making him whole for any injury he might suffer from a wrongful discharge. In addition, appellant Hodges complains of exactly the sort of injury for which the BCMR can supply effective and adequate balm. The gravamen of the complaint is that the Army did not follow the proper regulations in processing his discharge; whether this is viewed as a legal or a factual question, the Army ought to be the primary authority for the interpretation of its own regulations. A decision by the ABCMR that the Army should have followed AR 635-212 might completely obviate the need for judicial review. If, on the other hand, the ABCMR concludes that AR 635-212 is inapplicable to the facts in this case and Hodges then seeks judicial review, the court will at least have a definitive interpretation of the regulation and an explication of the relevant facts from the

highest administrative body in the Army's own appellate system [citations omitted].

Hodges argues that resort to the ABCMR in his case would obviously be futile and therefore ought not to be required. Since the Secretary of the Army ordered this discharge, Hodges insists, the ABCMR would be very reluctant to find any significant error in Hodges' favor. Besides, the statute grants final approval over the Board's decision to the Secretary, and he most certainly would not countermand himself, regardless of the Board's recommendation.

Appellees offer several responses to the futility argument. Although we do not share their overly sanguine view regarding the efficacy of the intraservice administrative review procedures, we do agree that requiring Hodges to exhaust those remedies will not necessarily be an exercise in futility. According to the Army regulations implementing 10 U.S.C. § 1552, the ABCMR may not "deny an application on the sole ground that the record was made by or at the direction of the President or the Secretary in connection with proceedings other than proceedings of a Board for the correction of military and naval records." 32 C.F.R. § 581.3(c)(5)(ii). The BCMR's action is subject to judicial reversal if it is arbitrary, capricious, unsupported by substantial evidence, or erroneous law. Sanford v. United States, 9 Cir. 1968, 399 F.2d 693. . . . Moreover, though the Secretary <u>may</u> overrule the Board's recommendations for relief, he cannot do so arbitrarily; if he rejects the Board's recommendations, he must provide either explicitly stated policy reasons, or his action must be supported by the record and evidence presented to the Board [citations omitted].

In any event, to base an exception to the exhaustion requirement on the fact that the final administrative decision is subject to the discretionary power of the Secretary would in effect turn the exhaustion doctrine on its head. Exhaustion is required in part because of the possibility that administrative review might obviate the need for judicial review.

That the administrative process might not have this effect is not usually a reason for bypassing it. And since the Service Secretary always has the final say over decisions by both the DRB and the BCMR, appellant's futility reasoning would mean that exhaustion of intraservice remedies should always be excused. The administrative remedy available to grievants like appellant Hodges may offer cold comfort and small consolation, but it is surely beyond our authority to permit the exceptions to the exhaustion doctrine to swallow the rule.

We recognize, of course, that considerable resources, judicial as well as combatant, have been expended since this litigation began over two years ago. And mindful of Mr. Justice Black's warning in another context against administrative procedures that exhaust the grievant before he can exhaust them, we are conscious of the burden on a plaintiff who at this stage of the game learns that he must begin anew at square one. Yet as serious as these considerations may be in Sergeant Hodges' individual case, we do not believe they justify overriding the exhaustion requirement. The exhaustion doctrine rests on legitimate and important policy objectives relating to the balance between military authority and the power of federal courts. Adherence to the exhaustion requirement in cases presenting the type of challenge to administrative discharge decisions being mounted here will serve well these objectives.

For one thing, we can avoid premature court review that might upset the balance between the civilian judiciary and the military as a separate administrative and judicial system. We can prevent untoward, unreasonable interference with the efficient operation of the military's judicial and administrative systems and allow the military an opportunity to exercise its own expertise and rectify its own errors before a court is called to render judgment. Moreover, we can guard, at least in the future, against inefficient use of judicial resources by requiring "finality" within the military system and thus avoiding needless review.

Since the exhaustion requirement does apply in the instant case, our decisions in McCurdy v. Zuckert, supra, and Tuggle v. Brown, supra, command that the district court have no further jurisdiction over the case until the requirement be satisfied. Accordingly, we reverse the decision of the court below and remand the case with instructions to dismiss without prejudice for failure to exhaust intraservice administrative remedies.

We emphasize that our holding is only that Hodges approached the courthouse prematurely and that the court below erred in permitting him to enter without first surmounting the exhaustion hurdle. Hodges would synomize pessimism with futility, but courts must--at least initially--indulge the optimistic presumption that the military will afford its members the protections vouchsafed by the Constitution, by the statutes, and by its own regulations. Certainly Kenneth L. Hodges did not surrender his right to due process of law when he doffed mufti. When he has completed his intraservice appeals, he is free to return in search of judicial review. The barricade erected by the exhaustion requirement does not completely block the courtroom door.

Reversed and remanded.

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c. Army Discharge Review Board (ADRB).

(1) General. Like the military correction boards, Congress created the discharge review boards to eliminate the tremendous burden of private relief legislation that arose during World War II.[44] This

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[44]Serviceman's Readjustment Act of 1944, Pub. L. No. 346, 58 Stat. 284 (1944). See Strang v. Marsh, 602 F. Supp. 1565, 1569 (D.R.I. 1985); Stichman, supra note 39, at 6001; Glosser & Rosenberg, supra note 24, at 392.

legislation, codified at 10 U.S.C. § 1553, provides in relevant part:

> (a) The Secretary concerned shall, after consulting the Administrator of Veterans' Affairs, establish a board of review, consisting of five members, to review the discharge or dismissal (other than a discharge or dismissal by sentence of a general court-martial) of any former member of an armed force under the jurisdiction of his department upon its own motion or upon the request of the former member or, if he is dead, his surviving spouse, next of kin, or legal representative. A motion or request for review must be made within 15 years after the date of the discharge or dismissal. With respect to a discharge or dismissal adjudged by a court-martial case . . . , action under this subsection may extend only to a change in the discharge or dismissal or issuance of a new discharge for purposes of clemency.
>
> (b) A board established under this section may, subject to review by the Secretary concerned, change a discharge or dismissal, or issue a new discharge, to reflect its findings.
>
> (c) A review by a board established under this section shall be based on the records of the armed forces concerned and such other evidence as may be presented to the board. A witness may present evidence to the board in person or by affidavit. A person who requests a review under this section may appear before the board in person or by counsel or an accredited representative of an organization recognized by the Administrator of Veterans' Affairs under chapter 59 of title 38.

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(2) Scope of Remedy. The ADRB has the power to upgrade the character of any discharge or dismissal except a discharge or dismissal adjudged by the sentence

of a general court-martial.[45] Where it has jurisdiction, the board is charged with reviewing the propriety and equity of an applicant's discharge and, if necessary, with effecting changes in its character.[46] The board does not have the power to enjoin a separation; its jurisdiction is triggered only on discharge or dismissal.[47] Moreover, as in the case of correction boards, the Military Justice Act of 1983 limited the power of discharge review boards to consider the character of discharges adjudged by courts-martial to determinations based on clemency.[48]

(3) Composition and Procedures. The ADRB is composed of one or more panels of five senior Army officers.[49] The senior member of the panel is the presiding officer.[50] An applicant must file a request for review of the character of a discharge or dismissal with the board within 15 years of issuance.[51] Applicants

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[45]10 U.S.C. § 1553(a).

[46]Dep't of Army, Reg. 15-180, Army Discharge Review Board, at A-39 (15 Oct. 1984) [hereinafter AR 15-180], (citing Dep't of Defense Directive 1332.28, Discharge Review Board (DRB) Procedures & Standards, at Encl. 4, para. A (Aug. 11, 1982) [hereinafter DOD Dir. 1332.28]).

[47]See 10 U.S.C. § 1553(a); AR 15-180, supra note 46, at A-7 (citing DOD Dir. 1332.28, at Encl. 2, para. A; Hodges v. Callaway, 499 F.2d 417, 421 (5th Cir. 1974)).

[48]Pub. L. No. 98-209, § 11(b), 97 Stat. 1407 (codified at 10 U.S.C. § 1553(a)).

[49]AR 15-180, supra note 46, para. 3c.

[50]Id.

[51]10 U.S.C. § 1553(a); AR 15-180, supra note 46, at A-9 (citing DOD Dir. 1332.28, at Encl. 3, para. A2).

are entitled to hearings before the board on request.[52] In each case properly before it, the board considers the propriety and equity of the character of the discharge or dismissal at issue, whether adjudged administratively or by court-martial (other than by general court-martial).[53] In every case granting or denying relief, the board must prepare a detailed statement of findings, conclusions, and reasons.[54] The board is not bound, however, by its decisions in prior cases.[55] Decisions of the ADRB are subject to review by the Secretary of the Army.[56] However, unlike the ABCMR, which can only make recommendations, the ADRB can render final decisions.[57]

(4) Necessity of Recourse to the ADRB. Although case law on the issue is relatively sparse, prior to Darby v. Cisneros, an application to the ADRB was generally required before a challenge to the character of a discharge or dismissal was lodged in the

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[52]28 U.S.C. § 1553(c); AR 15-180, supra note 46, at A-14 (citing DOD Dir. 1332.28, at Encl. 3, para. B3).

[53]AR 15-180, supra note 46, at A-39 (citing DOD Dir. 1332.28, at Encl. 4, para. A). But cf. Military Justice Act of 1983, Pub. L. No. 98-209, § 11(b), 97 Stat. 1407 (1983) (codified at 10 U.S.C. § 1553(a)) (discharges adjudged by courts-martial can only be reviewed for purposes of clemency).

[54]Urban Law Inst. v. Secretary of Defense, No. 76-0530 (D.D.C. Jan. 31, 1977) (settlement), cited in, Stichman, supra note 39, at 6001; AR 15-180, supra note 46, at A-32 to A-34 (citing DOD Dir. 1332.28, at Encl. 3, para. H).

[55]Strang v. Marsh, 602 F. Supp. 1565 (D.R.I. 1985).

[56]10 U.S.C. § 1553(b).

[57]Id. See AR 15-180, supra note 46, at A-29 (citing DOD Dir. 1332.28, at Encl. 3, para. G).

federal courts.[58] A claim for strictly equitable relief, such as a discharge upgrade, is precisely the type of APA claim over which Darby would preclude a federal court from imposing a jurisdictional exhaustion requirement.

d. Article 138, UCMJ.

(1) General. Article 138, UCMJ, provides a means by which servicemembers can seek redress for perceived wrongs caused by their commanding officers. Article 138 has an ancient lineage. Redress provisions existed in the Code of Articles of King Gustavus Adolphus of Sweden of 1621, the Articles of War of James II of England of 1688, and the British Articles of War of 1765, which were in force at the beginning of the American Revolutionary War.[59] America's first military codes, the Massachusetts Articles of War of April 1775 and the American Articles of War of June 30, 1775, contained similar provisions.[60] Thereafter, all of the Articles of War of the United States contained means by which soldiers could rectify wrongs committed by their commanders.[61] With the enactment of the UCMJ in 1950, the redress provisions became Article 138, which provides:

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[58]See, e.g., Michaelson v. Herren, 242 F.2d 693 (2d Cir. 1957); Pickell v. Reed, 326 F. Supp. 1086 (N.D. Cal.), aff'd, 446 F.2d 898 (9th Cir.), cert. denied, 404 U.S. 946 (1971).

[59]See W. Winthrop, Military Law & Precedents 908, 927-28, 937-38 (2d ed. 1920 reprint).

[60]Id. at 949, 954.

[61]See, e.g., Articles of War of 1806, arts. 34-35; Articles of War of 1874, arts. 29-30.

> Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.

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(2) Scope of Remedy. Although by its terms Article 138 seemingly provides redress for all wrongs committed by commanding officers, it is limited to grievances not rectifiable by other means. Where other statutes or regulations provide a review process, Article 138 generally is inappropriate.[62] For example, courts-martial, nonjudicial punishment, involuntary separations, filings of adverse information are all reviewable through other channels; thus, they are not subject to Article 138 relief.[63] Moreover, recourse to Article 138 is available only to members of the military on active duty and subject to the UCMJ.[64] Article 138 complaints cannot be filed by civilians or former servicemembers seeking relief for wrongs committed while they were on active duty.

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[62]Dep't of Army, Reg. 27-10, Military Justice, para. 20-5a (8 Aug. 1994).

[63]Id. para. 20-5b.

[64]Id. paras. 20-2, 2-4a.

(3) Procedure. Redress of wrongs under Article 138 involves a two-step process. First, the servicemember must make a written request for redress of the wrong to the commanding officer he believes wronged him.[65] If the commander does not grant relief, the soldier may then submit a complaint under Article 138, which goes to the officer exercising general court-martial jurisdiction for examination and action.[66] Regardless of whether redress is granted, the complaint is forwarded to Headquarters, Department of the Army, for review and, if necessary, further action.[67]

(4) Necessity of Recourse to Article 138. When available, servicemembers generally must avail themselves of the redress provided by Article 138 before seeking relief in the federal courts. The following case illustrates this requirement.

McGAW v. FARROW

472 F.2d 952 (4th Cir. 1973)

Before WINTER, BUTZNER and RUSSELL, Circuit Judges.

DONALD RUSSELL, Circuit Judge:

> The plaintiffs seek declaratory and injunctive relief in connection with the denial by the commander of the military base at Fort Eustis, Virginia, of their application to use the chapel facilities at such base for "a religious memorial service * * * for all Indo-China war dead." They describe themselves as persons "who are now, or, have been and will be, members of the United States

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[65] Id. paras. 20-3a(1), 20-6.

[66] Id. paras. 20-3a(1), 20-7 to 2-11.

[67] Id. para. 20-12

Army stationed at Fort Eustis, Virginia". It is their contention that the denial to them of the use of such facilities was "arbitrary and capricious * * * without any rational basis in fact and represented an abusive use of military authority", in violation of plaintiffs' constitutional right of free speech, peaceful assembly and the exercise of religious freedom. The defendants moved to dismiss the complaint and for summary judgment both on the procedural ground that plaintiffs were without standing and, substantively, on the ground that the action of the camp commander in denying the application was neither arbitrary nor capricious.

[The court first found that the district court lacked subject matter jurisdiction over the plaintiffs' claims.]

II.

There was a second basis for dismissal. Military procedures, as embodied in Section 938, 10 U.S.C., and as set forth in Army Regulations, provide a method of appeal from the action of the camp commander in this case. This administrative remedy within the procedures provided in the military administration system was admittedly known to the plaintiffs. It is well settled that, "Exhaustion of administrative remedies provided by the military service is a required predicate to relief in the civil courts." Before resorting to court action, the plaintiffs were accordingly obligated to exhaust the administrative remedy thus provided within the military system. They could not escape this obligation with the claim that they were not on "any level of technical equality as it applies to military law" with the officers to whom they had directed their application. The plaintiffs were not, by their own admission, novices in the field of military law. They conceded they knew of the right to appeal. At least one of the plaintiffs had exercised the right of appeal under the applicable statute and regulations. The complaint was accordingly properly dismissed for failure to exhaust administrative remedies.

Affirmed.[68]

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e. Other Administrative Remedies. In addition to the ABCMR, the ADRB, and Article 138, servicemembers have a number of other administrative remedies. These range from clemency,[69] to inspector general complaints,[70] to various "open door" polices and unit "hot lines." Although little case law mandates recourse to these remedies,[71] they should be raised by military attorneys. If nothing else, the remedies demonstrate that the military provides means through which servicemembers can voice complaints.

## 5.3 Exceptions to the Exhaustion Doctrine.

a. Introduction. The federal courts have created a number of exceptions to the exhaustion requirement.[72] Generally, exhaustion is not required if the

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[68]See also Woodrick v. Hungerford, 800 F.2d 1413, 1418 (5th Cir. 1986); Schatten v. United States, 419 F.2d 187, 191 (6th Cir. 1969); United States ex rel. Berry v. Commanding General, 411 F.2d 822, 825 (5th Cir. 1969); Ayala v. United States, 624 F. Supp. 259, 262-63 (S.D.N.Y. 1985); Adkins v. United States Navy, 507 F. Supp. 891 (S.D. Tex. 1981); Casey v. Schlesinger, 382 F. Supp. 1218, 1220-21 (N.D. Okl. 1974); Schmidt v. Laird, 328 F. Supp. 1009 (E.D.N.C. 1971).

[69]See 10 U.S.C. §§ 874, 951-54

[70]See Dep't of Army, Reg. 20-1, Inspector General Activities and Procedures, ch. 6 (56 Mar. 1994).

[71]See, e.g., Kaiser v. Sec'y of Navy, 542 F. Supp. 1263 (D. Colo. 1982) (recourse to Navy Clemency Board not required because relief provided is a matter of administrative grace).

[72]See Guitard v. United States Sec'y of Navy, 967 F.2d 737, 741 (2d Cir. 1992).

administrative remedies cannot provide adequate relief, if recourse to the remedies would be futile or cause irreparable injury, and if the only questions at issue are purely legal in nature. Courts have also excused plaintiffs from seeking administrative relief in class actions when administrative remedies can provide only piecemeal relief to a limited part of the class.

b. Inadequacy/Futility. An administrative remedy is inadequate if it cannot afford the relief the plaintiff seeks from the court. For example, a servicemember fighting an involuntary separation need not first seek review of the case in the ADRB, since the discharge review board lacks the power to enjoin a discharge.[73] It can only upgrade the character of discharges already issued.[74] The futility exception, on the other hand, assumes that the relief sought by the plaintiff is within the power of the administrative remedy to afford, but that the relief will not be afforded for one reason or another. The following case illustrates both the inadequacy and futility exceptions to the doctrine.

VON HOFFBURG v. ALEXANDER

615 F.2d 633 (5th Cir. 1980)

Before TUTTLE, FAY and THOMAS A. CLARK, Circuit Judges.

FAY, Circuit Judge:

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[73]Hodges v. Callaway, 499 F.2d 417, 421 (5th Cir. 1974). See also McCarthy v. Madigan, 112 S. Ct. 1081 (1992) (federal prisoner seeking money damages under Bivens theory need not exhaust remedies where money damages are not available in administrative process).

[74]10 U.S.C. § 1553(a).

Plaintiff Marie Von Hoffburg was honorably discharged from the United States Army because of her alleged homosexual tendencies. Just prior to her discharge, she instituted this action against the Secretary of the Army and others, seeking a declaratory judgment, injunctive relief and monetary damages. The United States District Court for the Middle District of Alabama dismissed the complaint without prejudice because plaintiff had failed to exhaust her administrative remedies.

Plaintiff now appeals the dismissal of her action, claiming that exhaustion of administrative remedies is futile in this case, and that the available administrative procedures and remedies are inadequate to provide her the relief she seeks.

We hold that plaintiff's case does not fit within the futility exception to the administrative exhaustion requirement. We affirm the dismissal without prejudice of plaintiff's claims for declaratory and injunctive relief because those claims should be reviewed, in the first instance, by the military's own internal administrative system. We reverse, however, the dismissal of plaintiff's claim for monetary damages, since such relief is not within the scope of remedies which the Army is empowered to award. We direct the district court to vacate the order of dismissal of the money damage claim and to hold the cause in abeyance until plaintiff has completed the administrative appeal of her other claims.

. . . .

II. The Exhaustion of Administrative Remedies Doctrine and Its Exceptions

A. Exhaustion in General

Under the rule requiring exhaustion of administrative remedies prior to judicial review, a party may not ask a court to rule on an adverse administrative determination until he has availed himself of all possible remedies within the agency itself. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 58

S. Ct. 459, 82 L.Ed. 638 (1938). The major purpose of the exhaustion doctrine is to prevent the courts from interfering with the administrative process until it has reached a conclusion. In McKart v. United States, 395 U.S. 185, 89 S. Ct. 1657, 23 L.Ed.2d 194 (1969) the Supreme Court noted that because the administrative agency is created as a separate entity and invested with certain powers and duties, the courts should not interfere with an agency until it has completed its action or clearly exceeded its jurisdiction. Id. at 194, 89 S. Ct. at 1662. The Court enumerated the practical notions of judicial efficiency which are served by the exhaustion doctrine. A complaining party may be successful in vindicating his rights in the administrative process; if he is required to pursue his administrative remedies, the courts may never have to intervene. When administrative channels are bypassed, subsequent judicial review may be hindered by the litigant's failure to allow the agency to make a factual record, exercise its discretion, or apply its expertise. In addition, notions of administrative autonomy require that an agency be given the opportunity to discover and correct its own errors before a court is called to render judgment. Finally, it is possible that frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures. 395 U.S. at 194-95, 89 S. Ct. at 1662-1663.

B. Exhaustion in the Military Context

The exhaustion doctrine has been applied with some irregularity in decisions of the various circuits; however, this court has consistently held that a plaintiff challenging an administrative military discharge will find the doors of the federal courthouse closed pending exhaustion of available administrative remedies. Hodges v. Callaway, 499 F.2d 417 (5th Cir. 1974); accord, Davis v. Secretary of the Army, 440 F.2d 817 (5th Cir. 1971); Stanford v. United States, 413 F.2d 1048 (5th Cir. 1969); Tuggle v. Brown, 362 F.2d 801 (5th Cir.), cert. denied, 385 U.S. 941, 87 S. Ct. 311, 17 L.Ed.2d 220 (1966); McCurdy v.

Zuckert, 359 F.2d 491 (5th Cir.), cert. denied, 385 U.S. 903, 87 S. Ct. 212, 17 L.Ed.2d 133 (1966). Although federal courts are not totally barred from barracks and billets, "a court should not review internal military affairs in the absence of (a) an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations, and (b) exhaustion of available intraservice corrective measures." Mindes v. Seaman, 453 F.2d 197, 201 (5th Cir. 1971) (emphasis added).

The strict application of the exhaustion doctrine in military discharge cases serves to maintain the balance between military authority and the power of federal courts. "[J]udges are not given the task of running the Army." Orloff v. Willoughby, 345 U.S. 83, 93-94, 73 S. Ct. 534, 540, 97 L.Ed. 842 (1953). Because the military constitutes a specialized community governed by a separate discipline from that of the civilian, orderly government requires that the judiciary scrupulously avoid interfering with legitimate Army matters. In the military context, the exhaustion requirement promotes the efficient operation of the military's judicial and administrative systems, allowing the military an opportunity to fully exercise its own expertise and discretion prior to any civilian court review. Hodges v. Callaway, 499 F.2d 417 (5th Cir. 1974).

C. Exceptions to the Exhaustion Requirement

Notwithstanding the strong policies favoring the exhaustion of administrative remedies in military cases, several established exceptions to the exhaustion doctrine have been held applicable to military discharge actions. First, only those remedies which provide a genuine opportunity for adequate relief need be exhausted. Hodges v. Callaway, 499 F.2d 420-21 (5th Cir. 1974). Second, exhaustion is not required when the petitioner may suffer irreparable injury if he is compelled to pursue his administrative remedies. Rhodes v. United States, 574 F.2d

1179, 1181 (5th Cir. 1978). Third, the doctrine will not apply when administrative appeal would be futile (the futility exception). See generally 5 B. Mezines, J. Stein, J. Gruff, Administrative Law § 49.02[4] (1979). Finally, exhaustion may not be required, under some precedents, if the plaintiff has raised a substantial constitutional question. See Downen v. Warner, 481 F.2d 642, 643 (9th Cir. 1973). But see Stanford v. United States, 413 F.2d 1048 (5th Cir. 1969).

In the instant case, plaintiff asserts that it would be an act of utter futility to pursue the administrative remedies available to her. She also claims that the applicable administrative procedures and remedies are manifestly inadequate to provide the relief she seeks. Our task is to determine whether plaintiff's case does in fact fit within the futility or inadequacy exceptions to the exhaustion doctrine, allowing her to circumvent the established administrative procedures for review of military discharges.

III. Does This Case Fall Within The Exceptions To The Exhaustion Requirement?

Plaintiff's administrative remedy is set forth in 10 U.S.C. § 1552 (1976), which provides that the Secretary of the Army, acting through the Army Board for Correction of Military Records (ABCMR), may correct any military record when he considers it necessary to correct an error or remove an injustice. The implementing regulation requires the ABCMR, composed of civilian employees of the Department of the Army, "to consider all applications properly before it for the purpose of determining the existence of an error or an injustice." 32 C.F.R. § 581.3(b)(2) (1979).

A. The Futility Exception

Plaintiff made no attempt to appeal her discharge to the ABCMR prior to instituting this suit. She contends that such efforts would be futile because of (1) the 1975 Department of Defense (DOD) policy doctrine on homosexuals within the Armed Forces, (2) the

Secretary of the Army's promulgation of paragraph 13-2e of AR 635-200, and (3) the rejection by the ABCMR of similar challenges.

We find plaintiff's futility arguments unpersuasive. First, there is a viable possibility that the ABCMR may determine that Marie Von Hoffburg is not a "homosexual" within the meaning of the DOD's policy directive. Similarly, the reviewing board may determine that she does not possess the "homosexual tendencies" referred to in paragraphs 13-2e and 13-5b(5) of AR 635-200. Quite possibly, the Army could adopt a construction of the contested regulation which would moot the constitutional question in the case.

Clearly the Army ought to be the primary authority for the interpretation of its own regulations. As the district court pointed out, "[t]o date only an Elimination Board composed of five local officers has heard and evaluated the complex issues here involved. The Army should be given the opportunity to fully evaluate its position and, within those parameters, review the decision of the Elimination Board." Memorandum Opinion, Record at 660. If the outcome of the administrative proceedings is adverse to the plaintiff, and she seeks judicial review, the court will at least have a definitive interpretation of the regulation and an explication of the relevant facts from the highest administrative body in the Army's own appellate system. Hodges v. Callaway, 499 F.2d 417, 422 (5th Cir. 1974).

Acknowledging that the ABCMR could afford her some of the relief she seeks, plaintiff points out that even if the board were to find the Army's "homosexual tendencies" regulation unconstitutional or inapplicable to her, and were to recommend her reinstatement to active duty, the Secretary of the Army could overrule that recommendation by providing explicitly stated policy reasons. See Hodges v. Callaway, 499 F.2d 417, 423 (5th Cir. 1974). Since the Secretary has already set forth his policy statement by promulgating paragraph 13-2e of AR 635-200, plaintiff argues, it is certain that he would overrule any board

recommendation and reinstatement. In essence plaintiff contends that the policy statement contained in paragraph 13-2e binds the Secretary to require discharge regardless of any ABCMR findings. To accept this argument would necessarily render the ABCMR powerless to act on any matter arising under any regulation promulgated by the Secretary of the Army; such a result clearly frustrates the purposes of administrative review by the ABCMR.

> [T]o base an exception to the exhaustion requirement on the fact that the final administrative decision is subject to the discretionary power of the Secretary would in effect turn the exhaustion doctrine on its head. Exhaustion is required in part because of the possibility that administrative review might obviate the need for judicial review. That the administrative process might not have this effect is not usually a reason for bypassing it. And since the Service Secretary always has the final say over decisions by both the DRB and the BCMR, appellant's futility reasoning would mean that exhaustion of intraservice remedies should always be excused. The administrative remedy available to grievants like appellant . . . may offer cold comfort and small consolation, but it is surely beyond our authority to permit the exceptions to the exhaustion doctrine to swallow the rule.

Hodges v. Callaway, 499 F.2d 417, 423 (5th Cir. 1974).

Plaintiff further asserts that the ABCMR's rejection of legal challenges similar to hers clearly establishes the futility of an administrative appeal. Plaintiff cites the ABCMR's denial of Miriam Ben-Shalom's petition for the correction of her records as evidence that a challenge to the constitutionality of the "homosexual tendencies, desires or interests" standard of paragraph 13-5b(5) has

already been considered and rejected in an administrative appeal under 10 U.S.C. § 1552. See Record at 645-54. We note, however, significant distinctions between the two cases. Miriam Ben-Shalom is a self-professed homosexual who has publicly proclaimed her homosexual tendencies. Having brought herself clearly within the proscription of the regulation she was challenging, Ben-Shalom could not effectively present the vagueness argument raised by plaintiff here. The instant case, on the other hand, presents unique questions of fact and regulatory interpretation. Whether Marie Von Hoffburg's alleged marriage and presumed sexual contacts with a biologically female transsexual fall within the provisions of AR 635-200 pertaining to homosexuals is an issue which should be determined by the appropriate authorities after full administrative review. We agree with the district court that the treatment of homosexuals in any branch of the armed forces is a matter of great concern and that the instant case is one in which the military should be given a full opportunity to exercise its own expertise and rectify its own errors. See Champagne v. Schlesinger, 506 F.2d 979, 984 (7th Cir. 1974) (exhaustion appropriate even if the meaning of the regulation appears reasonably clear).

B. The Inadequacy Exception

In addition to arguing that exhaustion of her administrative remedies would be futile, plaintiff asserts that exhaustion is not required in this case because the available administrative remedies are inadequate to grant her the relief she seeks. More specifically, she alleges that neither the ABCMR nor the Secretary of the Army has the authority to award damages to compensate persons who have been illegally arrested or searched by military officials. Plaintiff also points out that no formal discovery or subpoena procedures are available to an applicant before the ABCMR.

Plaintiff's inadequacy argument has some merit. As we stated in Hodges v. Callaway, "a plaintiff obviously need not appeal to the particular DRB [Discharge Review Board] or

BCMR [Board for Correction of Military Records] if the relief requested is not within the authority or power of those bodies to grant." 499 F.2d at 420-21. Although the ABCMR can change plaintiff's name on her official military records, restore her basic allowance for quarters, reinstate her to active duty, and expunge all record of her elimination proceeding, it cannot award money damages. See 10 U.S.C.§ 1552 (1976); 32 C.F.R. § 581.3 (1979). Even if the Army could award such damages, the lack of full discovery and subpoena procedures would make fair litigation of plaintiff's damage claims impossible.

It is clear that appeal to the ABCMR cannot adequately resolve plaintiff's monetary damage claim. Nevertheless, her request for money damages does not preclude application of the exhaustion requirement to her other claims. In Sanders v. McCrady, 537 F.2d 1199 (4th Cir. 1976), the plaintiff argued that he should not be required to exhaust his ABCMR remedy because his claim for money damages prevented the ABCMR from affording full relief. The court rejected this argument, stating that the board's inability to grant Sanders full relief by awarding damages and attorney's fees was not a controlling factor in determining whether Sanders was required to resort to his administrative remedies before seeking judicial relief. The court found that the inconvenience to Sanders and the postponement of his opportunity to obtain damages and fees were outweighed by the considerations of efficiency and agency expertise underlying the exhaustion requirement. 537 F.2d at 1201.

We find the reasoning in Sanders to be persuasive. All but one of plaintiff's claims for relief can be satisfied by resort to the military's administrative channels. The mere inclusion of a monetary damage claim should not deprive the Army of a chance to review its own rules and regulations prior to judicial intervention. We note, too, the admonition of the second circuit in Plano v. Baker, 504 F.2d 595, 599 (2d Cir. 1974), that "a boilerplate claim for damages will not automatically render the administrative remedy inadequate.

Where the relief claimed is the only factor that militates against the application of the exhaustion requirement, the complaint should be carefully scrutinized to ensure that the claim for relief was not asserted for the sole purpose of avoiding the exhaustion rule." While we do not attribute such a motive to the plaintiff before us, we do feel that to allow her to bypass administrative channels because of her monetary damage claim would seriously undermine the utility of the exhaustion of remedies doctrine.

IV. Conclusion

We hold that plaintiff must exhaust her administrative remedies prior to seeking judicial review of her honorable discharge from the Army. We therefore affirm the district court's dismissal of those claims which can be resolved through the Army's internal administrative procedure.

Plaintiff's claim for monetary damages cannot be satisfied by the available administrative remedies; she must resort to the courts for that form of relief. "Practical notions of judicial efficiency" suggest that court review of plaintiff's damage claim be withheld until the military has completed its review of plaintiff's other claims. See McKart v. United States, 395 U.S. 194-95, 89 S. Ct. 1662-1663 (1969). We hesitate, however, to affirm the dismissal of the damage claim for fear of foreclosing plaintiff's opportunity to seek such relief after completion of her military appeal. To avoid the potential bar of a statute of limitations, we remand the case to the district court with directions to vacate the order of dismissal of the claim for monetary damages. We further direct the court to hold the claim in abeyance pending the administrative resolution of plaintiff's remaining claims. See Concordia v. United States Postal Service, 581 F.2d 439, 444 (5th Cir. 1978).

AFFIRMED IN PART; REVERSED AND REMANDED IN PART WITH DIRECTIONS.[75]

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c. Irreparable Injury. If by ordering exhaustion of administrative remedies the plaintiff will be irreparably harmed, the courts will not require exhaustion and will proceed to the merits of the claim.

HICKEY v. COMMANDANT

461 F. Supp. 1085 (E.D. Pa. 1978)

OPINION

LUONGO, District Judge.

> Thomas R. Hickey, a seaman currently assigned to the Naval Support Activity at the Philadelphia Naval Base, petitions this court for a writ of habeas corpus. See generally 28 U.S.C. § 2241 (1976). He challenges as violative of Navy regulations and the due process clause his call to two years of active duty in an enlisted status, a commitment incurred when he was disenrolled from the Naval Reserve Officers Training Corps (NROTC) Program at Villanova University in December 1976. In addition, he alleges that under applicable Navy regulations his high blood pressure disqualifies him for service; consequently, he asserts that his certification by the Navy physician as medically fit for active duty was also in violation of the regulations. On September 13, 1978, I ordered the respondents to show

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[75] See also Cooper v. Marsh, 807 F.2d 988 (Fed. Cir. 1986) (inadequacy); Sanders v. McCrady, 537 F.2d 1199 (4th Cir. 1976) (inadequacy); Bradley v. Laird, 449 F.2d 898 (10th Cir. 1971) (futility); Schaefer v. Cheney, 725 F. Supp. 40 (D.D.C. 1989); Ayala v. United States, 624 F. Supp. 259, 263-64 (S.D.N.Y. 1985) (inadequacy); Watkins v. United States Army, 551 F. Supp. 212 (W.D. Wash. 1982) (futility), rev'd on other grounds, 721 F.2d 687 (9th Cir. 1983).

cause why the writ should not be granted, and a hearing was held on September 28, 1978. After careful consideration of the issues raised at the hearing and elaborated by the parties in their memoranda of law, I am persuaded that the writ must be denied.

. . . .

The Navy's second contention--that Hickey's failure to exhaust his administrative remedies renders this action premature--is somewhat more problematic. The Navy argues that appeal to the Board for Correction of Naval Records (BCNR) is a necessary prerequisite to judicial review. See generally 10 U.S.C. § 1552 (1976); 32 C.F.R. § 723 (1977). The threshold question, of course, is whether resort to the BCNR is an appropriate remedy under the circumstances of this case. . . .

. . . .

[S]everal factors in the case before me militate against abstention, at least with respect to the challenge to the initial activation order. The most obvious is the delay involved in an appeal to the BCNR. As the Navy conceded during the hearing, proceedings before the Board could take as long as 18 months before the claim is finally resolved. This delay bespeaks the potential for irreparable injury to the petitioner who is currently fulfilling the active duty obligation here challenged. This consideration differentiates Hickey's position from the paradigm case in which resort to the service's Board for Correction of Military Records was required as a prerequisite to judicial review. See Hayes v. Secretary of Defense, 169 U.S.App.D.C. 209, 515 F.2d 668, 674-75 & n.30 (1975). Hickey seeks to obtain rather than to prevent a discharge from the service. Refraining from judicial action in the latter situation rarely involved the prospect of irreparable injury. Moreover, if the party seeking to remain in the service were discharged before the Board could review the claim, the Board could grant the serviceman full retroactive relief. See id. at 674 n.30. Here, however, even if the Board

were to decide in Hickey's favor, the only relief forthcoming would be an honorable discharge. The Board could not adequately compensate Hickey for the time spent in active enlisted service pursuant to an order that was issued [The court, while the litigation dismiss the plaintiff's complaint based on his failure to exhaust administrative remedies, ruled in the Navy's favor on the merits of the claim.][76]

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d. Purely Legal Issues. If the issues raised by a plaintiff's complaint are exclusively legal in character, courts may not require exhaustion.[77] Courts consider themselves, not the military's administrative remedies, to be the proper forums for such issues.

DOWNEN v. WARNER

481 F.2d 642 (9th Cir. 1973)

Before BROWNING, DUNIWAY, and ELY, Circuit Judges

OPINION

ELY, Circuit Judge:

Gail Waugh Downen served as a regular officer in the United States Marine Corps until her marriage to Robert E. Downen. Since

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[76]See also Tartt v. Sec'y of Army, 841 F. Supp. 236, 240, n.1 (N.C. Ill. 1993); Goodrich v. Marsh, 659 F. Supp. 855, 856-57 (W.D. Ky. 1987). But see Martin v. Stone, 759 F. Supp. 19, 20 (D.D.C. 1991) (fact that separated cadet is falling behind peers at U.S. Military Academy during pendency of challenge to separation does not present the kind of irreparable harm that warrants premature judicial intervention in military personnel action).

[77]See, e.g., Committee for G.I. Rights v. Callaway, 518 F.2d 466, 474 (D.C. Cir. 1975). But cf. Ayala v. United States, 624 F. Supp. 259, 263 (S.D.N.Y. 1985); Benvenuti v. Sec'y of Defense, 587 F. Supp. 348 (D.D.C. 1984) (constitutional issues reviewable by ABCMR).

Mr. Downen was then the father of two children, ages thirteen and fifteen, Mrs. Downen was on January 31, 1969, discharged from the service pursuant to a Corps regulation that terminates the commission of any female officer who becomes "the step-parent of a child under the age of 18 years who is within the household of the woman for a period of more than thirty days a year. . . ." 32 C.F.R. § 714.1(d)(3)(i)(c); 32 C.F.R. § 730.61(c)(2)(iii).

In December of 1970, Mrs. Downen complained in District Court that the regulation compelling her separation from the Corps unconstitutionally discriminated against her solely by reason of her sex in violation of the due process clause of the Fifth Amendment. She sought a judgment (1) declaring that her discharge was unconstitutional, and (2) ordering reinstatement along with back pay and allowance.

The District Court declared that Mrs. Downen should first have sought administrative relief through the Board for Correction of Naval Records. Her failure, in the court's view, to exhaust this administrative remedy deprived the court of jurisdiction and the action was dismissed.

The judicially-created exhaustion requirement is intended to facilitate the development of a full factual record, to encourage the exercise of administrative expertise and discretion, and to promote judicial and administrative efficiency. See McKart v. United States, 395 U.S. 185, 194-195, 89 S. Ct. 1657, 23 L.Ed.2d 194 (1969); United States v. Nelson, 476 F.2d 254 (9th Cir. 1973); United States v. Hayden, 445 F.2d 1365, 1375 n.16 (9th Cir. 1971); Wills v. United States, 384 F.2d 943, 945 (9th Cir. 1967). The doctrine is not an absolute bar to judicial consideration and where justification for invoking the doctrine is absent, application is unwarranted. See id. Resolving a claim founded solely upon a constitutional right is singularly suited to a judicial forum and clearly inappropriate to an administrative board. Mrs. Downen's

complaint rests solely upon the resolution of her constitutional claim. Accordingly, Mrs. Downen was not barred from District Court through her failure to exhaust administrative remedies.

[The Court of Appeals remanded the case to the district court for resolution of the plaintiff's complaint on its merits.]

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Where the administrative agency's decision may moot the constitutional question, or where it may provide a factual matrix necessary to the resolution of the constitutional or legal question, exhaustion of the administrative remedy is necessary.[78]

e. Avoid Piecemeal Relief. Especially in class actions, where administrative remedies can only afford relief on an individual basis, exhaustion may not be required. In such cases, immediate judicial review may be a more efficient and economical means of disposing of the case.[79]

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[78]Robbins v. Lady Baltimore Foods, 868 F.2d 258, 263-264 (7th Cir. 1989); Republic Industries v. Central Pa. Teamsters, 693 F.2d 290, 296 (3d Cir. 1982).

[79]See, e.g., Committee for G.I. Rights v. Callaway, 518 F.2d 466, 474 (D.C. Cir. 1975); Walters v. Sec'y of Navy, 533 F. Supp. 1068 (D.D.C. 1982), rev'd on other grounds, 725 F.2d 107 (D.C. Cir. 1983)

# CHAPTER 6

# REVIEWABILITY

## 6.1 General.

a. Early Cases: Presumption of Nonreviewability. Until the 20th century, the federal courts employed a strong presumption that decisions of the Executive Branch were not reviewable. For example, in Decatur v. Paulding,[1] Mrs. Susan Decatur, widow of Commodore Stephen Decatur, challenged a determination made by the Secretary of the Navy that she was not entitled to receive a statutory pension. Because the Secretary of the Navy was charged with implementing the pension statute and was required to exercise his judgment and discretion in doing so, the Court refused to review his determination.

> The court could not entertain an appeal from the decision of one of the secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion or judgment. . . .
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> . . . .
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> The interference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief; and we

[1] 39 U.S. (14 Pet.) 497 (1840).

> are quite satisfied that such a power was never intended to be given to them.[2]

b. Abrogation of the Presumption of Nonreviewability. In 1902, the Supreme Court reversed the presumption of nonreviewability for most executive activities in American School of Magnetic Healing v. McAnnulty.[3] McAnnulty involved a challenge to an administrative determination of the Postmaster General that the plaintiff was using the mails to engage in fraudulent business practices in violation of federal law. As a consequence, the Postmaster General ordered all mail addressed to the plaintiff returned to its senders. The plaintiff filed suit seeking to enjoin enforcement of the order. Reversing the lower court's dismissal of the complaint, the Supreme Court held that the plaintiff's claim was reviewable:

> That the conduct of the post office is a part of the administrative department of the government is entirely true, but that does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved by any action by the head, or one of the subordinate officials, of that Department,

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[2]Id. at 515-16. See Keim v. United States, 177 U.S. 290 (1900); Hadden v. Merritt, 115 U.S. 25 (1885); Dorsheimer v. United States, 74 U.S. (7 Wall.) 166 (1869); United States v. Eliason, 41 U.S. (16 Pet.) 291 (1842). 5 K. Davis, Administrative Law Treatise 254 (2d ed. 1984); Peck, The Justices and the Generals: The Supreme Court and Judicial Review of Military Activities, 70 Mil. L. Rev. 1, 5-7 (1975); Sherman, Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement, 55 U. Va. L. Rev. 483, 490 (1969).

[3]187 U.S. 94 (1902).

> which is unauthorized by the statute under which he assumes to act. The acts of all its officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief.[4]

Thereafter, the Court found reviewability in many cases involving the federal government.[5]

Notwithstanding the broadening scope of reviewability in litigation involving the federal government, however, the courts continued to adhere to a presumption of nonreviewability in military cases for another half century.[6] The presumption of nonreviewability in military cases was finally overcome in Harmon v. Brucker.[7] In Harmon, the Court held that it had jurisdiction to determine whether the Secretary of the Army exceeded his statutory authority in issuing to the plaintiffs "less than honorable" discharges for preinduction activities. It found that the plaintiffs

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[4]Id. at 108.

[5]Davis, supra note 2, at 255; Sherman, supra note 2, at 490.

[6]See, e.g., Orloff v. Willoughby, 345 U.S. 83 (1953); Patterson v. Lamb, 329 U.S. 539 (1947); Denby v. Berry, 263 U.S. 29 (1923); United States ex rel. Creary v. Weeks, 259 U.S. 336 (1922); United States ex rel. French v. Weeks, 259 U.S. 326 (1922); Reaves v. Ainsworth, 219 U.S. 296 (1911). See also infra § 6.3. See generally Peck, supra note 2, at 9-16.

[7]355 U.S. 579 (1958).

had alleged "judicially cognizable injuries."[8] Although the federal courts continue to express reluctance to review military activities,[9] many of these activities, like those of other federal agencies, are presumptively reviewable.[10]

c. Current Law: Presumption of Reviewability with Exceptions. While federal administrative actions are now presumptively reviewable,[11] the presumption is rebuttable.[12] Executive branch determinations in general, and military decisions in particular, are nonreviewable when Congress has proscribed review or when prudential considerations militate in favor of judicial abstention. In other words, nonreviewability is a doctrine based on a combination of congressionally-imposed restrictions and judicial self-restraint. An issue may not be reviewed when Congress has statutorily precluded judicial review or has granted a broad range of discretion to an executive agency in a particular field. These limits on reviewability are prescribed by the Administrative Procedure Act [APA].[13]

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[8]Id. at 582. See Peck, supra note 2, at 31-33; Sherman, supra note 2, at 491; Suter, Judicial Review of Military Administrative Decisions, 6 Houston L. Rev. 55, 56 (1968).

[9]See infra § 6.3.

[10]See McDaniel, The Availability and Scope of Judicial Review of Discretionary Military Administrative Decisions, 108 Mil. L. Rev. 89, 115-16 (1985).

[11]Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967).

[12]Block v. Community Nutrition Inst., 467 U.S. 340, 349 (1984).

[13]5 U.S.C. § 701(a).

An issue may also be nonreviewable if its resolution would cause unwarranted interference with the military function and its resolution involves the application of expertise unique to the military. These limits of reviewability in military cases are imposed by federal courts. The principal doctrine applied by these courts is the so-called "Mindes test" created by the United States Court of Appeals for the Fifth Circuit.[14] This chapter discusses the concepts of nonreviewability under the APA and the "Mindes test."

d. Meaning of Nonreviewability. When we say an issue is nonreviewable, we do not mean that the court lacks the basic power to decide the controversy.[15] The court may have technical subject-matter jurisdiction and the dispute may be justiciable. Nonetheless, the courts may deem it inadvisable to decide a particular issue either because of congressional preclusion or prudential considerations. The question is said to be nonreviewable. Some confusion may also arise because the doctrine of nonreviewability and the political question prong of justiciability are similar and often used interchangeably.[16] Some differences exist, however, between the two concepts. Nonjusticiable political questions are usually "very broad or vague" and do "not arise from a specific injury or from any specific unlawful conduct. Thus, the very depth of the complaint

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[14]Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971).

[15]Comment, Federal Judicial Review of Military Administrative Decisions, 51 Geo. Wash. L. Rev. 612, 613 (1983) [hereinafter Comment, Federal Judicial Review].

[16]Peck, supra note 2, at 61; see, e.g., Doe v. Alexander, 510 F. Supp. 900 (D. Minn. 1981).

makes it difficult for a court to provide relief without intrusion into discretionary functions within the realm of the President or Congress."[17] The doctrine of nonreviewability, by contrast, "may preclude review even of very specific injuries."[18] Army litigators will often argue the concepts of nonjusticiability and nonreviewability together, urging the court first to find a question nonjusticiable or, if justiciable, nonreviewable.

## 6.2 Reviewability Under the Administrative Procedure Act (APA).

a. Applicability to the Military. The APA is applicable to the armed forces except that it does not encompass courts-martial and military commissions or military authority exercised in the field in time of war or in occupied territory.[19] The legislative history of the APA clearly supports this view when it states:

> The committee feels that it has avoided the mistake of attempting to oversimplify the measure. It has therefore not hesitated to state functional classifications and exceptions where those could be rested upon

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[17]Peck, supra note 2, at 59.

[18]Id. at 60.

[19]5 U.S.C. § 701(a). See Dronenberg v. Zech, 741 F.2d 1388, 1390 (D.C. Cir. 1984); Beller v. Middendorf, 632 F.2d 788, 796-97 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981); Jaffee v. United States, 592 F.2d 712, 718-17 (3d Cir.), cert. denied, 441 U.S. 961 (1979); Ornato v. Hoffman, 546 F.2d 10, 14 (2d Cir. 1976); McDaniel, supra note 10, at 94-96. But see Suter, supra note 8, at 57-60 (APA should not apply to military).

> firm grounds. In so doing, it has been the undeviating policy to deal with types of functions as such and in no case with administrative agencies by name. Thus certain war and defense functions are exempted, but not the War or Navy Departments in the performance of their own functions.[20]

b. Reviewability Under the APA.

(1) General. The APA's provisions for judicial review are found in 5 U.S.C. §§ 701-706. The Act codified the presumption of reviewability of federal administrative activities.[21] Under the APA, any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . is entitled to judicial review thereof."[22] The federal courts give this provision a "hospitable interpretation" in favor of review.[23] Indeed, agency actions are reviewable under the APA unless another statute precludes judicial review or the agency action is committed to agency discretion by law.[24] These two

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[20]S. Rep. No. 752, 79th Cong., 1st Sess. 5 (1945), quoted in McDaniel, supra note 10, at 95.

[21]Davis, supra note 2, §§ 28:4, 28:5.

[22]5 U.S.C. § 702.

[23]Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967), quoting Shaughnessy v. Pedreiro, 349 U.S. 48, 51 (1955). See also Clarke v. Securities Indus. Ass'n, 107 S. Ct. 750, 755 (1987); Morris v. Gressette, 432 U.S. 491, 501 (1977); Dunlop v. Bachowski, 421 U.S. 560, 567 (1975); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971); Rusk v. Cort, 369 U.S. 367, 379-80 (1962).

[24]5 U.S.C. § 701(a).

exceptions to APA review--"statutory preclusion" and "committed to agency discretion by law"--are considered next.

(2) "Statutory Preclusion." An agency action is not reviewable under the APA to the extent another statute "precludes judicial review."[25] While few statutes expressly preclude judicial review, on occasion the federal courts will discern an "implied statutory preclusion of review."[26] Absent an explicit proscription against review, "[w]hether and to what extent a particular statute precludes judicial review is determined . . . from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved."[27] Where Congress has not expressly barred review, the agency bears the burden of overcoming the presumption of reviewability by demonstrating that a particular statute or statutory scheme prohibits judicial intervention. "[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review."[28] The presumption favoring review may be overcome, however, by

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[25]5 U.S.C. § 701(a)(1).

[26]Investment Annuity, Inc. v. Blumenthal, 609 F.2d 1, 8 (D.C. Cir. 1979), cert. denied, 446 U.S. 981 (1980).

[27]Block v. Community Nutrition Inst., 467 U.S. 340, 345 (1984). See Clarke, 107 S. Ct. at 758; Morris, 432 U.S. at 501; Ludecke v. Watkins, 335 U.S. 160, 16365 (1948); Switchmen's Union of North America v. National Mediation Bd., 320 U.S. 297, 301 (1943); Note, Statutory Preclusion of Judicial Review under the Administrative Procedure Act, 1976 Duke L.J. 431, 447-49.

[28]Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967), quoting Rusk v. Cort, 369 U.S. 367, 380 (1962). See Dunlop v. Bachowski, 421 U.S. 560, 567 (1975).

"a reliable indicator of congressional intent."[29] Examples of statutes held to preclude judicial review in areas of importance to the military are the Military Claims Act,[30] and the Civil Service Reform Act's performance appraisal system.[31]

(3) "Committed to Agency Discretion by Law."

(a) General. In the absence of specific statutory preclusion of judicial review, an agency action is nonreviewable under the APA only if that action has been "committed to agency discretion by law."[32] That an agency may exercise some discretion over a particular activity is not enough to bar review since § 706(2)(A) of the APA empowers federal courts to review agency actions for an "abuse of discretion."[33] Instead, the agency must have broad unguided discretionary powers over the challenged activity.[34] Thus, the Supreme Court

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[29]Block, 467 U.S. at 349. See Dellums v. Smith, 797 F.2d 817, 822-23 (9th Cir. 1986); Ruff v. Hodel, 770 F.2d 839, 840 (9th Cir. 1985); Rhodes v. United States, 760 F.2d 1180, 1183 (11th Cir. 1985).

[30]10 U.S.C. §§ 2733, 2735. See Schneider v. United States, 27 F.3d 1327 (8th Cir. 1994), cert. denied, 115 S. Ct. 723 (1995); Poindexter v. United States, 777 F.2d 231 (5th Cir. 1985); LaBash v. United States Dep't of the Army, 668 F.2d 1153 (10th Cir.), cert. denied, 456 U.S. 1008 (1982).

[31]5 U.S.C. §§ 4301-4305, 5401-5405. See Veit v. Heckler, 746 F.2d 508 (9th Cir. 1984).

[32]5 U.S.C. § 701(a)(2).

[33]See McDaniel, supra note 10, at 97-106.

[34]Local 2855, AFGE v. United States, 602 F.2d 574 (3d Cir. 1979). Cf. Robbins v. Reagan, 780 F.2d 37, 45 (D.C. Cir. 1985) ("The mere fact that a statute grants broad (continued...)

has held that judicial review of administrative actions is barred only "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'"[35] This exception to review is a "very narrow" one.[36]

(b) Scope of the "Committed to Agency Discretion" Exception. The Supreme Court explored the boundaries of the "committed to agency discretion" exception to review in Heckler v. Chaney.[37] In Chaney, a number of prison inmates, convicted of capital offenses and sentenced to death by lethal injection of drugs, petitioned the Food and Drug Administration (FDA) to prevent the use of the drugs because they had not been approved by the FDA as "safe and effective" for human executions. The FDA refused the petition, and the plaintiffs sued claiming the FDA's refusal was an abuse of discretion under the APA. The Supreme Court held,

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[34](...continued)
discretion to an agency does not render the agency's decisions completely nonreviewable under the 'committed to agency discretion by law' exception unless the statutory scheme, taken together with other relevant materials, provides absolutely no guidance as to how that discretion is to be exercised."). Hondros v. United States Civil Serv. Comm'n, 720 F.2d 278, 292 (3d Cir. 1983). See generally Woodsmall v. Lyng, 816 F.2d 1241, 1243-46 (8th Cir. 1987).

[35]Webster v. Doe, 486 U.S. 592 (1988); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), quoting S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945); Kreis v. Sec'y of Air Force, 866 F.2d 1508 (D.C. Cir. 1989); Arnow v. United States Nuclear Regulatory Comm'n, 868 F.2d 223 (7th Cir.), cert. denied sub nom., Citizens of Illinois v. United States Nuclear Regulatory Comm'n, 110 S. Ct. 61 (1989).

[36]Id.

[37]470 U.S. 821 (1985).

however, that the FDA's refusal to commence enforcement proceedings to prevent the use of lethal drugs in executions was nonreviewable under the APA because the matter had been committed to the FDA's discretion by law.

> [E]ven where Congress has not affirmatively precluded review, review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion. In such a case, the statute ("law") can be taken to have "committed" the decisionmaking to the agency's judgment absolutely. This construction avoids conflict with the "abuse of discretion" standard of review in § 706--if no judicially manageable standards are available for judging how and when an agency should exercise its discretion then it is impossible to evaluate agency action for "abuse of discretion."[38]

The Supreme Court in Chaney established a presumption of nonreviewability for agency decisions not to exercise

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[38]Id. at 830. See Southern Ry. Co. v. Seaboard Allied Milling Corp., 442 U.S. 444, 454 (1979); Schilling v. Rogers, 363 U.S. 666, 675-76 (1960); Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309, 317-18 (1958); Slyper v. Attorney General, 827 F.2d 821 (D.C. Cir. 1987); Clementson v. Brock, 806 F.2d 1402, 1404 (9th Cir. 1986); Florida v. United States Dep't of Interior, 768 F.2d 1248, 1255 (11th Cir. 1985), cert. denied, 475 U.S. 1011, 106 S. Ct. 1186 (1986); Local 1219, American Fed. of Gov't Employees v. Donovan, 683 F.2d 511, 515 (D.C. Cir. 1982); Rank v. Nimmo, 677 F.2d 692, 699-700 (9th Cir.), cert. denied, 459 U.S. 907 (1982); Alan Guttmacher Inst. v. McPherson, 597 F. Supp. 1530, 1534-35 modified at 805 F.2d 1088 (S.D.N.Y. 1984).

investigative or enforcement powers.[39] This presumption of nonreviewability may be overcome, however, where the substantive statute provides guidelines for the agency to follow in exercising its enforcement powers.[40]

In Webster v. Doe[41] the Court held that where Congress gave broad discretionary employment termination power to the Director of the CIA, the Director's exercise of that power was not reviewable for allegedly being arbitrary and capricious in violation of the APA because such a review had been committed to the agencies' discretion. The Court explained, however, that where a former employee alleges his dismissal violated his constitutional rights, congressional intent to preclude judicial review of such a claim must be clear.

> A discharged employee thus cannot complain that his termination was not "necessary or advisable in the interests of the United States," since that assessment is the Director's alone. Subsections (a)(1) and (a)(2) of § 701, however, remove from judicial review only those determinations specifically identified by Congress or "committed to agency

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[39]Heckler, 470 U.S. at 832; Block v. SEC, 50 F.3d 1078 (D.C. Cir. 1995); Harmon Cave Condominium Ass'n v. Marsh, 815 F.2d 949 (3d Cir. 1987). Cf. Falkowski v. EEOC, 764 F.2d 907 (D.C. Cir. 1985), cert. denied, 106 S. Ct. 3319 (1986) (Justice Department decision not to represent individually-sued federal official is presumptively nonreviewable under Chaney).

[40]See Dunlop v. Bachowski, 421 U.S. 560 (1975); The Supreme Court, 1984 Term, 99 Harv. L. Rev. 120, 267 (1985).

[41]486 U.S. 592 (1988).

discretion by law." Nothing in § 102(c) persuades us that Congress meant to preclude consideration of colorable constitutional claims arising out of the actions of the Director pursuant to that section; we believe that a constitutional claim based on an individual discharge may be reviewed by the District Court.

More recently, in Lincoln v. Vigil,[42] the Court held that an agency's allocation of funds from a lump-sum appropriation is committed to agency discretion by law as long as the allocation meets permissible statutory objectives. The Court summarized its cases as follows:

> The Act provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof," 5 U.S.C. § 702, and we have read the Act as embodying a "basic presumption of judicial review." Abbott Laboratories v. Gardner, 387 U.S. 136, 140, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1967). This is "just" a presumption, however, Block v. Community Nutrition Institute, 467 U.S. 340, 349, 104 S.Ct. 2450, 2455, 81 L.Ed.2d 270 (1984), and under § 701(a)(2) agency action is not subject to judicial review "to the extent that" such action "is committed to agency discretion by law." As we explained in Heckler v. Chaney, 470 U.C. 821, 830, 105 S.Ct. 1649, 1655, 84 L.Ed.2d 714

[42]113 S. Ct. 2024 (1993). See 42 UCLA L. Rev. 1157, 1234; 95 Colum. L. Rev. 749, 755; 108 Harv. L. Rev. 27, 104.

(1985), § 701(a)(2) makes it clear that "review is not to be had" in those rare circumstances where the relevant statute "is drawn so that a court would have no meaningful standard against which to judge the agency's discretion." See also Webster v. Doe, 486 U.S. 592, 599-600, 108 S.Ct. 2047, 2052, 100 L.Ed.2d 632 (1988); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.C. 402, 410, 91 S.Ct. 814, 820-821, 28 L.Ed.2d 136 (1971). "In such a case, the statute ('law') can be taken to have 'committed' the decisionmaking to the agency's judgment absolutely." Heckler, supra, at 830, 105 S.Ct. At 1655.

(c) Factors Used in Determining the "Committed to Agency Discretion" Exception. Federal courts often cite three criteria used in determining whether an agency's discretion is so broad in a particular area as to be immune from judicial review:

> (1) the broad discretion given an agency in a particular area of operation, (2) the extent to which the challenged action is the product of political, economic or managerial choices that are inherently not subject to judicial review, and (3) the extent to which the challenged agency action is based on some special knowledge or expertise.[43]

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[43]American Fed. of Gov't Employees Local 2017 v. Brown, 680 F.2d 722, 726 (11th Cir. 1982), cert. denied, 459 U.S. 1104 (1983). See Story v. Marsh, 732 F.2d 1375, 1376-77 (8th Cir. 1984); Hondros v. United States Civil Serv. Comm'n, 720 F.2d 278, 293 (3d Cir. 1983); Suntex Dairy v. Block, 666 F.2d 158, 164 (5th Cir.), cert. denied, 459 U.S. 826 (1982); Local 2855, AFGE v. United

(continued...)

Application of these factors in a military context is illustrated by the following case involving the Army's Commercial Activities Program.

AMERICAN FED. OF GOV'T EMPLOYEES LOCAL 2017
v. BROWN

680 F.2d 722 (11th Cir. 1982),
cert. denied, 459 U.S. 1104 (1983)

Before MORGAN, HILL and KRAVITCH, Circuit Judges.

JAMES C. HILL, Circuit Judge:

The appellants, Local 2017 of the American Federation of Government Employees and three former civilian employees of the Department of the Army at Fort Gordon, Georgia, filed a complaint in the United States District Court for the Southern District of Georgia, seeking temporary and permanent injunctive relief enjoining the United States Army from contracting out certain work performed by civilian employees at Fort Gordon. The complaint alleged inter alia that the defendants' decisions to

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[43](...continued)
States, 602 F.2d 574, 578-79 (3d Cir. 1979); Curran v. Laird, 420 F.2d 122, 128-29 (D.C. Cir. 1969) (en banc). See generally Ketler, Federal Employee Challenges to Contracting Out: Is There a Viable Forum?, 111 Mil. L. Rev. 103, 148-56 (1986).

contract out the work to Pan American World Airways (hereinafter Pan Am) violated sections 806(a)(1) and 806(a)(2)(A) of the Department of Defense Authorization Act, 1980. Pub. L. No. 96-107, 93 Stat. 803 (1979), 10 U.S.C. § 2304 note (Supp. III 1979). The District Court dismissed the complaint on the basis that the court lacked jurisdiction, and that the appellants lacked standing to sue. For the reason stated below we affirm the decision of the District Court.

The general policy of the federal government is to rely on competitive private enterprise to supply the products and services it needs except when comparative cost analysis indicates that procurement from a private source is not as cost-effective as in-house performance. This policy is explicitly set forth in Office of Management and Budget (OMB) Circular No. A-76, 44 Fed. Reg. 20,556 (1979), revised, 45 Fed. Reg. 69,322 (1980). OMB Circular No. A-76 also provides guidelines for the implementation of the policy.

In 1979 Congress enacted the Department of Defense Authorization Act, 1980. Pub. L. No. 96-107, 93 Stat. 803 (1979), 10 U.S.C. § 2304 note (Supp. III 1979). Section 806(a) of the Act addressed the matter of the Department of Defense converting from in-house performance of commercial and industrial functions to performance of these functions by private contractor. Section 806(a) had the effect of elevating certain aspects of Circular A-76 to the status of law. Specifically, this provision stated that no

function being performed by Department of Defense personnel could be converted to performance by a private contractor: (1) to circumvent any civilian personnel ceiling; (2) without prior notification to Congress of the decision to study the function for possible conversion; and (3) without certification to Congress of the in-house cost calculation.

The present case arose from the decision by the Department of the Army to contract out certain functions performed by the Directorate of Industrial Operations and Housing at Fort Gordon, Georgia. These functions included housing, maintenance, supply and service, and transportation. Prior to making the contracting out decision the Army conducted an analysis of the functions to determine whether a cost savings could in fact be achieved by conversion to a private contractor. As a part of this analysis the Army first performed a study to determine the most efficient and cost-effective organization for in-house performance of these functions. The Army then solicited and received cost proposals from private contractors for the performance of the functions. The cost proposal offered by Pan Am was determined to be the lowest of all the contractors. The Army compared Pan Am's cost proposal with the cost calculation for in-house performance and determined that an estimated 58-month savings of approximately $32 million could be achieved by contracting with Pan Am for the performance of the functions.

The results of the Army's study were reported to Congress, including a certification that the Army's in-house cost calculation for the functions was based on an estimate of the most efficient and cost-effective organization for in-house performance. The Army's tentative decision to contract out to Pan Am was also reported to Congress. Congress raised no objections to the in-house cost calculations or to the decision to contract out.

The Army, consequently, awarded the contract to Pan Am. On the same day that the contract was awarded reduction-in-force notices were sent to 618 civilian employees at Fort Gordon whose positions would be eliminated because of the contract. The appellants then brought this action to enjoin the Army from proceeding with the conversion to Pan Am.

The appellant's complaint alleged that the conversion violated Public Law 96-107, Section 806(a) because it was done to circumvent civilian personnel ceilings, and because the Army's in-house cost calculations failed to provide a proper estimate of the most efficient and cost-effective organization for in-house performance.

The District Court did not consider the complaint on the merits, but rather held a hearing on the threshold issues of jurisdiction and standing. The court concluded that it was without jurisdiction because the Army's conversion decision was not subject to judicial review. The court further

concluded that the plaintiffs lacked standing because they were not within the zone of interests protected by Section 806. Upon the dismissal of the plaintiff's complaint this appeal was taken.

II

The two issues before us on appeal are first, whether district courts have judicial review over alleged violations of Section 806(a) and second, whether affected civilian employees and their labor organization have standing under Section 806(a) to challenge a decision of the Department of the Army to convert from in-house performance of certain base functions to performance by private contractors.

The appellants argue that pursuant to the Administrative Procedure Act (APA) judicial review of the Army's decision is available. They contend that Public Law 96-107 evinces no statutory preclusion of judicial review, and furthermore, that the Army's contracting decision is not committed to agency discretion by law.

There is no question that the APA affords judicial review of agency action to any person adversely affected or aggrieved by an agency action except to the extent that, (1) statutes preclude judicial review, or (2) agency action is committed to agency discretion by law. Public Law 96-107 contains no explicit preclusion of judicial review such that the first exception is clearly inapplicable to the

present case. Whether the second exception applies depends upon an analysis of the nature of the agency decision involved. As we stated in Bullard v. Webster, 623 F.2d 1042 (5th Cir. 1980):

> In the absence of a statute that explicitly precludes judicial review, an agency action is committed to the agency's discretion and is not reviewable when an evaluation of the legislative scheme as well as the practical and policy implications demonstrate that review should not be allowed.

623 F.2d at 1046. In Bullard we indicated three criteria useful in making a determination of whether an action is committed to agency discretion: (1) the broad discretion given an agency in a particular area of operation, (2) the extent to which the challenged action is the product of political, economic or managerial choices that are inherently not subject to judicial review, and (3) the extent to which the challenged agency action is based on some special knowledge or expertise. Id. The application of these criteria to the case at hand convinces us that the decision to contract out was indeed committed to the discretion of the Army and is thus not subject to judicial review.

We agree with the finding of the District Court that Section 806 vests the Army with broad discretion to make contracting out

decisions and provides no legal standard for the court to apply. As the District Court stated:

> Section 806 is a statement of policy and legislative intent. It is a mandate from the legislative branch to the executive branch, but it is not replete with formulae or discernable (sic) guidelines against which the agency decision may be measured.

AFGE, Local 2017 v. Brown, No. CV 180-136 at 12 (S.D. Ga. August 29, 1980).

There is no dispute that in enacting Section 806 Congress sought to elevate some aspects of existing practice and procedure under OMB Circular A-76 to the status of law. Section 806 in no way affected the nature of the conversion decision and imposed no new standards to guide the military's discretion. Except for the requirements of congressional notification and reporting, there were no restrictions on conversions in Section 806 that are not in OMB Circular A-76. Indeed, the OMB Circular is far more detailed and offers far more by way of guidelines for decisions than does Section 806. Thus, a number of cases concerning Army conversion decisions made pursuant to OMB Circular A-76 are extremely persuasive. All of the courts which have considered the issue have held that conversion decisions made by the Department of Defense officials under Circular A-76 are

committed to agency discretion and are not subject to judicial review. Local 2855, AFGE v. United States, 602 F.2d 574 (3d Cir. 1979); American Federation of Government Employees v. Stetson, C.A. No. 77-2146 (D.D.C. July 25, 1979); American Federation of Government Employees v. Hoffmann, 427 F. Supp. 1048, 1082-84 (N.D. Ala. 1976); and AFGE, Local 1688 v. Dunn, No. A-75-15§ (D. Alaska Sept. 30, 1975), aff'd on other grounds, 561 F.2d 1310 (9th Cir. 1977).

In Local 2855, AFGE, the Third Circuit observed that pursuant to Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410, 91 S. Ct. 814, 820 (1971), the committed to agency discretion exception to judicial review is intended to be "applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' [citation omitted]." 602 F.2d at 578-79. In applying this rule to OMB Circular A-76 the court concluded that the circular failed "to provide meaningful criteria against which a court may analyze the Army's decision." Id. In a similar vein the District Court in the case at hand concluded correctly that because Section 806 lacked discernible guidelines "a District Judge would have no law to apply in determining whether or not a decision made by the agency was correct." AFGE, Local 2017 at 11-12.

The Army's contracting out decision is also an inappropriate subject for judicial review because the decision involves military and managerial choices inherently unsuitable

for the judiciary to consider. As the Supreme Court noted in Orloff v. Willoughby, 345 U.S. 83, 78 S. Ct. 534, 97 L.Ed. 842 (1954) "[j]udges are not in the business of running the Army. . . . Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to interfere in judicial matters." 345 U.S. at 93-4, 73 S. Ct. at 540.

In addition, the contracting out decision is based on the special expertise of the Army officials involved. Calculations of the most efficient and cost-effective way to perform a function at a military installation "are matters on which experts may disagree; they involve nice issues of judgment and choice." Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309, 78 S. Ct. 752, 2 L.Ed.2d 788 (1958). These issues are best resolved by the Army analysts rather than by the courts since, in the words of Justice Frankfurter, they "do not present questions of an essentially legal nature in the sense that legal education and lawyers' learning afford peculiar competence for their adjustment." Driscoll v. Edison Light & Power Co., 307 U.S. 104, 122, 59 S. Ct. 715, 724 (1939) (Frankfurter, J. concurring).

The appellants argue further that the District Court erred in holding that they lacked standing to challenge the Army's contracting out decision. In view of our determination that the District Court was correct in finding that it lacked jurisdiction

it is unnecessary to address the question of standing.

III

The judgment of the District Court is AFFIRMED.

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(d) Effect of Agency Regulations and Policies. Even where a statute is drawn in such broad terms as to give the courts no meaningful standard against which to judge an agency action, "the agency itself can provide a basis of judicial review through the promulgation of regulations or announcement of policies."[44] "Once an agency has declared that a given course is the most effective way of implementing the statutory scheme, the courts are entitled to closely examine agency action that departs from this stated policy."[45]

(e) Military Administrative Actions and the "Committed to Agency Discretion" Exception. Perhaps because of the autonomy given to the service secretaries

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[44]Robbins v. Reagan, 780 F.2d 37, 45 (D.C. Cir. 1985).

[45]Id. (footnote omitted). See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 41-42 (1983); Sargisson v. United States, 913 F.2d 918 (Fed. Cir. 1990); Chong v. Director, USIA 821 F.2d 171 (3d Cir. 1987). Cf. Vitarelli v. Seaton, 359 U.S. 535 (1959); Service v. Dulles, 354 U.S. 363 (1953); United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954) (agencies must abide by their own regulations).

to govern their departments,[46] and the broad nature of command discretion,[47] courts do not review many military administrative actions under the APA. Instead, the threshold for review of military determinations is generally greater than for other federal agencies. Most courts have adopted stricter standards of reviewability in cases involving the armed forces. These standards are embodied in the so-called "Mindes test."

## 6.3 Reviewability Under the "Mindes Test."

a. Background.

(1) Traditionally the federal courts have been reluctant to review military activities.[48] As noted earlier,[49] the presumption of nonreviewability in military cases survived long after it was reversed in most other federal administrative litigation. Moreover, even though the presumption has been overcome, courts still grant a great deal of deference to military decisions.[50] This deference is grounded, in part, in the fear that review would "interfere with the military's ability to maintain order and discipline among service

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[46]See, e.g., 10 U.S.C. § 3012(g).

[47]Ornato v. Hoffman, 546 F.2d 10, 14 (2d Cir. 1976).

[48]See Haggerty, Judicial Review of Military Administrative Decisions, 3 Hastings Const. L.Q. 171 (1976); Peck, supra note 2, at 4; Note, Judicial Review and Military Discipline--Cortright v. Resor: The Case of the Boys in the Band, 72 Colum. L. Rev. 1048, 1054 (1972).

[49]See supra § 6.1.

[50]E.g., Goldman v. Weinberger, 475 U.S. 503 (1986); Rostker v. Goldberg, 453 U.S. 57, 64-67 (1981); Gilligan v. Morgan, 413 U.S. 1, 9-12 (1973).

members."[51] The federal "'courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have.'"[52] This deference is also based on the constitutional separation of powers.[53] The Constitution entrusts regulation and control of the military to the legislative and executive branches of the government.[54] Judicial review of military activities necessarily causes the federal courts to intrude into areas constitutionally committed to these branches.[55]

(2) The classic case cited in support of nonreviewability of military activities is Orloff v. Willoughby.[56] Although military decisions are no longer presumptively nonreviewable, Orloff is still an important case, and military attorneys and federal courts often cite its sweeping language in favor of judicial deference to the military.

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[51]Comment, Federal Judicial Review, supra note 15, at 613.

[52]Chappell v. Wallace, 462 U.S. 296, 305 (1983), quoting Warren, The Bill of Rights and the Military, 37 N.Y.U.L. Rev. 181, 187 (1962).

[53]Comment, Federal Judicial Review, supra note 15, at 614; Peck, supra note 2, at 59; Sherman, supra note 2, at 490.

[54]U.S. Const. art. I, § 2, art. II, § 8.

[55]Peck, supra note 2, at 59. See, e.g., Gilligan v. Morgan, 413 U.S. 1, 8 (1973); Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953).

[56]Orloff, 345 U.S. at 83.

ORLOFF v. WILLOUGHBY
345 U.S. 83 (1953)

Mr. Justice Jackson delivered the opinion of the Court.

Petitioner presents a novel case. Admitting that he was lawfully inducted into the Army, he asks the courts, by habeas corpus, to discharge him because he has not been assigned to the specialized duties nor given the commissioned rank to which he claims to be entitled by the circumstances of his induction. The petitioner had passed the ages liable to induction except under the Universal Military Training and Service Act, 50 USC App § 454(i)(1)(A), which authorizes conscription of certain "medical and allied specialist categories." The statute sets up a priority system for calling such specialists, the first liable being those who received professional training at government expense during World War II and who have served less than ninety days since completion of such training. As a doctor who had received training under this program, Orloff was subject to this provision and was called up pursuant to it.

His petition alleged that he was illegally restrained of his liberty because he was liable for service only as a doctor, but after induction, had been given neither rank nor duties appropriate to that profession and so was entitled to be discharged. He alleged that under Army regulations and practice one can serve as a doctor only as a commissioned officer and that he applied for but had not

received such an appointment. He also alleged that he had requested assignment of physician's duties, with or without a commission, but that this also had been denied him.

The return to the order to show cause asserted that Orloff was lawfully inducted and therefore the court is without jurisdiction of the subject matter. An affidavit by Colonel Willoughby set forth that the petitioner, after sixteen weeks of army medical service training following his induction, was awarded "a potential military occupation specialty" as a medical laboratory technician. Appointment as an officer in the Army Medical Corps Reserve, he said, was still under consideration. It also asserted that under his induction he was liable for training and service under military jurisdiction and was subject to military orders and service the same as any other inducted person.

Answering the petition for habeas corpus, the respondent raised as affirmative defenses that petitioner was subject to military command and that both the subject matter and the person of the petitioner were under the exclusive jurisdiction of the President of the United States as Commander in Chief of the Armed Forces, and that petitioner had failed to exhaust his administrative remedies. Respondent further stated that his application for a commission still was being processed by military authorities "because of particular statements made by petitioner in his application concerning prior membership or

association with certain organizations designated by the Attorney General of the United States on October 30, 1950 pursuant to Executive Order 9835," that the court was without jurisdiction, and that habeas corpus does not lie for the purpose of the case.

By way of traverse, Orloff set forth in detail his qualifications as a physician and psychiatrist and alleged that the medical laboratory technician status was not a doctor's work and required no more than a four-month training of a layman in the medical field service school. This, he claims, is not within the medical specialist category for which he was conscripted. He asserted that he was willing to serve as a medical specialist, that is as a medical doctor, and had offered his services as a doctor in the grade or rank of private but had been advised that he could serve as a doctor only upon being commissioned.

Upon such pleadings the cause proceeded to hearing. Petitioner's counsel told the trial court that no question was involved as to the Army's granting or not granting a commission and that the petitioner was not asking anybody to give anybody else a commission, but he claimed to be entitled to discharge until the Army was prepared to use his services as a doctor. It was admitted that petitioner had made no request of respondent for a discharge. Evidence was taken indicating that the specialty to which Orloff had been assigned was not that usual for a physician. The trial judge concluded

that the law does not require a person drafted under the "medical and allied specialist categories" to be assigned doctor's functions and those only, and interpreted the law that a doctor inducted under the statute was in the same status, so far as his obedience to order is concerned, as if he had been inducted under other conscription statutes and could not insist on being used in the medical category. He therefore denied the writ.

On appeal, as the Court of Appeals pointed out, the case was argued and briefed by the Government on the broad theory that under the statute doctors could be drafted and used for any purpose the Army saw fit, that duty assignment for such inductees was a matter of military discretion. The court agreed and on that ground affirmed.

We granted certiorari, and in this Court the parties changed positions as nimbly as if dancing a quadrille. The Government here admits that the petitioner is entitled to duties generally within a doctor's field and says that he now has been assigned to such. The petitioner denies that he yet has duties that fully satisfy this requirement. Notwithstanding his position before the trial court, he further says that anyway he must be commissioned and wants this Court to order him commissioned or discharged.

In its present posture, questions presented are, first, whether to accept the Government's concession that one inducted as a medical specialist must be used as such; second, whether petitioner, as a matter of

law, is entitled to a commission; third, whether the federal courts, by habeas corpus, have power to discharge a lawfully mustered member of the Armed Forces because of alleged discriminatory or illegal treatment in assignment of duties.

This Court, of course, is not bound to accept the Government's concession that the courts below erred on a question of law. They accepted the Government's argument as then made and, if they were right in doing so, we should affirm. We think, however, that the Government is well advised in confessing error and that candid reversal of its position is commendable. We understand that the Army accepts and is governing itself by the Government's present interpretation of its duty toward those conscripted because of professional skills. To separate particular professional groups from the generality of the citizenship and render them liable to military service only because of their expert callings, and after induction, to divert them from the class of work for which they were conscripted would raise questions not only of bad faith but of unlawful discrimination. We agree that the statute should be interpreted to obligate the Army to classify specially inducted professional personnel for duty within the categories which rendered them liable to induction. It is not conceded, however, that particular duty orders within the general field are subject to judicial review by habeas corpus.

We cannot comply with the appellant's insistence that we order him to be commissioned or discharged. We assume that he is correct in stating that it has been a uniform practice to commission Army doctors; indeed, until 1950 Congress provided that the Army Medical Corps should consist of ". . . commissioned officers below the grade of brigadier general." 10 U.S.C. § 91. But in 1950 Congress repealed § 91 and substituted in its place the following language: "[The Medical Corps] . . . shall consist of Regular Army officers appointed and commissioned therein and such other members of the Army as may be assigned thereto by the Secretary of the Army. . . ." 10 U.S.C. § 81-1. 10 U.S.C. § 94 provides that medical officers of the Army may be assigned by the Secretary of the Army to such duties as the interests of the service demand. Thus, neither in the language of the Universal Military Training and Service Act nor of the Army Reorganization Act referred to above is there any implication that all personnel inducted under the Doctor's Draft Act and assigned to the Medical Corps be either commissioned or discharged.

Petitioner, by his concessions on the hearing to the effect that the question of commission was not involved, may have avoided a full litigation of the facts which lie back of his noncommissioned status, but enough appears to make plain that there was cause for refusing him a commission.

It appears that just before petitioner was inducted he applied for and was granted a commission as captain in the Medical Corps, United States Air Force Reserve. When he refused to execute the loyalty certificate prescribed for commissioned officers, his appointment was revoked and he was discharged. This petitioner refused information as to his membership in or association with organizations designated by the Attorney General as subversive or which advocated overthrow of the Government by force and violence. He gave as his reason that "as a matter of conscience, I object to filling out the loyalty certificate because it involves an inquisition into my personal beliefs and views. Moreover, the inquiry into organizational affiliations employs the principle of guilt by association, to which I am vigorously opposed. Further, it is my understanding that all the organizations were listed by the Attorney General without notice or hearing which has caused the Supreme Court to invalidate it."

After he was inducted, petitioner applied for another commission and filed the required loyalty certificate but again refused to supply the requested information. He stated, "I have attended public meetings of the Civil Rights Congress and the National Council of American-Soviet Friendship. In 1943, I co-authored a radio play for the latter organization. Over a period of 7-1/2 months I attended classes at the Jefferson School of Social Sciences (ending in the Spring of

1950). With respect to any other organizations contained on the annexed list I am compelled to claim my Federal Constitutional Privilege. However, I never considered myself an organizational member of any of the aforesaid." As to the question "Are you now or have you ever been a member of the Communist Party, U.S.A. or any Communist Organization?" he said, "Federal constitutional privilege is claimed."

The petitioner appears to be under the misconception that a commission is not only a matter of right, but is to be had upon his own terms.

The President commissions all Army officers. 5 U.S.C. § 11. We have held that, except one holding his appointment by virtue of a commission from the President, he is not an officer of the Army. United States v. Mouat, 124 U.S. 303, 31 L. Ed. 463, 8 S. Ct. 505. Congress has authorized the President alone to appoint Army officers in grades up to and including that of colonel, above which the advice and consent of the Senate is required. 55 Stat. 728, as amended, 57 Stat. 380.

It is obvious that the commissioning of officers in the Army is a matter of discretion within the province of the President as Commander in Chief. Whatever control courts have exerted over tenure or compensation under an appointment, they have never assumed by any process to control the appointing power either in civilian or military positions.

Petitioner, like every conscript, was inducted as a private. To obtain a change of

that status requires appointment by or under authority of the President. It is true that the appointment he seeks is one that long and consistent practice seems never to have been denied to one serving as an Army doctor; one, too, that Congress in authorizing the draft of doctors probably contemplated normally would be forthcoming. But, if he is the first to be denied a commission, it may also be that he is the first doctor to haggle about questions concerning his loyalty. It does not appear that it is the President who breaks faith with Congress and the doctors of America. We are not easily convinced that the whole military establishment is out of step except Orloff.

The President's commission to Army officers recites that "reposing special trust and confidence in the patriotism, valor, fidelity and abilities" of the appointee, he is named to the specified rank during the pleasure of the President. Could this Court, whatever power it might have in the matter, rationally hold that the President must, or even ought to, issue the certificate to one who will not answer whether he is a member of the Communist Party?

It is argued that Orloff is being punished for having claimed a privilege which the Constitution guarantees. No one, at least no one on this Court which has repeatedly sustained assertion by Communists of the privilege against self-incrimination, questions or doubts Orloff's rights to withhold facts about himself on this ground. No one believes he can be punished for doing

so. But the question is whether he can at the same time take the position that to tell the truth about himself might incriminate him and that even so the President must appoint him to a post of honor and trust. We have no hesitation in answering that question "No."

It is not our view of Orloff's fitness that governs. Regardless of what we individually may think of the usefulness of loyalty oaths or the validity of the Attorney General's list of subversive organizations, we cannot doubt that the President of the United States, before certifying his confidence in an officer and appointing him to a commissioned rank, has the right to learn whatever facts the President thinks may affect his fitness. Perhaps we would not ask some of these questions, or we might ask others, but if there had never been an Attorney General's list the President would be within his rights in asking any questions he saw fit about habits, associations and attitudes of the applicants for his trust and honor. Whether Orloff deserves appointment is not for judges to say and it would be idle, or worse, to remand this case to the lower courts on any question concerning his claim to a commission.

This leaves the question as to whether one lawfully inducted may have habeas corpus to obtain a judicial review of his assignments to duty. The Government has conceded that it was the legal duty of the Army to assign Orloff to duties falling within "medical and allied specialist categories." However, within the area covered by this concession

there are many varieties of particular duties. The classification to which petitioner belonged for inductive purposes was defined by statute to be "medical and allied specialist categories." This class includes not merely doctors and psychiatrists but other medical technicians, and, while the duties must be within this category, a large area of discretion as to particular duties must be left to commanding officers. The petitioner obtained basic medical education at the expense of the Government. In private life he has pursued a specialty. But the very essence of compulsory service is the subordination of the desires and interests of the individual to the needs of the service. A conscripted doctor may have pursued the specialty of obstetrics, but in the Army, which might have limited use for his specialty, could he refuse other service within the general medical category?

Each doctor in the Army cannot be entitled to choose his own duties, and the Government concession does not extend to an admission that duties cannot be prescribed by the military authorities or that they are subject to review and determination by the judiciary.

The nature of this issue is pointed up by the controversy that survives the changes the parties have made in their positions in this Court. It is admitted that Orloff is now assigned to medical duties in the treatment of patients within the psychiatric field. He is not allowed functions that pertain to

commissioned officers, but, apart from that, he is restricted from administering certain drugs and treatments said to induce or facilitate a state of hypnotism. Orloff claims this as his professional prerogative, because in private practice he would be free to administer such treatments. The Government says, however, that because of doubts about his loyalty he is not allowed to administer such drugs since his patients may be officers in possession of important military information which he could draw out from them while they were under the influence of the drugs. Of course, if it were the function or duty of the judiciary to resolve such a controversy, this case should be returned to the District Court to take evidence as to all issues involved.

However, we are convinced that it is not within the power of this Court by habeas corpus to determine whether specific assignments to duty fall within the basic classification of petitioner. It is surely not necessary that one physician be permitted to cover the whole field within the medical classification, nor would we expect that a physician is exempt from occasional or incidental duties not strictly medical. In these there must be a wide latitude allowed to those in command.

We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But judges are

not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters. While the courts have found occasion to determine whether one has been lawfully inducted and is therefore within the jurisdiction of the Army and subject to its orders, we have found no case where this Court has assumed to revise duty orders as to one lawfully in the service.

But the proceeding being in habeas corpus, petitioner urges that, if we may not order him commissioned or his duties redefined, we may hold that in default of granting his requests he may be discharged from the Army. Nothing appears to convince us that he is held in the Army unlawfully, and, that being the case, we cannot go into the discriminatory character of his orders. Discrimination is unavoidable in the Army. Some must be assigned to dangerous missions; others find soft spots. Courts are presumably under as great a duty to entertain the complaints of any of the thousands of soldiers as we are to entertain those of Orloff. The effect of entertaining a proceeding for judicial discharge from the Army is shown from

this case. Orloff was ordered sent to the Far East Command, where the United States is now engaged in combat. By reason of these proceedings, he has remained in the United States and successfully avoided foreign service until his period of induction is almost past. Presumably, some doctor willing to tell whether he was a member of the Communist Party has been required to go to the Far East in his place. It is not difficult to see that the exercise of such jurisdiction as is here urged would be a disruptive force as to affairs peculiarly within the jurisdiction of the military authorities.

We see nothing to be accomplished by returning this case for further litigation. The judgment is

Affirmed.

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b. Reviewability Under Mindes.

(1) As discussed above, the doctrine of nonreviewability of military activities was short-lived after Orloff. A series of subsequent decisions established that military decisions could be the subject of judicial review.[57] In 1971, the United States Court of Appeals for the Fifth Circuit, in Mindes v. Seaman,[58] synthesized existing case law involving judicial review of military activities and formulated an analysis for

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[57]See Harmon v. Brucker, 355 U.S. 579 (1958).

[58]453 F.2d 197 (5th Cir. 1971).

determining the reviewability of military activities. A majority of the courts of appeals have since adopted the "Mindes test" for reviewability.

MINDES v. SEAMAN
453 F.2d 197 (5th Cir. 1971)

CLARK, Circuit Judge:

According to the allegations of his complaint, which must be taken as admitted in the procedural posture of this appeal, Air Force Captain Milbert Mindes has tenaciously sought to void a factually erroneous and adverse Officer Effectiveness Report (OER) which resulted in his being separated from active duty and placed in a reserve status. However, his efforts to date have been fruitless. After traversing all available intraservice procedural reviews--ending with a denial of relief by the civilian Air Force Board for Correction of Military Records (Board)--Mindes filed a complaint seeking declaratory and injunctive relief in the district court. On a hearing on plaintiff's motion for a temporary restraining order and before answer or other responsive pleading, that court not only denied the temporary restraining order but also dismissed the cause with prejudice for want of jurisdiction. We vacate and remand with directions to review the cause on its merits, applying the standards articulated here.

Bell v. Hood, 327 U.S. 678, . . . (1946) teaches that the procedure of rendering a final dismissal for want of jurisdiction

should be utilized sparingly. This analysis by Professor Wright is apt. "[F]ederal jurisdiction exists if the complaint states a case arising under federal law, even though on the merits the party may have no federal right. If his claim is bad, then judgment is to be given against him on the merits, and even if the court is persuaded that federal law does not give the right the party claims, it is to dismiss for failure to state a claim on which the relief can be granted rather than for want of jurisdiction. Dismissal for want of jurisdiction is appropriate only if the federal claim is frivolous or a mere matter of form." (Footnotes omitted). C. Wright, Law of Federal Courts, 62 (2d Ed. 1970). Since we find that Mindes' federal claims are not frivolous, it follows that the court erred in basing its dismissal on lack of jurisdiction. The proper test was to determine if this cause fails to state a claim on which relief may be granted.

Not only because a judgment which is right for the wrong reasons is due to be affirmed, but also since the core issue must be faced on remand, an unreasoned vacation of the dismissal as procedurally erroneous could be improper or constitute poor judicial husbandry. Hence we make this somewhat detailed analysis of when internal military affairs should be subjected to court review.

What we really determine is a judicial policy akin to comity. It is a determination made up of several subjective and interrelated factors. Traditional judicial trepidation

over interfering with the military establishment has been strongly manifested in an unwillingness to second-guess judgments requiring military expertise and in a reluctance to substitute court orders for discretionary military decisions. Concern has also been voiced that the courts would be inundated with servicemen's complaints should the doors of reviewability be opened. But the greatest reluctance to accord judicial review has stemmed from the proper concern that such review might stultify the military in the performance of its vital mission. On the other hand, the courts have not entirely refrained from granting review and sometimes subsequent relief. However, no collection or collation of these cases has yet been attempted by this circuit. This is the task we undertake now.

The basic starting point is obviously the precedents of the Supreme Court. In Harmon v. Brucker, 355 U.S. 579, . . . (1958) the Secretary of the Army had issued discharge certificates in a form other than "honorable," and in doing so had taken into account the inductee's pre-induction activities. The Court, after construing various statutes and regulations, concluded that the Secretary had acted beyond the scope of his statutory and regulatory powers in utilizing pre-induction activities as a basis for his decision. But more importantly for our purposes, the Court held that the federal courts may review matters of internal military affairs to

determine if an official has acted outside the scope of his powers.

In Orloff v. Willoughby, 345 U.S. 83, . . . (1953) the habeas petitioner launched a two-prong attack on the failure of the Army to grant him a commission and to assign him duties befitting his civilian status, as a doctor. Orloff first argued that under the applicable statutes he was entitled to a commission, and that it was denied him because he had exercised his Fifth Amendment rights against self-incrimination. The Court held that the Army was justified in refusing to commission Orloff due to the exercise of these rights since the President certainly had the discretion to deny a position of honor and trust to one whose loyalty is in doubt. Nonetheless, note should be taken that the Court allowed review of this attack although it denied relief to Orloff on the merits. Secondly, Orloff contended that as a doctor he was entitled to duties commensurate with his particular civilian medical skills. The Army conceded that under the statutes Orloff was entitled to be assigned to duties in the medical field but argued that particular assignments within that field were within the discretion of the Army. The Court agreed, and went further, stating that the courts would not review duty assignments if discriminatorily made. However, this phase of Orloff's case raised no question of deprivation of constitutional rights or action clearly beyond the scope of Army authority. Thus the last statement of the Court must be

read restrictively. The Court could not stay its hand if, for example, it was shown that only blacks were assigned to combat positions while whites were given safe jobs in the sanctuary of rear echelons.

In Reaves v. Ainsworth, 219 U.S. 296, . . . (1911), Reaves was found by a medical board to be mentally unfit for promotion, which finding required that he be discharged from the service. Reaves mounted a double-barreled assault on the Army, claiming a denial of due process. First, he attacked the jurisdiction of the board; but the Court, after reviewing the merits, found that the board did not lack jurisdiction. Second, Reaves argued that even if the board had jurisdiction, its exercise of that jurisdiction was arbitrary and capricious. The Court declined to even review the merits of this latter argument, stating that to do so would involve the courts in commanding and regulating the Army. The reason we discern for this refusal to review is that it would have entailed an analysis of the medical records and a determination of Reaves' fitness as an officer. Clearly, the Court was unwilling to venture into this area of military expertise.

In numerous cases the courts of appeal have held that review is available where military officials have violated their own regulations, which is one thing Mindes argues has happened to him. See, e.g., Feliciano v. Laird, 426 F.2d 424 (2d Cir. 1970); Van Bourg v. Nitze, 388 F.2d 577 (D.C. Cir. 1967). See

also Bluth v. Laird, 435 F.2d 1065 (4th Cir. 1970); Nixon v. Secretary of Navy, 422 F.2d 934 (2d Cir. 1970); Schatten v. United States, 419 F.2d 187 (6th Cir. 1969), Smith v. Resor, 406 F.2d 141 (2d Cir. 1969).

Judicial review has been held to extend to the constitutionality of military statutes, executive orders, and regulations--another claim Mindes advances. See Morse v. Boswell, 289 F. Supp. 812 (D. Md. 1968), aff'd 401 F.2d 544 (4th Cir. 1968), in which the constitutionality of the statute allowing the President to call up reserve forces was reviewed and found constitutional. Similarly, in Goldstein v. Clifford, 290 F. Supp. 275 (D.N.J. 1968), a three-judge court reviewed the constitutionality of the statute and executive order providing for the call-up of reserves. Recently this Circuit had the opportunity to review the constitutionality of a regulation promulgated by the commander of a military installation. United States v. Flower, 452 F.2d 80 (5th Cir. 1971). Although the case contains a factual distinction since the plaintiff was not a serviceman, the following words are apt to the question here:

> We do not infer that the commander has unfettered discretion under this regulation. We hold only that within certain limits, the military establishment has authority to restrict the distribution of printed materials. This right to restrict distribution must be kept within

> reasonable bounds and courts may determine whether there is a reasonable basis for the restriction. Dash v. Commanding General Fort Jackson, South Carolina, 307 F. Supp. 849 (D., S.C., 1969), aff'd, Yahr v. Resor, 431 F.2d 690 (4th Cir.), cert. denied, 401 U.S. 981 (1970). Whether the Post Commander acts arbitrarily or capriciously, without proper justification, is a question which the courts are always open to decide. (Emphasis added). At 86.

However, some such attacks on regulations have produced the opposite result. In two cases in which reservists were called to active duty for failure to satisfactorily perform their reserve obligations, i.e., their long hair did not present the required "neat and soldierly appearance," the reservists mustered several constitutional arguments to support their alleged right to wear long hair, but the 2nd and 7th Circuits declined review. Anderson v. Laird, 437 F.2d 912 (7th Cir. 1971); Raderman v. Kaine, 411 F.2d 1102 (2d Cir. 1969). Both courts held that what constitutes a "neat and soldierly appearance," was within the discretion of the military. This Circuit, in a per curiam opinion, affirmed the dismissal of a case on the same subject in which the serviceman had failed to exhaust available service remedies. However, in dicta, the court reached the merits of the

regulation and held it valid. Doyle v. Koelbl, 434 F.2d 1014 (5th Cir. 1970). With regard to exhaustion, see also In re Kelly, 401 F.2d 211 (5th Cir. 1968); Tuggle v. Brown, 362 F.2d 801 (5th Cir. 1966); and Sherman, Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement, 55 Va. L. Rev. 483 (1969).

Litigation challenging individual orders alleged to violate the rights of the serviceman involved have been unsuccessful. Without noting the presence of any constitutional contention, the 9th Circuit has held that it would not review the question of why an officer was relieved from the command of his ship. Arnheiter v. Chafee, 435 F.2d 691 (9th Cir. 1970). In Cortright v. Resor, 447 F.2d 245 (2d Cir. 1971), the plaintiff soldier was transferred from New York to El Paso, Texas, allegedly because of First Amendment activities. The 2nd Circuit held that court interference with military transfer orders required a stronger showing than Cortright presented.

Court-martial convictions alleged to involve errors of constitutional proportions have consistently been held to be subject to court review. In Burns v. Wilson, 346 U.S. 137, . . . (1953), the Supreme Court held court-martial convictions of servicemen were subject to habeas corpus review, but the scope of that review was left uncertain. Subsequently, this Circuit held that a collateral habeas attack could inquire into the deprivation of constitutional rights. See

Gibbs v. Blackwell, 354 F.2d 469 (5th Cir. 1965). See also McCurdy v. Zuckert, 359 F.2d 491 (5th Cir. 1966); Kauffman v. Secretary of the Air Force, 415 F.2d 991 (1969). Other circuits have done more than set aside court-martial convictions. In Ashe v. McNamara, 355 F.2d 277 (1st Cir. 1965), the 1st Circuit required the Board for the Correction of Military Records to expunge from a serviceman's record a dishonorable discharge eventuating from a court-martial which was infected by constitutional violations. The 10th Circuit followed suit. Smith v. McNamara, 395 F.2d 896 (10th Cir. 1968); Angle v. Laird, 429 F.2d 892 (10th Cir. 1970).

Selective service induction procedures present another area with clear precedent for judicial review, despite a limiting statute. 50 U.S.C.A.App. § 460(b)(3). See Oestereich v. Selective Service System, 393 U.S. 233 (1968), where the Board acted outside the scope of its statutory authority; and Wolff v. Selective Service Local Board No. 16, 373 F.2d 817 (2d Cir. 1967), where the Board deprived the plaintiffs of their First Amendment rights.

From this broad ranging, but certainly not exhaustive, view of the case law, we have distilled the primary conclusion that a court should not review internal military affairs in the absence of (a) an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations, and (b) exhaustion of available

intraservice corrective measures. The second conclusion, and the more difficult to articulate, is that not all such allegations are reviewable.

A district court faced with a sufficient allegation must examine the substance of that allegation in light of the policy reasons behind nonreview of military matters. In making that examination, such of the following factors as are present must be weighed (although not necessarily in the order listed).

1. The nature and strength of the plaintiff's challenge to the military determination. Constitutional claims, normally more important than those having only a statutory or regulatory base, are themselves unequal in the whole scale of values--compare haircut regulation questions to those arising in court-martial situations which raise issues of personal liberty. An obviously tenuous claim of any sort must be weighted in favor of declining review. See, e.g., Cortright v. Resor, supra.

2. The potential injury to the plaintiff if review is refused.

3. The type and degree of anticipated interference with the military function. Interference per se is insufficient since there will always be some interference when review is granted, but if the interference would be such as to seriously impede the military in the performance of vital duties, it militates strongly against relief.

4. The extent to which the exercise of military expertise or discretion is involved. Courts should defer to the superior knowledge and experience of professionals in matters such as promotions or orders directly related to specific military functions. We do not intimate how these factors should be balanced in the case sub judice. That is the trial court's function.

Mindes alleges that: (i) he was denied due process because his separation from the service was based upon a factually erroneous OER: (ii) the promotion or discharge regulation, AFR 36.12 ¶ 74(c), violates due process; (iii) the Board denied him due process by failing to conduct a full, fair, and impartial hearing; and (iv) the Board denied him due process by failing to file findings of fact and conclusions of law. While we can assert that Mindes' allegations, in toto, are sufficient to withstand a motion to dismiss at the pleading stage, it is for the district court to weigh and balance the factors we have set out as to the proven or admitted facts. Therefore, nothing said here should be read as intimating any opinion as to reviewability or outcome of any part of his claims.

The judgment of the district court is vacated and the cause is remanded for further proceedings not inconsistent with the opinion.

Vacated and remanded.

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(2) The Mindes test involves a two-step analysis for determining whether courts may review military determinations. First, a court should not intervene in internal military affairs in the absence of (a) an allegation of the deprivation of a constitutional right, or an assertion that the military has acted in violation of applicable statutes or its own regulations, and (b) exhaustion of available intraservice remedies. If a plaintiff is able to meet the threshold requirements of Mindes, review still is not a certainty. In determining whether review is appropriate, the court must balance the nature and strength of the plaintiff's claim, the potential injury to the plaintiff if review is denied, the degree of interference with the military function, and the extent to which military expertise and discretion are involved. Gonzalez v. Department of the Army provides an example of the application of the "Mindes test."

GONZALEZ v. DEPARTMENT OF THE ARMY
718 F.2d 926 (9th Cir. 1983)

Before PECK, FLETCHER, and PREGERSON, Circuit Judges.

FLETCHER, Circuit Judge:

Appellant, an Army Major, appeals from the district court's dismissal of his complaint alleging race discrimination in violation of Title VII, 42 U.S.C. § 2000e et seq. (1976 & Supp. V 1981), 42 U.S.C. § 1981 (1976), and 42 U.S.C. § 1983 (Supp. V 1981). The district court dismissed the complaint because it found appellant's claims

nonjusticiable and unreviewable, holding that Title VII did not apply to uniformed members of the Armed Forces, and that the section 1981 claim was barred by the doctrine of sovereign immunity. Appellant filed a timely appeal; this court's jurisdiction rests on 28 U.S.C. § 1291 (1976). We affirm the district court's judgment.

## I

## FACTS

Appellant, Aristides Gonzalez, is a native of Puerto Rico and a regular commissioned officer in the Army, holding the rank of Major. He entered on active duty in 1965 as a Second Lieutenant. He was promoted to First Lieutenant in 1966 and to Captain in 1967. From 1967 to 1980 appellant was several times considered for, but not promoted to, the rank of Major. During this period appellant alleges that he had outstanding ratings and would have been promoted but for the intentional race discrimination practiced by the Army.

In 1980, appellant was terminated from duty in the Army. At that time he began to pursue administrative remedies seeking a correction of his record and reinstatement. Through this process, several of his performance ratings were raised and he was granted reinstatement and a promotion to Major with a retroactive effective date of October 1, 1979.

Appellant contends that despite this retroactive promotion he is "at least four years behind his class-year contemporaries in the promotion process." He claims that this and other injuries were caused by the Army's intentional race discrimination. The discrimination that the Army practiced is alleged to consist of: (1) reliance on Officer Efficiency Ratings (OERs) that purport to measure the qualifications of eligible officers, but actually operate to discriminate against persons of appellant's race and national origin; (2) inadequate recruitment of minorities and failure to accept them on an equal and impartial basis; (3) reliance on arbitrary, non-job-related requirements for continued employment; and (4) other generalized complaints regarding Army recruitment and promotion programs.

Appellant filed this action against the Army in September, 1980. It was stayed pending the outcome of the Army administrative hearings which resulted in appellant's reinstatement. Following the conclusion of the administrative proceedings, the Army moved to dismiss appellant's complaint. The district court granted the motion to dismiss without giving appellant leave to amend.

II

DISCUSSION

A. Appellant's Title VII Claim.

[The court held that Title VII did not apply to uniformed members of the military.]

B. Appellant's Section 1981 Claim.

The district court dismissed appellant's claim of intentional race discrimination in violation of 42 U.S.C. § 1981 (1976), on the ground that the Army and the Secretary of the Army, as agents of the United States, were immune from suit. Without addressing the correctness of this ruling, we affirm the district court's dismissal of appellant's section 1981 claim but on a different basis.

In Chappell v. Wallace, 462 U.S. 296 (1983), the Supreme Court remanded to this court a suit by a number of Navy enlisted men alleging race discrimination by their superior officers in order for us to determine whether the plaintiffs' claims for relief might be cognizable under 42 U.S.C. § 1985(3). See id. at 2368 n. 3. Implicit in the court's order of remand is the recognition that, in some situations at least, uniformed members of the Armed Services may assert that their constitutional and statutory rights have been violated by their superiors. See id. at 2368. We need not decide in this case, however, whether appellant Gonzalez's claims against

the Army of race discrimination in violation of section 1981 are cognizable because, even if we assume that he may assert his claims of discrimination under section 1981, the particular claims that appellant makes are nonreviewable. See Wallace v. Chappell, 661 F.2d 729, 732-33 (9th Cir. 1981), rev'd on other grounds, 462 U.S. 296 (1983).

In Wallace v. Chappell, we adopted, with some modification, the approach outlined by the Fifth Circuit in Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971), to the question of whether a civilian court should review a serviceman's allegation of a deprivation of constitutional rights by the military. See 661 F.2d at 732-34. The Mindes-Wallace analysis requires two separate multi-factored inquiries. First,

> an internal military decision is unreviewable unless the plaintiff alleges (a) a violation of the Constitution, a federal statute, or military regulations; and (b) exhaustion of available intraservice remedies.

Wallace, 661 F.2d at 732; Mindes, 453 F.2d at 201. The Army essentially concedes that appellant has met these initial requirements. It argues, however, that review of appellant's challenge to the Army's promotion decisions in this case is precluded under the second part of the Mindes-Wallace analysis. This second

phase consists of a weighing of four factors to determine whether review should be granted:

> (1) The nature and strength of the plaintiff's claim. . . . [C]onstitutional claims ordinarily carry greater weight than those resting on a statutory or regulatory base, but . . . within the class of constitutional claims, the nature and strength of the claim can vary widely.
> (2) The potential injury to the plaintiff if review is refused.
> (3) The extent of interference with military functions. . . . [I]nterference per se should not preclude review because some degree of interference will always exist.
> (4) The extent to which military discretion or expertise is involved.

Wallace, 661 F.2d at 733; see also Mindes, 453 F.2d at 201-02.

After evaluating each of these factors, we conclude that the district court's decision not to hear appellant's claim under section 1981 should be affirmed. Even though appellant alleges "recognized" constitutional claims of the type that may be reviewed, see Wallace, 661 F.2d at 734, the other Mindes-Wallace factors strongly militate against reviewability. The second factor weighs against review, because the potential injury

to appellant if review is denied is not substantial. He has already been reinstated by the Army with retroactive promotion to the rank of Major. He now seeks an earlier retroactive promotion date and guaranteed promotions in the future. Even if upon review these claims would have been upheld, the most that appellant would have gained is an earlier retroactive promotion date. As a result of the administrative action, he is eligible for promotions in the future and if these are discriminatorily denied, the decisions may be challenged through the appropriate administrative procedure. The third and fourth factors also counsel against review of appellant's claims. The interference with the Army if appellant's claims were reviewed would be significant. The officers who participated in reviewing appellant's performance would have to be examined to determine the grounds and motives for their ratings. Other evidence of appellant's performance would have to be gathered for the 10-year period in question. In short, the court would be required to scrutinize numerous personnel decisions by many individuals as they relate to appellant's claim that he was improperly denied promotion. This inquiry would involve the court in a very sensitive area of military expertise and discretion. While we would not shrink from such an assessment in a civilian setting, the same hesitation that precludes a Bivens-type claim in the military setting, see Chappell v. Wallace, 103 S. Ct. at 2364-67, compels restraint here. For these reasons, we hold

that under the analysis described in Wallace v. Chappell and Mindes v. Seaman, review of appellant's section 1981 claim of discrimination in promotion must be denied.

Our assessment is consistent with the Supreme Court's decision in Reaves v. Ainsworth, 219 U.S. 296, 31 S. Ct. 230, 55 L.Ed.225 (1911). There, a military officer sought review of a decision by the Army to discharge him without retirement pay. He claimed that the military board of examiners that made the decision in his case acted arbitrarily and deprived him of due process. The Court rejected his efforts to secure review of the discharge, stating that such a determination falls within the scope of the military tribunal's lawful powers and "cannot be viewed or set aside by the courts." Id. at 304, 31 S. Ct. at 233. As the Fifth Circuit observed in Mindes with regard to the decision in Reaves

> The reason we discern for this refusal to review is that it would have entailed an analysis of the medical records and a determination of Reaves' fitness as an officer. Clearly, the Court was unwilling to venture into this area of military expertise.

453 F.2d at 200 (emphasis added). In like manner, we decline the invitation to engage in a review of appellant's fitness for promotion

to higher levels of military authority or the timing of such promotions.

CONCLUSION

Because a Title VII suit is unavailable to appellant and because his claims under 42 U.S.C. § 1981 are unreviewable, the judgment of the district court is

AFFIRMED.

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(3) The Supreme Court has never explicitly adopted the "Mindes test"; however, it now represents the weight of authority in the lower courts. To date, the United States Courts of Appeals for the First, Fourth, Fifth, Eighth, Ninth, Tenth, and Eleventh Circuits have expressly followed Mindes.[59] The United States Court of Appeals for the Sixth Circuit has cited Mindes favorably, although it did not formally apply the

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[59]Diekan v. Stone, 995 F.2d 1061 (1st Cir. 1993); Penagaricano v. Llenza, 747 F.2d 55 (1st Cir. 1984); Guerra v. Scruggs, 942 F.2d 270 (4th Cir. 1991); Mickens v. United States, 760 F.2d 539 (4th Cir. 1985), cert. denied, 474 U.S. 1104 (1986); Gochnour v. Marsh, 754 F.2d 1137 (5th Cir.), cert. denied, 471 U.S. 1057 (1985); West v. Brown, 558 F.2d 757 (5th Cir. 1977), cert. denied, 435 U.S. 926 (1978); Nieszner v. Mark, 684 F.2d 562 (8th Cir. 1982), cert. denied, 460 U.S. 1022 (1983); Gilliam v. Miller, 973 F.2d 760 (9th Cir. 1992); Khalsa v. Weinberger, 787 F.2d 1288 (9th Cir. 1986); Wallace v. Chappell, 661 F.2d 729 (9th Cir. 1981), rev'd on other grounds, 462 U.S. 296 (1983); Lindenau v. Alexander, 663 F.2d 68 (10th Cir. 1981); Clark v. Windall, 51 F.3d 917 (10th Cir. 1995); Stinson v. Hornsby, 821 F.2d 1537 (11th Cir. 1987), cert. denied, 488 U.S. 959 (1988); Rucker v. Sec'y of Army, 702 F.2d 966 (11th Cir. 1983).

"Mindes test,"[60] while the Federal Circuit has placed limited reliance on Mindes. The Second, Third, Seventh, and District of Columbia Circuits have either explicitly or implicitly rejected the Mindes approach.[61]

In rejecting the Mindes test the other circuit courts do not necessarily imply that review of military decisions is readily available. The Seventh Circuit agreed with the Third Circuit that "the Mindes approach erroneously 'intertwines the concept of justiciability with the standards to be applied to the merits of the case.'"[62] Instead, the Seventh Circuit adopted the test of "whether the military seeks to achieve legitimate ends by means designed to accommodate the individual right at stake to an appropriate degree."[63]

> Knutson's challenge to his termination, on the other hand, implicates only the nature of the procedure used in his termination. The interference that judicial review poses here is more than a matter of administrative inconvenience. These sorts of reinstatement claims, often pending for several years in

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[60]Schultz v. Wellman, 717 F.2d 301 (6th Cir. 1983).

[61]Maier v. Orr, 754 F.2d 973, 983 n.9 (Fed. Cir. 1985). Knutson v. Wisconsin Air Nat'l Guard, 995 F.2d 765 (7th Cir.), cert. denied, 114 S.Ct. 347 (1993); Crawford v. Cushman, 531 F.2d 1114 (2d Cir. 1976); Mack v. Rumsfeld, 609 F. Supp. 1561, 1563 (W.D.N.Y. 1985), aff'd, 784 F.2d 438 (2d Cir.), cert. denied, 479 U.S. 815 (1986); Dillard v. Brown, 652 F.2d 316 (3d Cir. 1981); Kreis v. Sec'y of Air Force, 866 F.2d 1508 (D.C. Cir. 1989).

[62]Knutson v. Air National Guard, 995 F.2d at 768; Dillard, 652 F.2d at 323; accord Kreis, 866 F.2d at 1512.

[63]Knutson, 995 F.2d at 768.

> civilian courts, may well leave [the ANG] in limbo awaiting the outcome of litigation and thus significantly hamper its ability to staff properly and to fulfill its mission. If civilian courts are regularly open to claims challenging personnel decisions of the military services, judicial review may also undermine military discipline and decision-making or impair training programs and operational readiness. For these reasons, civilian courts have traditionally deferred to the superior experience of the military in matters of duty orders, promotions, demotions, and retentions. Knutson's request for reinstatement would require us to intrude on a province committed to the military's discretion, which we decline to do.[64]

The Seventh Circuit's standard, at least in this case, appears to be less intrusive of military affairs than a Mindes analysis. The District of Columbia Circuit is in accord with the Seventh Circuit in matters such as promotion. "To grant such relief would require us to second-guess the Secretary's decision about how best to allocate military personnel. . . . This court is not competent to compare appellant with other officers competing for such a promotion."[65] Alternatively, the court was willing to review a matter involving "only whether the Secretary's decision making process was deficient, not whether his decision was correct."[66] "To

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[64]Knutson at 771.

[65]Kreis, 866 F.2d at 1511.

[66]Id.

grant the relief . . . would not require the district court to substitute its judgment for that of the Secretary . . . [but] only require the Secretary on remand to explain more fully the reasoning behind his decision . . . ."[67]

The Third Circuit, by contrast, finds a strong presumption of reviewability in cases seeking injunctive relief from the military. "[S]uits against the military are non-cognizable in federal court only in the rare case where finding for plaintiff require[s] a court to run the military."[68] If the military justification outweighs the infringement of the plaintiff's individual freedom, we may hold for the military on the merits, but we will not find the claim to be non-justiciable and therefore not cognizable by a court.[69]

The Sixth and Federal Circuits have placed limited reliance on Mindes. "We decline . . . to review or second guess the manifestly reasonable interpretation of military law represented by the decision of the administrative discharge board in this case."[70]

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[67] Id. at 1512.

[68] Jorden v. National Guard Bureau, 799 F.2d 99, 111 (3d Cir. 1986) (quoting Dillard v. Brown, 652 F.2d 316, 322 (3d Cir. 1981)). An example of such a case is Gilligan v. Morgan, 93 S. Ct. 2440 (1973).

[69] Dillard v. Brown, 652 F.2d 316, 323-324 (3d Cir. 1981).

[70] Schultz v. Wellman, 717 F.2d 301, 307 (6th Cir. 1983) (citing Mindes). See also Maier v. Orr, 754 F.2d 973, 983 n.9 (Fed. Cir. 1985).

# CHAPTER 7

# SCOPE OF REVIEW OF MILITARY ADMINISTRATIVE DETERMINATIONS

## 7.1 Introduction.

a. Meaning of "Scope of Review." What is meant by the "scope of review" of military activities is not easily defined. It includes elements of the question of reviewability as well as issues concerning methods of review. In essence, however, "scope of review" involves the determination of what issues the federal courts will examine in cases properly before them and to what extent federal judges will substitute their judgment for that of the military officials or bodies whose decisions are being reviewed. The law concerning the scope of review of courts-martial has developed quite independently of the law concerning the scope of review of other military activities. For this reason, this chapter will treat it separately. It will deal with the scope of review of military administrative determinations. Chapter 8 will examine federal judicial review of courts-martial.

b. "Scope of Review" Dependent on Nature of Challenged Administrative Determination. Generalizations about the scope of review of military administrative determinations are difficult. One problem is that they range in character from the very informal (such as barring an individual from an installation) to the very formal (such as hearings before the Army Board for Correction of Military Records). Another problem is that the scope of review of administrative determinations is

unclear.[1] Perhaps the only definitive statement that can be made is that scope of review depends on the nature of the determination being reviewed.

c. Types of Military Administrative Determinations. Generally, military administrative matters can be grouped into five areas in discussing the various standards of review used by the federal courts: enlistment contracts, conscientious objector determinations, violations of statutes and regulations, constitutional violations, and disputed discretionary decisions.

## 7.2 Enlistment Contracts.

a. General Rule. Claims that enlistment contracts are invalid or have been breached are decided under traditional principles of contract law. The leading case is Peavy v. Warner:

PEAVY v. WARNER
493 F.2d 748 (5th Cir. 1974)

> Peavy appeals from the district court's denial of his writ of habeas corpus in which he sought cancellation of his two year enlistment extension in the Navy. Concluding that the court below applied the wrong standard of review and seemingly failed to make findings as to the most important aspect of Peavy's claim, we reverse and remand for further proceedings.

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[1] See generally 5 K. Davis, Administrative Law Treatise § 29.1 (1984).

On October 20, 1969, Peavy joined the Navy. On November 6, 1969, in exchange for advanced training in a technical field, Peavy agreed to extend his original four year enlistment for two additional years. The relevant clause of Peavy's extension agreement provided:

> I understand that this Extension Agreement becomes binding upon successful completion of basic training (Phase I) and upon enrollment in advanced training (Phase II) and thereafter may not be cancelled except. . . . (emphasis added)

Peavy testified that after the Navy assigned him to a type of advanced training other than his first choice but before enrollment in the training program he attempted to secure information from various sources including Navy personnel officers on the manner in which to cancel the extension agreement. Peavy stated that the sources answered uniformly--impossible. The Navy now concedes that the contract did provide for cancellation prior to enrollment in advanced training.

Immediately before enrollment in advanced training Peavy executed an "automatic advanced agreement" that purported to make the extension agreement binding. Peavy contended that he executed the advanced agreement and accepted the concomitant promotion to E-4 because he was faced with no other choice.

Both a Naval personnel officer and a Naval legal officer advised him at that time that he could not cancel the extension, thus the automatic advancement agreement was immaterial.

Later in his tour of duty, Peavy submitted formal requests for cancellation to the Chief of Naval Personnel and to the Board of Correction of Naval Records. Naval Personnel denied the cancellation saying that Peavy had received the training and personnel were not normally disenrolled at their own request. The letter of denial failed to address Peavy's contention that he was denied the option to cancel the extension prior to enrollment. The Board also denied Peavy's request and failed to address the issue of the option to cancel prior to enrollment.

The district court concluded that both Peavy's extension and the Navy's subsequent refusals to cancel comported with regulations. The court also relied in denying Peavy's habeas corpus on the automatic advancement agreement and the benefits (training, promotion, pay raise) which flowed from the extension agreement.

The federal courts have habeas corpus jurisdiction over claims of unlawful detention by members of the military, In re Kelly, 401 F.2d 211 (5th Cir. 1968). The standard of review varies with the military decision or action complained of. Habeas corpus review of convictions by court-martial is limited to questions of jurisdiction, O'Callahan v. Parker, 395 U.S. 258 . . . (1969), and the

limited function of determining whether the military has given fair consideration to petitioners' claims, Burns v. Wilson, 346 U.S. 137 . . . (1953). A challenge to a discretionary decision will be reviewed under an abuse of discretion or failure to exercise discretion standard. Nixon v. Secretary of Navy, 422 F.2d 934 (2d Cir. 1970); Bluth v. Laird, 435 F.2d 1065 (4th Cir. 1970). Discretionary decisions on conscientious-objector applications are reviewed under the same standards as are decisions by draft boards--the "any basis in fact for the decision" test, Pitcher v. Laird, 421 F.2d 1272 (5th Cir. 1970); Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968). In reviewing the claims that a branch of the military failed to comply with its own regulations the courts will look simply for a showing by the claimant that the regulation was not followed and for a showing of prejudice to the petitioner. Friedberg v. Resor, 453 F.2d 935 (2d Cir. 1971); Nixon v. Secretary of Navy, supra; Bluth v. Laird, supra. Finally, claims that enlistment contracts are invalid or have been breached are decided under traditional notions of contract law. Shelton v. Brunson, 465 F.2d 144 (4th Cir. 1972); Johnson v. Chafee, 469 F.2d 1216 (9th Cir. 1972); Chalfant v. Laird, 420 F.d 945 (9th Cir. 1969).

If Peavy's enrollment in advanced training was valid and binding, Naval regulations precluded cancellation of his two year-extension. The essence of Peavy's claim is that the Navy breached the original

extension agreement by failing to allow him to cancel the extension before enrollment in advanced training. Additionally, he insists that the automatic advancement agreement (referred to by the district court as a reaffirmation of the extension agreement) was invalid because he was induced to execute it by the misrepresentations of Navy authorities. The Navy concedes that Peavy could have cancelled the original extension prior to enrollment, but contends that Peavy made no cognizable efforts to cancel it and that the executed automatic advancement agreement conclusively showed that Peavy intended to fulfill the extension agreement and negates his contention that he sought to cancel the extension.

The district court either failed to consider or failed to make findings regarding this contractual dispute. Although evidence in the record--Peavy's testimony and letters written by Peavy's father corroborating Peavy's statements--supports Peavy's position, we cannot say as a matter of law that Peavy sought cancellation and that the Navy invalidly refused or ignored his requests during the period in which it is now conceded the extension could have been cancelled. Therefore, on remand the district court should make appropriate findings. If the court concludes: (1) that the Navy refused Peavy's requests for cancellation; or (2) that the Navy through misrepresentation induced Peavy to execute the "reaffirmation" agreement, then

he is entitled to cancellation of the remainder of his extension.

Reversed and remanded.

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b. Recruiter Representations. The courts are split on the question whether the military is bound by unauthorized representations by recruiters. Some courts have held that representations[2] bind the military while others have held that they do not bind the military.[3]

c. Remedy. If a court finds that the military has breached the terms of an enlistment contract, the usual remedy is rescission of the contract or cure, at the option of the military.[4] To order rescission of an enlistment contract, however, a court ordinarily must find a breach so substantial or fundamental as to go to the root of the contract. A minor or de minimis breach is not enough.[5]

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[2]Helton v. United States, 532 F. Supp. 813 (S.D. Ga. 1982); Withum v. O'Connor, 506 F. Supp. 1374 (D.P.R. 1981). See Tartt v. Sec'y of Army, 841 F. Supp. 236 (N.D. Ill. 1993) (allowing discovery concerning whether material misrepresentations induced enlistment).

[3]McCracken v. United States, 502 F. Supp. 561 (D. Conn. 1980).

[4]Pence v. Brown, 627 F.2d 872 (8th Cir. 1980); Brown v. Dunleavy, 722 F. Supp. 1343 (E.D. Va. 1989); Allen v. Weinberger, 546 F. Supp. 455 (E.D. Mo. 1982); Mansfield v. Orr, 545 F. Supp. 118 (D. Md. 1982).

[5]See Schneble v. United States, 614 F. Supp. 78, 83 (S.D. Ohio 1985) (clerical error in activation orders); Allen v. Weinberger, 546 F. Supp. 455 (E.D. Mo. 1982) (same).

## 7.3 Conscientious Objectors.

In the Army, conscientious objectors are governed by AR 600-43.[6] Under this regulation, applicants have the burden of establishing their conscientious objector status by clear and convincing evidence.[7] If their application is denied and they seek review of the determination in the federal courts, the denial is reviewed under the narrowest standard known to the law: the "basis-in-fact" test.[8] Under this test, the reviewing court does not weigh the evidence or determine whether substantial evidence exists to support the denial. Instead, the court searches the record for some evidence to support the military's finding; any proof incompatible with an applicant's claim is sufficient to sustain the administrative determination.[9] The following case illustrates the "basis-in-fact" test.

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[6]Dep't of Army, Reg. No. 600-43, Conscientious Objection (7 Aug. 1987).

[7]Id. para. 1-7c.

[8]E.g., Estep v. United States, 327 U.S. 114, 122-23 (1946); Koh v. United States, 719 F.2d 1384 (9th Cir. 1983); Wiggins v. Sec'y of Army, 751 F. Supp. 1238 (W.D. Tex. 1990), aff'd, 946 F.2d 892 (5th Cir. 1991); McAliley v. Birdsong, 451 F.2d 1244 (6th Cir. 1971); Helwick v. Laird, 438 F.2d 959 (5th Cir. 1971).

[9]Woods v. Sheehan, 987 F.2d 1454 (9th Cir. 1993); Taylor v. Claytor, 601 F.2d 1102, 1103 (9th Cir. 1979); Goodrich v. Marsh, 659 F. Supp. 855, 857 (W.D. Ky. 1987). See Hagar v. Sec'y of Air Force, 938 F.2d 1449 (1st Cir. 1991) (suspicion and speculation are not sufficient to form a basis in fact).

KOH v. SECRETARY OF THE AIR FORCE
719 F.2d 1384 (9th Cir. 1983)

Before SWYGERT, NELSON and CANBY, Circuit Judges.

SWYGERT, Senior Circuit Judge:

The Secretary of the Air Force ("Secretary") appeals from the district court's judgment, 559 F. Supp. 852, that the Secretary lacked a "basis in fact" to deny Dr. Audrey S. Koh's application for conscientious objector status. In Taylor v. Claytor, 601 F.2d 1102 (9th Cir. 1979), we discussed the standard of judicial review of the military's denial of conscientious objector status:

> Once the applicant has asserted a prima facie claim for conscientious objector status, the burden of proof shifts to the government to demonstrate "a basis in fact" for denial of his application. Judicial review under the "basis in fact" test is "the narrowest review known to the law." Sanger v. Seamans, 507 F.2d 814, 816 (9th Cir. 1974). The reviewing court does not weigh the evidence for itself or ask whether there is substantial evidence to support the military authorities' denial of the applicant's request for conscientious objector status. Witmer v. United States, . . ., 348

> U.S. [375] at 380-81 [75 S. Ct. 392 at 395, 99 L.Ed. 428], . . . . Rather, the court "search[es] the record for some affirmative evidence" to support the authorities' overt or implicit finding that the applicant "has not painted a complete or accurate picture of his activities." [citation omitted]. Put another way, the reviewing court should look for "some proof that is incompatible with the applicant's claims." [citation omitted].

601 F.2d at 1103.

We mention here three of the five "facts" upon which the Secretary based the denial. First, Koh's two previous applications for discharge were based upon grounds other than an opposition to war in any form. In these earlier applications, Koh alleged that she had been misled about the terms of her military commitment, and that the overall milieu of the military was not compatible with her own expectations or lifestyle. Koh objected to the bureaucracy, regimentation, isolation, and sexism of the military, but Koh did not express moral, religious, or philosophical opposition to war. Second, Koh submitted her conscientious objector claim one month after receiving active duty orders. While the timing of a conscientious objector claim cannot be the only basis for a finding of

insincerity, it can be one of the facts which casts doubt on an applicant's sincerity. Christensen v. Franklin, 456 F.2d 1277, 1278 (9th Cir. 1972). Third, Koh enrolled in a medical training program which conflicted with her military commitment.

The district court's treatment of these facts was an improper application of the standard of review set forth in Taylor v. Claytor, supra. The sole question is whether there was some proof that is incompatible with the applicant's claims. These three facts taken together provided the Secretary with a basis in fact to conclude that expedience rather than sincerity prompted the application.

The judgment of the district court is reversed.

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**7.4 Violation of Statutes and Regulations.**

a. General Rule. Although federal courts will give considerable deference to the armed forces' interpretation of the statutes they administer[10] and

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[10]Barnet v. Weinberger, 818 F.2d 953, 960 (D.C. Cir. 1987). See generally Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844-45 (1984); Blum v. Bacon, 457 U.S. 132, 141 (1982); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380-81 (1969); Edwards' Lessee v. Darby, 25 U.S. (12 Wheat.) 206, 210 (1827).

their own regulations,[11] the courts will not hesitate to overturn a determination made by military decisionmakers in violation of statute or regulation.[12] The following case is an example of a court's reaction to an administrative determination made in violation of a regulation:

WATKINS v. UNITED STATES ARMY
541 F. Supp. 249 (W.D. Wash. 1982)

MEMORANDUM AND ORDER

ROTHSTEIN, District Judge.

THIS MATTER comes before the court on the parties' cross motions for summary judgment. These motions incorporate the arguments made in support of and in opposition to defendants' earlier motion to dismiss. The history of the litigation is as follows.

On October 13, 1981 plaintiff filed an amended complaint seeking a temporary restraining order and preliminary and permanent injunctions prohibiting defendants from discharging plaintiff from the United

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[11]United States v. Saade, 800 F.2d 269, 271 (1st Cir. 1986); Wronke v. Marsh, 787 F.2d 1569 (Fed. Cir.), cert. denied, 479 U. S. 853 (1986). See generally INS v. Stanisic, 395 U.S. 62, 72 (1969); Udall v. Tallman, 380 U.S. 1 (1965).

[12]Vitarelli v. Seaton, 359 U.S. 535 (1959); Harmon v. Brucker, 355 U.S. 579 (1958); Service v. Dulles, 354 U.S. 363 (1957); United States ex rel. Accardi v. Shaughnessey, 347 U.S. 260 (1954); Dilley v. Alexander, 603 F.2d 914 (D.C. Cir. 1979); Arens v. United States, 969 F.2d 1034 (Fed. Cir. 1992). But see Sargisson v. U.S., 913 F.2d 918 (Fed. Cir. 1990) (determination will not be disturbed where error was not prejudicial).

States Army on grounds of homosexuality. At a hearing on plaintiff's application for the temporary restraining order on October 23, plaintiff asked the court to enjoin an Army administrative discharge board, scheduled to convene on October 28, from considering plaintiff for discharge. The court declined to enter a restraining order, but retained jurisdiction over plaintiff's request for preliminary injunctive relief and directed the parties to inform the court before any action adverse to plaintiff was taken pursuant to a recommendation that the discharge board might make.

The three member board convened at Fort Lewis, Washington on October 28. After hearing testimony and the arguments of counsel, on October 29 a two member majority found that plaintiff was "undesirable for further retention in the military service because he has stated that he is a homosexual," and recommended that plaintiff be issued an honorable discharge certificate. Transcript of Proceedings (Tr.) at 429. The dissenting member concluded that plaintiff had not been proved to be a homosexual as defined by Army regulations and recommended that plaintiff not be discharged. Id.

Major General Robert M. Elton, commander of the 9th Infantry Division of the United States Army and the discharge authority for the administrative proceeding, requested an exception to the application of Army Regulation (AR) 635-200, para. 1-19b from Headquarters, Department of the Army (HQDA).

Defendants' Memorandum at 7. Plaintiff submitted a rebuttal letter. Exhibit A to Plaintiff's Motion to Strike Defendants' Motion to Dismiss. After HQDA granted the requested exception, MG Elton approved the finding and recommendation of the majority and made the following additional finding:

> I also find, based upon a preponderance of the evidence properly before the board, that SSG Perry J. Watkins has engaged in homosexual acts with other soldiers.

Report of Proceedings at 3. MG Elton directed plaintiff's discharge to occur on April 19, 1982. On April 12 this court, having retained jurisdiction over plaintiff's motion for injunctive relief, entered a preliminary injunction staying plaintiff's discharge from the Army until the court could rule on the instant motions for summary judgment. On May 7, 1982 defendants filed a notice of appeal from the court's injunction. Before proceeding further with a discussion of the instant motions, the court must indicate that an appeal from a preliminary injunction does not divest the trial court of jurisdiction to proceed with the action on the merits. Ex parte National Enameling & Stamping Co., 201 U.S. 156, 162, 26 S. Ct. 404, 406, 50 L.Ed. 707 (1906); Phelan v. Taitano, 233 F.2d 117, 119 (9th Cir. 1956); Thomas v. Board of Education, 607 F.2d 1043, 1047 n.7 (2d Cir. 1979), cert. denied, 444 U.S. 1081, 100 S. Ct.

1034, 62 L.Ed.2d 765 (1980); 9 Moore's Federal Practice para. 203.11, at 3-54 & n.42 (2d ed. 1980).

The facts of the case are not in dispute. On August 27, 1967, plaintiff reported to an Army facility for his preinduction physical examination. On a Report of Medical History plaintiff checked the box "YES" indicating that he then had homosexual tendencies or had experienced homosexual tendencies in the past. Tr. at Inclosure 7. A psychiatrist evaluated plaintiff and found him "qualified for admission." Id. Following induction and training, plaintiff served in the United States and Korea as a chaplain's assistant, personnel specialist, and company clerk. Defendants' Memorandum at 3. While at Fort Belvoir, Virginia, in November 1968, plaintiff stated to an Army Criminal Investigation Division agent that he had been a homosexual since the age of 13 and had engaged in homosexual relations with two servicemen. Tr. at Inclosure 9. The investigation of plaintiff for committing sodomy, a criminal offense under Article 125 of the Uniform Code of Military Justice, 10 U.S.C. § 925, was dropped because of insufficient evidence. Tr. at Inclosure 10, at 2. Plaintiff received an honorable discharge from the Army on May 8, 1970 at the conclusion of his tour of duty. Official Military Personnel File at 47. His reenlistment eligibility code was listed as "unknown." Id.

In May 1971, plaintiff requested correction of the reenlistment designation in

his release papers, and on June 3 the Army notified him that his reenlistment code had been corrected to category 1, "eligible for reentry on active duty." Id. at 48. On June 18 plaintiff reenlisted for a period of three years. Id. at 56. During the fall of 1971, with the permission of the acting commanding officer of his unit, plaintiff performed an entertainment act as a female impersonator before the troops at a celebration of Organization Day for the 56th Brigade. Amended Complaint para. 19. Plaintiff's performance was reported in the December 1, 1971 issue of Army Times, a publication distributed to Army personnel worldwide. Id. para. 20. In the spring of 1972, plaintiff performed as a female impersonator at the Volks Festival in Berlin, West Germany, with the express permission of his commanding officer. Id. para. 22. In January 1972, plaintiff was denied a security clearance based on his November 1968 statements concerning his homosexuality. Military Intelligence File at 22.

On March 21, 1974 plaintiff reenlisted for six years and was subsequently reassigned to South Korea as a company clerk. Official Military Personnel File at 65. In October 1975, plaintiff's commander initiated elimination proceedings against plaintiff for unsuitability due to homosexuality pursuant to AR 635-200, Chapter 13. On October 14, 1975, a four member board convened at Camp Mercer, South Korea and heard testimony indicating that plaintiff was a homosexual and the

arguments of counsel. Military Intelligence File at 84. Captain Albert J. Bast III testified that as plaintiff's commander he had discovered, through a background records check, that plaintiff had a history of homosexual tendencies. When Bast asked plaintiff about it, plaintiff stated that he was a homosexual. Id. at 85. Bast testified further that plaintiff was "the best clerk I have known," and that plaintiff's homosexuality did not affect the company. Id. First Sergeant Owen Johnson testified that everyone in the company knew that plaintiff was a homosexual and that plaintiff's homosexuality had not caused any problems or elicited any complaints. Id. at 86. The board made the following unanimous finding: "SP5 Perry J. Watkins is suitable for retention in the military service." Id. at 87. The board's recommendation was that plaintiff "be retained in the military service," and that plaintiff was "suited for duty in administrative positions and progression through Specialist rating." Id. The convening authority apparently agreed with the board's finding and recommendations.

Following an assignment in the United States as a unit clerk, plaintiff was reassigned to Germany, where he served as a clerk and a personnel specialist with the 5th United States Army Artillery Group. In November 1977, the commander of the 5th USAAG granted plaintiff a security clearance for information classified as "Secret." Id. at 14. Thereafter plaintiff applied for a

position in the Nuclear Surety Personnel Reliability Program, to qualify for which an applicant must have a security clearance for information classified as "Secret" and must pass a background investigation check. Amended Complaint para. 28. Plaintiff was initially informed that, because his medical records showed he had homosexual tendencies, he was ineligible for a position in the program. Defendants' Memorandum at 5 n.1; Amended Complaint para. 29. Plaintiff appealed. Id. para. 30. In support of his appeal plaintiff's commanding officer, Captain Dale E. Pastian, requested that plaintiff be requalified because plaintiff had been medically cleared, because of plaintiff's "outstanding professional attitude, integrity, and suitability for assignment" in the program, and because the 1975 Chapter 13 board recommended that plaintiff be retained and be allowed to progress in the military. Military Intelligence File at 68. Examining physician Lieutenant Colonel J. C. De Tata, M.D., concluded that plaintiff's homosexuality appeared to cause no problems in his work and noted that plaintiff had been through a Chapter 13 board "with positive results." Id. at 70. The decision to deny plaintiff's eligibility for the Nuclear Surety Program was reversed and plaintiff was accepted into the program in July 1978. Id. at 64.

Following an investigation by military intelligence in the spring of 1979, the commander of the U.S. Army Personnel Clearance Facility by letter dated December 18, 1979,

notified plaintiff of the Army's intent to revoke his security clearance. Id. at 12. The letter stated that revocation was being sought "because during an interview on 15 March 1979, you stated that you have been a homosexual for the past 15 to 20 years." Id. Plaintiff submitted a rebuttal letter on May 29, 1980, admitting making that statement. Id. at 8. The commanding officer of the Central Security Facility revoked plaintiff's security clearance by letter dated July 10, 1980. Id. at 6.

In February 1981, plaintiff appealed the revocation to the Office of the Assistant Chief of Staff for Intelligence. Amended Complaint, Exhibit J-2. Upon discovering in May that his appeal letter had apparently been misplaced or lost, plaintiff sent a second copy of the February letter to Ronald W. Morgan of the Office of the Assistant Chief of Staff for Intelligence. Id. para. 35. That office referred the matter to the Army's Deputy Chief of Staff for Personnel for a determination whether the newly promulgated Chapter 15 of AR 635-200 required or permitted plaintiff's discharge. Defendants' Memorandum at 6. The Assistant Chief of Staff's Office stayed action on plaintiff's appeal pending the determination whether proceedings under Chapter 15 would be commenced. Declaration of Ronald W. Morgan, filed April 12, 1982. Plaintiff brought this action on August 31, 1981, challenging the revocation of his security clearance because he had admitted to

being a homosexual and seeking to prevent his discharge from the Army for homosexuality.

After receiving an opinion from the Judge Advocate General (JAG) of the Army that AR 635-200, para. 1-19b, the Army's regulatory "double jeopardy" provision, did not preclude plaintiff's discharge for homosexuality, the Deputy Chief of Staff's Office referred the matter to plaintiff's commander for appropriate action under Chapter 15. Defendant's Memorandum at 6; see Tr. at Inclosure 4. Plaintiff received notice of his commander's decision to hold a Chapter 15 discharge proceeding by letter dated September 17, 1981. Tr. at Inclosure 3. Plaintiff amended his complaint on October 12 and sought a temporary restraining order enjoining the Army from convening an administrative discharge board. As stated earlier, the court declined to enter a temporary restraining order, the board recommended that plaintiff be given an honorable discharge, and MG Elton approved that recommendation.

Plaintiff's amended complaint alleges that the revocation of his security clearance violates substantive and procedural due process requirements, the First Amendment, principles of equal protection, and is based on an unconstitutionally vague provision. Plaintiff further alleges that discharging him under AR 635-200, Chapter 15 is unconstitutional because Chapter 15 is void on its face and as applied to plaintiff, and because due process, privacy, First Amendment

and estoppel principles prevent it. Plaintiff prays for a permanent injunction barring defendants from discharging plaintiff from the Army on grounds of homosexuality, and requiring defendants to reinstate plaintiff's security clearance and not revoke it in the future based on plaintiff's homosexuality. Plaintiff also requests a declaratory judgment that AR 635-200, Chapter 15 is unconstitutional on its face. Finally, plaintiff asks that the court enter an injunction prohibiting defendants from ever failing to promote or decorate, or from taking any action to retard or hinder plaintiff's Army career because of his homosexuality.

[The court held that plaintiff's claim was reviewable and that he need not exhaust administrative remedies.]

III. Validity of Plaintiff's Discharge

Having determined that plaintiff's claims are presently reviewable, the court turns to the question whether the decision to discharge plaintiff was proper. The military decision must be affirmed unless it was arbitrary or capricious, unsupported by substantial evidence, or contrary to law. Sanford v. United States, 399 F.2d 693, 694 (9th Cir. 1968) (per curiam); Hodges v. Callaway, supra, 499 F.2d at 423; Peppers v. United States Army, 479 F.2d 79, 83-84 (4th Cir. 1973); Doe v. Chafee, 355 F. Supp. 112, 114 (N.D. Cal. 1973); see 5 U.S.C. § 706(2)(C), (D).

It is well settled that the Army must abide by its own regulations. Harmon v. Brucker, 355 U.S. 579, 582, 78 S. Ct. 433,

435, 2 L.Ed.2d 503 (1958) (per curiam); Grimm v. Brown, 449 F.2d 654 (9th Cir. 1971); Van Bourg v. Nitze, 388 F.2d 557 (D.C. Cir. 1967). The Army regulation at issue in this case provides in pertinent part as follows:

> b. Separation pursuant to this regulation should not be based on conduct which has already been considered at a prior administrative or judicial proceeding and disposed of in a manner indicating that separation is not warranted. Accordingly, administrative separations under the provisions of chapter 13, 14 and 15 of this regulation and AR 604-10 are subject to the following restrictions and no member will be considered for administrative separation because of conduct which--
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> . . . .
>
> (2) Has been the subject of administrative proceedings resulting in a final determination that the member should be retained in the service.
>
> . . . .
>
> c. The restrictions in b above are not applicable when--
>
> (1) Substantial new evidence, fraud, or collusion is discovered, which was not known at the time of the original proceeding, despite the exercise of due diligence, and which

will probably produce a result significantly less favorable for the soldier at a new hearing.

(2) Subsequent conduct by the soldier warrants consideration for separation. Such conduct need not independently justify the soldier's discharge, but must be sufficiently serious to raise a question as to his potential for further useful military service. This exception, however, does not permit further consideration of conduct of which the soldier has been absolved in a prior final factual determination by an administrative or judicial body.

(3) An express exception has been granted by HQDA pursuant to a request by a convening authority through channels that, due to the unusual circumstances of the case, administrative separation should be accomplished. Prior to forwarding the case, however, the member will be advised of the convening authority's intentions in this regard, given the opportunity to review the proposed forwarding correspondence, and be permitted to present written matters in rebuttal thereto if desired.

AR 635-200, para. 1-19b & c (September 1, 1981) (emphasis added).

As stated earlier, in October 1975, a four member administrative board, convened to consider whether plaintiff should be discharged under the predecessor regulation to Chapter 15, unanimously recommended that plaintiff "be retained in the military service" and be eligible for promotion. The board's determination apparently was adopted by the discharge authority and became final. Defendants' Memorandum at 6.

At the close of the Army's case at Fort Lewis last October, the Legal Advisor heard argument on the applicability of para. 1-19b. He ruled that para. 1-19b was inapplicable for two reasons. Under para. 1-19c(2), he found that there was proof of subsequent conduct on the part of plaintiff which the board was entitled to consider. Tr. at 228-29. That conduct evidently could include, or be limited to, plaintiff's March 15, 1979, statement to a military intelligence agent that he was a homosexual, as is reflected by the Advisor's instructions to the board. Tr. at 417-18. Second, the Advisor found that Inclosure 4 to the Transcript of Proceedings, consisting of a letter from HQDA, was an express exemption to the applicability of para. 1-19b. Plaintiff excepted to the ruling.

The court is constrained to hold that the Advisor's ruling was arbitrary, unsupported by substantial evidence, and contrary to law. "Subsequent conduct" evidence consisted of testimony relating to two incidents. Specialist Fourth Class Andrew K. Snook

testified to being picked up while hitchhiking on or about July 4, 1980, by a black staff sergeant in a silver or gray car with light colored license plates. Snook testified that the sergeant squeezed his leg in a homosexual advance. Snook was unable to identify plaintiff in a line-up conducted on October 28, 1981, at Fort Lewis. Captain Hugh M. Bryan, who was the unit commander at Fort Lewis in 1980 when the alleged incident took place, testified that after talking with Snook he believed that the staff sergeant who had given Snook a ride was plaintiff. Plaintiff later testified to owning a silver car with light colored license plates. On cross examination, Captain Bryan admitted that there were probably thousands of black staff sergeants at Fort Lewis, and that probably a couple of hundred of them had light colored cars.

The other alleged incident was testified to by PFC David P. Valley. Valley testified that plaintiff asked him if he'd like to move into plaintiff's apartment with him, and that plaintiff used to come by the mailroom and stare at Valley. Plaintiff denied both allegations. On cross examination, Valley indicated that he was not sure that plaintiff had been making an advance toward him. In addition, Valley admitted to being prejudiced against black people and against homosexuals, having once had a bad experience with a homosexual, and related that he had been disciplined once by a board of which plaintiff was a member. The rest of the evidence

presented by the Army was relevant only to the quality of plaintiff's performance and the character of the discharge plaintiff would receive.

The board rejected the evidence that plaintiff had engaged in homosexual acts with Snook and Valley. It returned the single finding that plaintiff had stated he was a homosexual, and, following the Advisor's instructions, made the recommendation that plaintiff be discharged. Plaintiff's candid admission in 1967 that he had homosexual tendencies undoubtedly would have been a proper basis for denying him eligibility for service duty or enlistment. See Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980). Plaintiff's restatement of that fact subsequent to 1975, however, standing alone, cannot justify his discharge. No member can be separated "because of conduct which . . . has been the subject of administrative proceedings resulting in a final determination that the member should be retained in the service." AR 635-200, para. 1-19b(2). The 1975 Chapter 13 board had before it evidence that plaintiff admitted he was a homosexual. The regulation in effect at that time provided for separation of members who had homosexual tendencies whether or not homosexual acts had been committed. AR 635-200, para. 13-5(b)(5) (effective November 23, 1972). The 1975 proceedings resulted in a final determination that plaintiff should be retained in the Army. Accordingly, plaintiff cannot be separated

because he had admitted that he is a homosexual.

The fact that he had repeated his admission subsequent to 1975 does not change this result. Plaintiff's admissions appear to have been made, in every instance, in response to questioning by a superior officer. Aside from the unfairness of penalizing plaintiff for his honesty in responding to official questioning, plaintiff's reiteration of a fact which the 1975 Chapter 13 board found did not require his separation cannot be considered "subsequent conduct" under para. 1-19c(2). That fact was the subject of the prior administrative proceeding.

The Legal Advisor was also in error in ruling that the letter from HQDA, Inclosure 4 to the Transcript of Proceedings, was an "express exception" to the double jeopardy bar of para. 1-19b(2). See Tr. at 231. Inclosure 4 does not even purport to be an express exception under para. 1-19c(3), nor were the procedural requirements of that paragraph followed with respect to Inclosure 4. Were Inclosure 4 such an exception, MG Elton would have had no need to petition HQDA for an exception ruling after he received the board's recommendation.

Defendants argue, however, that the express exception obtained by MG Elton sometime after December 23, 1981, permits plaintiff's discharge. The court cannot agree. The administrative discharge board concluded on October 29, 1981, that plaintiff should be discharged because he had stated he

was a homosexual. Yet the regulation only permits separation under Chapter 15 when an exception "has been granted . . . [p]rior to forwarding the case. . . ." AR 635-200, para. 1-19c(3) (emphasis added). The exemption obtained by MG Elton sometime after December was not a prior express exemption as is contemplated by the regulation. In Cuadra v. Resor, 437 F.2d 1211 (9th Cir. 1970) (per curiam), the Army's failure to follow its own regulation, which required it to obtain Selective Service advice before acting on an application for a hardship discharge, required vacation of the district court's judgment for the Army. The Army had denied plaintiff's application for discharge, then, after plaintiff sued, had sought Selective Service advice. Similarly, in the case at bar, the Army convened the discharge board which recommended discharge, then, after plaintiff raised the bar of para. 1-19b at the proceeding, obtained the exemption allowing it to accomplish separation. Defendants' Memorandum at 7.

Even if retroactive application were sufficient under para. 1-19c(3), however, the determination by HQDA that an express exception was proper was arbitrary. The Adjutant General's letter requesting the express exception argues that para. 1-19b(2) does not make "any allowance for eliminations based upon a change in policy." See Exhibit A to Plaintiff's Motion to Strike Defendants' Motion to Dismiss. It then requests that an exception be granted because the new policy

expressed in Chapter 15 is an "unusual circumstance." The flaw in the Adjutant General's argument, and HQDA's action thereon, is apparent. Paragraph 1-19b itself states: "[A]dministrative separations under the provisions of chapter 13, 14 and 15 of this regulation . . . are subject to the [double jeopardy] restrictions. . . ." Hence HQDA's determination that the new policy expressed in Chapter 15 was an "unusual circumstance" that warranted denying plaintiff the protection of para. 1-19b(2) was contrary to para. 1-19b itself.

The court's determination that the instant discharge of plaintiff is void because it cannot be predicated on his statements that he is a homosexual is bolstered by evidence that the Army previously declined to process plaintiff under Chapter 15 because of the double jeopardy bar. Major Palmer Penny, 9th Aviation Battalion, testified at the Chapter 15 proceedings that in the summer of 1980 he had looked into holding a Chapter 13 proceeding. Penny stated that he had contacted members of the Adjutant General's office to ascertain whether a Chapter 13 proceeding was possible. Tr. at 69. According to Penny, "the AG folks" had told him that a Chapter 13 was not permissible because plaintiff had already been cleared by a prior Chapter 13 board. Id. at 70, 73 ("[A]ll avenues were closed unless Sergeant Watkins . . . approached someone. . . ." Id. at 72.). Then, after Private Snook complained about the hitchhiking incident, Penny again

sought advice from the Adjutant General's office. Penny testified that the Adjutant General's office advised him that the Snook incident did not constitute substantial evidence against plaintiff. Id. at 74-75. The matter was therefore dropped. Id.

Nor does MG Elton's supplemental finding of acts render the double jeopardy bar inapplicable. The regulation states that, if the administrative board recommends discharge, the discharge authority shall "(1) Approve the finding and direct separation; or (2) Disapprove the finding. . . ." AR 635-200, para. 15-11b; accord, 32 C.F.R. § 41.13(e)(4)(ii)(B). The option to make additional findings is not available.

In light of all the foregoing, noting in particular the basic unfairness of discharging plaintiff because he repeated after 1975 the same statement he made at every critical juncture during his Army career, the court rules that plaintiff's motion for summary judgment is GRANTED IN PART and DENIED IN PART as follows:

1. Defendants may not discharge plaintiff because he has stated in the past or will state in the future that he is a homosexual. The court expresses no opinion whether plaintiff can validly be discharged in the event the Army proves the commission of homosexual acts by plaintiff that have not been the subject of administrative proceedings.

. . . .

5. The court further Orders that plaintiff's status shall not be diminished by defendants as a result of this lawsuit; this includes, but is not limited to, plaintiff's right to attend Army training programs. Defendants' motion for summary judgment is DENIED.

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b. Prerequisites to Enforcement of Statute or Regulation. Two conditions are imposed on judicial enforcement of statutory or regulatory provisions. First, the provision must be for the benefit of the individual--that is, the individual must fall within the "zone of interests" of the statute or regulation.[13] Second, the putative violation must prejudice the plaintiff challenging the military's determination.[14]

7.5 Constitutional Violations.

a. General. The Supreme Court has never clearly articulated a standard for the review of constitutional challenges to military administrative determinations or policies. Therefore, generalizations about the manner in which the federal courts should treat such challenges

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[13]See, e.g., Allgood v. Kenan, 470 F.2d 1071 (9th Cir. 1972); Silverthorne v. Laird, 460 F.2d 1175 (5th Cir. 1972); Cortright v. Resor, 447 F.2d 245 (2d Cir. 1971), cert. denied, 405 United States 965 (1972); Hadley v. Sec'y of Army, 479 F. Supp. 189 (D.D.C. 1979).

[14]See, e.g., Connor v. United States Civil Serv. System, 721 F.2d 1054 (6th Cir. 1983); Knehans v. Alexander, 566 F.2d 312 (D.C. Cir. 1977), cert. denied, 435 U.S. 995 (1978). Cf. Dodson v. United States Government, Dep't of Army, 988 F.2d 1199 (Fed. Cir. 1993) (proof of prejudice not required).

are difficult to make. However, that the Supreme Court will grant considerable deference to military decisions even in the face of a constitutional challenge is clear. This deference is grounded in the Court's concern over preserving discipline in the armed forces, a theme that has appeared in Supreme Court decisions over the past century.[15] This concern has justified judicial acceptance of sometimes substantial restrictions on soldiers' speech,[16] severe limitations on the ability of soldiers to sue either the government or their superiors for injuries incurred incident to military service,[17] greatly circumscribed judicial review of court-martial proceedings,[18] tight control of military installations to the extent that civilians seeking entry to exercise

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[15]See, e.g., In re Grimley, 137 U.S. 147, 153 (1890) ("An Army is not a deliberative body. It is the executive arm. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier"); Burns v. Wilson, 346 U.S. 137, 140 (1953) ("the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline"); Schlesinger v. Councilman, 420 U.S. 738, 757 (1975) ("the military must insist upon a respect for discipline without counterpart in civilian life"); Brown v. Glines, 444 U.S. 348, 357 n.14 (1980) ("Loyalty, morale, and discipline are essential attributes of military service").

[16]See, e.g., Brown, 444 U.S. at 348; Sec'y of Navy v. Huff, 444 U.S. 453 (1979); Parker v. Levy, 417 U.S. 733 (1974).

[17]See, e.g., United States v. Stanley, 107 S. Ct. 3054 (1987); United States v. Johnson, 107 S. Ct. 2063 (1987); United States v. Shearer, 473 U.S. 52 (1985); Chappell v. Wallace, 462 U.S. 296 (1983); Feres v. United States, 340 U.S. 135 (1950).

[18]See, e.g., Schlesinger, 420 U.S. at 738; Burns, 346 at U.S. 137.

constitutional rights can be barred,[19] and discrimination based on sex.[20] The Supreme Court's decision in Goldman v. Weinberger is an example of its deferential standard of review.

GOLDMAN v. WEINBERGER
106 S. Ct. 1310 (1986)
475 U.S. 503

Justice REHNQUIST delivered the opinion of the Court.

Petitioner S. Simcha Goldman contends that the Free Exercise Clause of the First Amendment to the United States Constitution permits him to wear a yarmulke while in uniform, notwithstanding an Air Force regulation mandating uniform dress for Air Force personnel. The District Court for the District of Columbia permanently enjoined the Air Force from enforcing its regulation against petitioner and from penalizing him for wearing his yarmulke. The Court of Appeals for the District of Columbia Circuit reversed on the ground that the Air Force's strong interest in discipline justified the strict enforcement of its uniform dress requirements. We granted certiorari because of the importance of the question, and now affirm.

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[19]See, e.g., United States v. Albertini, 472 U.S. 675 (1985); Greer v. Spock, 424 U.S. 828 (1976); but see Flower v. United States, 407 U.S. 197 (1972) (per curiam).

[20]Rostker v. Goldberg, 453 U.S. 57 (1981); Schlesinger v. Ballard, 419 U.S. 498 (1975); but see Frontiero v. Richardson, 411 U.S. 677 (1973).

Petitioner Goldman is an Orthodox Jew and ordained rabbi. In 1973, he was accepted into the Armed Forces Health Professions Scholarship Program and placed on inactive reserve status in the Air Force while he studied clinical psychology at Loyola University of Chicago. During his three years in the scholarship program, he received a monthly stipend and an allowance for tuition, books, and fees. After completing his Ph.D. in psychology, petitioner entered active service in the United States Air Force as a commissioned officer, in accordance with a requirement that participants in the scholarship program serve one year of active duty for each year of subsidized education. Petitioner was stationed at March Air Force Base in Riverside, California, and served as a clinical psychologist at the mental health clinic on the base.

Until 1981, petitioner was not prevented from wearing his yarmulke on the base. He avoided controversy by remaining close to his duty station in the health clinic and by wearing his service cap over the yarmulke when out of doors. But in April 1981, after he testified as a defense witness at a court-martial wearing his yarmulke but not his service cap, opposing counsel lodged a complaint with Colonel Joseph Gregory, the Hospital Commander, arguing that petitioner's practice of wearing his yarmulke was a violation of Air Force Regulation (AFR) 35-10. This regulation states in pertinent part that "[h]eadgear will not be worn . . .

[w]hile indoors except by armed security police in the performance of their duties." AFR 35-10, para. 1-6.h(2)(f) (1980).

Colonel Gregory informed petitioner that wearing a yarmulke while on duty does indeed violate AFR 35-10, and ordered him not to violate this regulation outside the hospital. Although virtually all of petitioner's time on the base was spent in the hospital, he refused. Later, after petitioner's attorney protested to the Air Force General Counsel, Colonel Gregory revised his order to prohibit petitioner from wearing the yarmulke even in the hospital. Petitioner's request to report for duty in civilian clothing pending legal resolution of the issue was denied. The next day he received a formal letter of reprimand, and was warned that failure to obey AFR 35-10 could subject him to a court-martial. Colonel Gregory also withdrew a recommendation that petitioner's application to extend the term of his active service be approved, and substituted a negative recommendation.

Petitioner then sued respondent Secretary of Defense and others, claiming that the application of AFR 35-10 to prevent him from wearing his yarmulke infringed upon his First Amendment freedom to exercise his religious beliefs. The United States District Court for the District of Columbia primarily enjoined the enforcement of the regulation, 530 F. Supp. 12 (1981), and then after a full hearing permanently enjoined the Air Force from prohibiting petitioner from wearing a yarmulke while in uniform. Respondents appealed to the

Court of Appeals for the District of Columbia Circuit, which reversed. 236 U.S.App.D.C. 248, 734 F.2d 1531 (1984). As an initial matter, the Court of Appeals determined that the appropriate level of scrutiny of a military regulation that clashes with a constitutional right is neither strict scrutiny nor rational basis. Id., at 252, 734 F.2d, at 1535-1536. Instead, it held that a military regulation must be examined to determine whether "legitimate military ends are sought to be achieved," Id., at 253, 734 F.2d, at 1536, and whether it is "designed to accommodate the individual right to an appropriate degree." Ibid. Applying this test, the court concluded that "the Air Force's interest in uniformity renders the strict enforcement of its regulation permissible." Id., at 257, 734 F.2d, at 1540. The full Court of Appeals denied a petition for rehearing en banc, with three judges dissenting. 238 U.S.App.D.C. 267, 739 F.2d 657 (1984).

Petitioner argues that AFR 35-10, as applied to him, prohibits religiously motivated conduct and should therefore be analyzed under the standard enunciated in Sherbert v. Verner, 374 U.S. 398, 406, 83 S. Ct. 1790, 1795, 10 L.Ed.2d 965 (1963). See also Thomas v. Review Board, 450 U.S. 707, 101 S. Ct. 1425, 67 L.Ed.2d 624 (1981); Wisconsin v. Yoder, 406 U.S. 205, 92 S. Ct. 1526, 32 L.Ed.2d 15 (1972). But we have repeatedly held that "the military is, by necessity, a specialized society separate from civilian

society." Parker v. Levy, 417 U.S. 733, 743, 94 S. Ct. 2547, 2555, 41 L.Ed.2d 439 (1974). See also Chappell v. Wallace, 462 U.S. 296, 300, 103 S. Ct. 2362, 2365, 76 L.Ed.2d 586 (1983); Schlesinger v. Councilman, 420 U.S. 738, 757, 95 S. Ct. 1300, 1312-13, 43 L.Ed.2d 591 (1975); Orloff v. Willoughby, 345 U.S. 83, 94, 73 S. Ct. 534, 540, 97 L.Ed. 842 (1953). "[T]he military must insist upon a respect for duty and a discipline without counterpart in civilian life," Schlesinger v. Councilman, supra, 420 U.S., at 757, 95 S. Ct., at 1312-13, in order to prepare for and perform its vital role. See also Brown v. Glines, 444 U.S. 348, 354, 100 S. Ct. 594, 599, 62 L.Ed.2d 540 (1980).

Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society. The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps. See, e.g., Chappell v. Wallace, supra, 462 U.S., at 300, 103 S. Ct., at 2365; Greer v. Spock, 424 U.S. 828, 843-844, 96 S. Ct. 1211, 1220, 47 L.Ed.2d 505 (1976) (POWELL, J., concurring); Parker v. Levy, supra, 417 U.S., at 744, 94 S. Ct., at 2556. The essence of military service "is the subordination of the desires and interests of the individual to the needs of the service."

Orloff v. Willoughby, supra, 345 U.S., at 92, 73 S. Ct., at 539.

These aspects of military life do not, of course, render entirely nugatory in the military context the guarantees of the First Amendment. See, e.g., Chappell v. Wallace, supra, 462 U.S., at 304, 103 S. Ct., at 2367. But "within the military community there is simply not the same [individual] autonomy as there is in the larger civilian community." Parker v. Levy, supra, 417 U.S., at 751, 94 S. Ct., at 2559. In the context of the present case, when evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest. See Chappell v. Wallace, supra, 462 U.S., at 305, 103 S. Ct., at 2368; Orloff v. Willoughby, supra, 345 U.S., at 93-94, 73 S. Ct., at 540. Not only are courts "'ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have,'" Chappell v. Wallace, supra, 462 U.S., at 305, 103 S. Ct., at 2368, quoting Warren, The Bill of Rights and the Military, 37 N.Y.U.L.Rev. 181, 187 (1962), but the military authorities have been charged by the Executive and Legislative Branches with carrying out our Nation's military policy. "Judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations

for their governance is challenged." Rostker v. Goldberg, 453 U.S. 57, 70, 101 S. Ct. 2646, 2655, 69 L.Ed.2d 478 (1981).

The considered professional judgment of the Air Force is that the traditional outfitting of personnel in standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission. Uniforms encourage a sense of hierarchical unity by tending to eliminate outward individual distinctions except for those of rank. The Air Force considers them as vital during peacetime as during war because its personnel must be ready to provide an effective defense on a moment's notice; the necessary habits of discipline and unity must be developed in advance of trouble. We have acknowledged that "[t]he inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection." Chappell v. Wallace, supra, 462 U.S., at 300, 103 S. Ct., at 2365.

To this end, the Air Force promulgated AFR 35-10, a 190-page document, which states that "Air Force members will wear the Air Force uniform while performing their military duties, except when authorized to wear civilian clothes on duty." AFR § 35-10, para. 1-6 (1980). The rest of the document describes in minute detail all of the various items of apparel that must be worn as part of the Air Force uniform. It authorizes a few

individualized options with respect to certain pieces of jewelry and hair style, but even these are subject to severe limitations. See AFR 35-10, Table 1-1, and para. 1-12.b(1)(b) (1980). In general, authorized headgear may be worn only out of doors. See AFR § 35-10, para. 1-6.h (1980). Indoors, "[h]eadgear [may] not be worn . . . except by armed security police in the performance of their duties." AFR 35-10, para. 1-6.h(2)(f) (1980). A narrow exception to this rule exists for headgear worn during indoor religious ceremonies. See AFR 35-10, para. 1-6.h(2)(d) (1980). In addition, military commanders may in their discretion permit visible religious headgear and other such apparel in designated living quarters and nonvisible items generally. See Department of Defense Directive 1300.17 (June 18, 1985).

Petitioner Goldman contends that the Free Exercise Clause of the First Amendment requires the Air Force to make an exception to its uniform dress requirements for religious apparel unless the accoutrements create a "clear danger" of undermining discipline and esprit de corps. He asserts that in general, visible but "unobtrusive" apparel will not create such a danger and must therefore be accommodated. He argues that the Air Force failed to prove that a specific exception for his practice of wearing an unobtrusive yarmulke would threaten discipline. He contends that the Air Force's assertion to the contrary is mere ipse dixit, with no support from actual experience or a scientific study

in the record, and is contradicted by expert testimony that religious exceptions to AFR 35-10 are in fact desirable and will increase morale by making the Air Force a more humane place.

But whether or not expert witnesses may feel that religious exceptions to AFR 35-10 are desirable is quite beside the point. The desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment. Quite obviously, to the extent the regulations do not permit the wearing of religious apparel such as a yarmulke, a practice described by petitioner as silent devotion akin to prayer, military life may be more objectionable for petitioner and probably others. But the First Amendment does not require the military to accommodate such practices in the face of its view that they would detract from the uniformity sought by the dress regulations. The Air Force has drawn the line essentially between religious apparel which is visible and that which is not, and we hold that those portions of the regulations challenged here reasonably and evenhandedly regulate dress in the interest of the military's perceived need for uniformity. The First Amendment therefore does not prohibit them from being applied to petitioner even though their effect is to restrict the wearing of the headgear required by his religious beliefs.

The judgment of the Court of Appeals is Affirmed.

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b. Lower Court Applications of Deference. Some federal courts have attempted to construct a more definitive standard for reviewing constitutional challenges to military policies and administrative determinations. For example, in Katcoff v. Marsh,[21] which involved a challenge to congressional funding of the Army's chaplaincy, the United States Court of Appeals for the Second Circuit held that the military policies were presumptively constitutional if they could be deemed reasonably relevant and necessary to further the national defense:

> The line where military control requires that enjoyment of civilian rights be regulated or restricted may sometimes be difficult to define. But caution dictates that when a matter provided for by Congress in the exercise of its war power and implemented by the Army appears reasonably necessary to furtherance of our national defense it should be treated as presumptively valid and any doubt as to its constitutionality should be resolved as a matter of judicial comity in favor of deference to the military's exercise of its discretion.[22]

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[21]755 F.2d 223 (2d Cir. 1985).

[22]Id. at 234. See Mack v. Rumsfeld, 609 F. Supp. 1561 (W.D.N.Y. 1985), aff'd, 784 F.2d 438 (2d Cir.), cert. denied, 479 U.S. 815 (1986) (applying standard to constitutional challenge to single parent policies of Army and Air Force).

To similar effect is the decision of the United States Court of Appeals for the District of Columbia Circuit, in Goldman v. Secretary of Defense,[23] The court held that the proper scope of its review was to determine "whether legitimate military ends are sought to be achieved by means designed to accommodate the individual right to an appropriate degree."[24]

## 7.6 Discretionary Determinations.

a. Standards of Review. Most military administrative determinations are purely discretionary in character. If such decisions are reviewable, the court will examine the decisions to ensure that they are supported by substantial evidence and are not arbitrary and capricious. Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion; it can be somewhat less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's finding from being supported by substantial evidence.[25] The arbitrary and capricious standard is a highly deferential standard that determines whether the decision challenged was based on

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[23]734 F.2d 1531 (D.C. Cir. 1984), aff'd sub. nom. Goldman v. Weinberger, 475 U.S. 503 (1986).

[24]Id. at 1536, citing United States v. Robel, 389 U.S. 258, 268 n.20 (1967); Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994).

[25]Cranston v. Clark, 767 F.2d 1319, 1321 (9th Cir. 1985). See Heisig v. United States, 719 F.2d 1153, 1157 (Fed. Cir. 1983).

relevant factors and whether there was a clear error in judgment.[26]

b. Examples. Examples of military administrative determinations subject to the substantial evidence/ arbitrary and capricious standard are decisions by the Correction Boards to deny relief,[27] medical fitness determinations,[28] adverse personnel actions against civilian employees,[29] separation of service academy cadets and midshipmen,[30] bar letters,[31] decisions under

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[26]Cranston, 767 F.2d at 1321; Grieg v. United States, 640 F.2d 1261, 1266-67 (Ct. Cl. 1981), cert. denied, 455 U.S. 907 (1982); Marcotte v. Sec'y of Defense, 618 F. Supp. 756, 763 (D. Kan. 1985); Benvenuti v. Department of Defense, 613 F. Supp. 308, 311-12 (D.D.C. 1985). See Gilmore v. Lujan, 947 F.2d 1409 (9th Cir. 1991) (court reluctantly upheld government decision because compelled by the narrow scope of review).

[27]Miller v. Lehman, 801 F.2d 492, 496 (D.C. Cir. 1986); Smith v. Marsh, 787 F.2d 510, 512 (10th Cir. 1986); Dougherty v. United States Navy Bd. for Correction of Naval Records, 784 F.2d 499, 501 (3d Cir. 1986); Koster v. United States, 685 F.2d 407 (Ct. Cl. 1982); Johnson v. Reed, 609 F.2d 784 (5th Cir. 1980); Swann v. Garrett, 811 F. Supp. 1336 (N.D. Ind. 1992); Marcotte, 618 F. Supp. at 763; Benvenuti, 613 F. Supp. at 311-12; Mahoney v. United States, 610 F. Supp. 1065, 1068 (S.D.N.Y. 1985); Fairchild v. Lehman, 609 F. Supp. 287 (E.D. Va. 1985), aff'd, 814 F.2d 1555 (Fed. Cir. 1987).

[28]Heisig, 719 F.2d at 1153; Sidoran v. Commissioner, 640 F.2d 231 (9th Cir. 1981).

[29]5 U.S.C. § 7703(c); Sherman v. Alexander, 684 F.2d 464 (7th Cir. 1982), cert. denied, 459 U.S. 1116 (1983); Hoska v. Dep't of Army, 677 F.2d 131 (D.C. Cir. 1982).

[30]Dougherty v. Lehman, 688 F.2d 158 (3d Cir. 1982), aff'g 539 F. Supp. 4 (E.D. Pa. 1981); Love v. Hidalgo, 508 F. Supp. 177 (D. Md. 1981).

[31]S.A.F.E. Export Corp. v. United States, 803 F.2d 696 (Fed. Cir. 1986); Medina v. United States, 709 F.2d 104 (1st Cir. 1983), aff'g 541 F. Supp. 719 (D.P.R. 1982); Tokar v. Hearne, 699 F.2d 753 (5th Cir.), cert. denied, 464 U.S. 844 (1983).

the Missing Persons Act,[32] and hardship discharge determinations.[33] The following is a typical case applying the substantial evidence/arbitrary and capricious standard.

POWELL v. MARSH
560 F. Supp. 636 (D.D.C. 1983)

MEMORANDUM OPINION

CHARLES R. RICHEY, District Judge.

In his suit, plaintiff seeks review of a decision by the Army Board for Correction of Military Records ("ABCMR" or the "Board") that he was only 10% disabled at the time of his discharge. The Court now has before it Defendant's Motion to Dismiss, or, in the Alternative for Summary Judgment, plaintiff's opposition thereto and the entire record herein. For the reasons set forth herein, the Court will grant Defendant's Motion for Summary Judgment, thus refusing to disturb the ABCMR's decision denying plaintiff the record correction he sought.

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[32]Luna v. United States, 810 F.2d 1105 (Fed. Cir. 1987); Cherry v. United States, 697 F.2d 1043 (Fed. Cir. 1983); Pitchford v. United States, 666 F.2d 533 (Ct. Cl. 1981).

[33]Jackson v. Allen, 553 F. Supp. 528 (D. Mass. 1982).

## BACKGROUND

Plaintiff enlisted in the Army in 1952 and served (with a short absence between enlistments) until 1966 when he was honorably discharged. In 1958, plaintiff volunteered to participate in a drug-related experiment, in the course of which, he received one dose of lysergic acid diethylamide (LSD) and then participated in a variety of simulated combat skills. Upon his separation from the Army, plaintiff underwent a physical examination that found that he was fit for duty. No psychological disorder was noted at that time. Nor was plaintiff diagnosed or treated for any mental disorder between 1958 and 1976, although he underwent medical treatment for a variety of internal complaints during that time period. Additionally, plaintiff was continuously employed for the eight years following his discharge and did not seek any relief from the Army during this time.

In December of 1975, plaintiff applied to the Veterans Administration ("VA") for disability benefits for the first time. He claimed he was suffering from the disabling effects of an unknown drug administered to him in 1958. Plaintiff underwent medical and psychiatric examinations in connection with his application in early 1976. He was diagnosed as suffering from an "anxiety reaction." However, the VA determined that he was entitled to no disability benefits.

On January 22, 1979, plaintiff, through counsel, sought reconsideration by the VA of

its 1976 rating decision denying him disability benefits. Counsel also informed the VA that plaintiff had received LSD in the 1958 Army experiments. Plaintiff again underwent a medical examination, and was awarded a 10% disability rating for a nonservice connected duodenal ulcer in July 18, 1980.

Prior to that decision, plaintiff applied to the ABCMR for the correction of his records. Plaintiff's application was based on the claim that he was disabled due to the 1958 experiment. He sought to convert his honorable discharge into a medical disability retirement with a 100% disability rating retroactive to the date of his separation.

In order to evaluate plaintiff's application, the ABCMR requested that the Office of the Surgeon General ("SG") determine whether plaintiff should have been retired because of disability, rather than honorably discharged. The SG concluded that plaintiff did not have a medical condition at the time of his separation that would have warranted disability retirement.

At the request of plaintiff's counsel and to further aid in evaluating plaintiff's application, the ABCMR received authorization to conduct a comprehensive mental and physical evaluation of plaintiff, at the Army's expense, in February of 1981. This evaluation, conducted at the Walter Reed Army Medical Center ("Walter Reed"), found that plaintiff suffered from chronic paranoid schizophrenia, the onset of which occurred

during plaintiff's active duty. However, the evaluation found no causal connection between the LSD plaintiff received and the psychological condition from which he suffered. Instead, the conclusion was that the LSD incident was a "coincidental precipitant" to plaintiff's disorder.

Plaintiff was next sent to Brooke Army Medical Center ("Brooke") for further testing. Brooke also found that plaintiff was suffering from a "paranoid delusional state." Based upon the findings of Walter Reed and Brooke, the ABCMR recommended that the SG reconsider its prior no-disability decision. The SG complied and issued a new opinion stating that if plaintiff's current condition had existed at the time of his discharge he would have been referred to a Medical Evaluation Board ("MEB"), which would have determined plaintiff to be medically unfit and would have referred plaintiff to a Physical Evaluation Board ("PEB").

Plaintiff's application was then referred by the ABCMR to the United States Army Physical Disability Agency ("USAPDA"). The USAPDA determined that if plaintiff had been referred to a PED at the time of his discharge he would have been given a 10% disability rating with entitlement to disability severance pay. This determination was based on review of plaintiff's record including all of the evaluations previously conducted and upon the fact that plaintiff was able to maintain employment for eight years after separation.

In July of 1981, the ABCMR provided plaintiff with copies of all of the relevant opinions noted above and invited plaintiff's response. Plaintiff requested a hearing at this time, but the ABCMR denied that request. Plaintiff then returned to the VA and asked them to review their rating decision of July 1980 granting plaintiff 10% disability. After another examination, the VA affirmed its prior decision. However, when requested to reconsider by the Disabled American Veterans organization, the VA convened yet another review by a "Board of Three Psychiatrists." When the Board confirmed the prior diagnoses, the VA granted plaintiff a 50% disability rating for service-connected schizophrenia. Plaintiff's counsel then submitted the VA decision to the ABCMR.

Ultimately, the ABCMR granted plaintiff's application in part, amending his records to state that he was honorably discharged with 10% disability entitling him to severance pay. His records were so amended and on May 17, 1982, plaintiff received $8,870.40 in disability severance pay based on the correction of his records.

. . . .

The ABCMR's Decision was Reasonable and Supported By Substantial Evidence.

The Court's role in cases of this type is limited to reviewing the record to determine whether the ABCMR's decision was arbitrary or

capricious, unsupported by substantial evidence, or contrary to law. See, e.g., deCicco v. United States, 677 F.2d 66, 70 (Ct. Cl. 1982); Heisig v. Secretary of the Army, 554 F. Supp. 623, 627 (D.D.C. 1982); Amato v. Chafee, 337 F. Supp. 1214, 1217 (D.D.C. 1972). The ABCMR's action clearly meets this standard in the case at bar.

It is undisputed that plaintiff is now suffering from a serious illness. However, that is not the question here. The ABCMR was charged with determining whether plaintiff was suffering from a disabling illness at the time of his discharge and whether that disability was caused by his ingestion of LSD in an Army experiment.

In order to arrive at a reasoned and supportable conclusion, the ABCMR authorized numerous physical and psychological examinations of plaintiff. Based on the evidence produced by these exams, and the recommendation of the USAPDA, the Board determined that plaintiff would only have been diagnosed as suffering from a 10% service related disability at the time of his discharge. The severity of his current illness, the Board concluded, was not causally related to the LSD he received in the Army's testing program. The Court finds that this determination was reasonable and supported by substantial evidence.

An Order in accordance with the foregoing will be issued of even date herewith.

# CHAPTER 8

## COLLATERAL REVIEW OF COURTS-MARTIAL

### 8.1 Introduction.

a. Of all military activities, courts-martial historically have been the subject of the earliest civilian court review. Federal courts, however, have never exercised a power of general supervision and control over the military justice system. Courts-martial are constitutionally separate from the federal judiciary. "[A] military tribunal is an Article I legislative court with jurisdiction independent of the power created and defined by Article III."[1] Indeed, until the Military Justice Act of 1983, which provided for discretionary Supreme Court review of decisions of the Court of Military Appeals,[2] courts-martial were not directly reviewable by any federal court. Instead, courts-martial could only be challenged indirectly, through collateral proceedings such as habeas corpus, back pay claims, and suits for money damages for various common law torts connected with the enforcement of court-martial sentences. Moreover, as the Supreme Court will directly consider very few cases under the Military Justice Act of 1983, most future federal court

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[1]Gosa v. Mayden, 413 U.S. 665, 686 (1973).

[2]Pub. L. No. 98-209, § 10, 97 Stat. 1393 (1983) (codified at 28 U.S.C. § 1259). The argument has been raised that this legislation, authorizing direct review of Court of Military Appeals decisions, precludes all collateral review of courts-martial. The Courts have soundly rejected the argument. See Matias v. United States, 923 F.2d 821 (Fed. Cir. 1990); Machado v. Commanding Officer, 860 F.2d 542 (2d Cir. 1988).

intervention in military court proceedings is likely to be collateral in nature.

b. This chapter considers federal judicial review of courts-martial in collateral proceedings, including the threshold for and scope of review, the doctrine of exhaustion of military judicial remedies, and the doctrine of waiver. First, however, it is important to understand the historical development of the still-evolving role of the federal courts in the military justice system.

## 8.2 Historical Overview.

a. General. From a historical perspective, the relationship between the civilian courts and the military justice system fits relatively neatly into three distinct periods. Until World War II, collateral challenges were limited to questions of technical jurisdiction. Beginning in 1943, lower federal courts began reviewing the constitutional claims of persons convicted by courts-martial. This expansion of the scope of review, which was consistent with developments in civilian habeas corpus, culminated with the Supreme Court's landmark decision in Burns v. Wilson.[3] In Burns, the Supreme Court recognized that constitutional claims were subject to review in collateral challenges to military court convictions. Finally, the post-Burns era, from 1953 to the present, has been marked by a lack of uniformity in federal court decisions about the proper limits of review of court-martial proceedings.

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[3]346 U.S. 137 (1953).

b. Collateral Review Before World War II.

(1) Early English Experience. The evolution of the relationship between the English common law and military courts is intertwined with the complex and historic struggles between the Crown and Parliament, and between the common law courts and other rival courts.[4] Parliament and the common law courts strove to limit the jurisdiction of military tribunals. The preference was for trial in the common law courts, especially in time of peace.[5] For example, in 1322, a military court composed of King Edward II and various noblemen condemned Thomas, Earl of Lancaster, to death.[6] Parliament reversed the judgment in 1327,[7] on the ground "'that in time of peace no man ought to be adjudged to death for treason or another offense without being arraigned and held to answer; and that regularly when the King's courts are open it is a time of peace in judgment of law.'"[8]

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[4]Duker, The English Origins of the Writ of Habeas Corpus: A Peculiar Path to Fame, 53 N.Y.U. L. Rev. 983, 1007, 1015-25, 1025-36, 1042-54 (1978); Schlueter, The Court-Martial: An Historical Survey, 87 Mil. L. Rev. 129, 139-44 (1980); Developments in the Law--Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1045 (1969) [hereafter Developments].

[5]M. Hale, The History of the Common Law of England 25 (3d ed. London 1739) (1st ed. London 1713); C. Walton, History of the British Standing Army 532 (1894).

[6]W. Blackstone, Commentaries *413.

[7]Id.

[8]Ex parte Milligan, 71 U.S. (4 Wall.) 2, 128 (1866). See E. Coke, 3 Institutes *52 (quoted in S. Adye, A Treatise on Courts-Martial 50 (8th ed. London 1810) (1st ed. London 1769)) ("[I]f a lieutenant or other, that hath commission of martial law, doth, in time of peace, hang or otherwise execute any man, by colour of martial law, this is murder, for it is against the Magna Charta").

Despite this preference for civilian courts, however, common law court intervention into the proceedings of military tribunals was relatively confined. Generally, review was limited to ensuring that the military tribunal did not exceed its jurisdiction.[9]

(2) Collateral Review in America Before the Civil War. Before the Civil War, few collateral challenges to military proceedings were brought in the federal courts.[10] Not until 1879 did the Supreme Court receive its first case involving a petition for habeas relief from a court-martial sentence.[11] In an early habeas corpus decision not involving military proceedings, however, the Court presaged the scope of review it would employ by declaring that the substantive

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[9]See, e.g., Barwis v. Keppel, 95 Eng. Rep. 831, 833 (K.B. 1766); Grant v. Gould, 126 Eng. Rep. 434, 451 (C.P. 1792); The King v. Suddis, 102 Eng. Rep. 119, 123 (K.B. 1801); Mann v. Owen, 109 Eng. Rep. 22 (K.B. 1829).

[10]Rosen, Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial, 108 Mil. L. Rev. 5, 20 (1985). During the first half of the 19th Century, state courts were the principal forum for collateral attacks on courts-martial. Id. at 24-27. State courts heard both damages claims arising from court-martial proceedings, e.g., Loomis v. Simons, 2 Root (Conn.) 454 (1796); Hickey v. Huse, 57 Me. 493 (1869); Rathburn v. Martin, 20 Johns. (N.Y.) 343 (1823); Duffield v. Smith, 3 Serg. & Rawle (Pa.) 190 (1818); Barnett v. Crane, 16 Vt. 246 (1844), and habeas corpus challenges to the sentences of confinement imposed by military courts. E.g., Ex parte Anderson, 16 Iowa 595 (1864); In the Matter of Carlton, 7 Cow. (N.Y.) 471-72 (1827); Husted's Case, 1 Johns. (N.Y.) 136 (1799); State v. Dimmick, 12 N.H. 197 (1841); Commonwealth ex rel. Webster v. Fox, 7 Pa. 336 (1847). The Supreme Court, in two Civil War-era cases, ended the state courts' habeas jurisdiction over petitioners in federal custody. In re Tarble, 80 U.S. (13 Wall.) 397 (1871); Ableman v. Booth, 62 U.S. (21 How.) 506 (1858).

[11]Ex parte Reed, 100 U.S. 13 (1879).

principles governing the writ of habeas corpus would be those established by the common law.[12] Thus, review was limited to questions of jurisdiction.[13] The earliest challenges to courts-martial to reach the Supreme Court were actions to recover damages or property. In these cases, the Supreme Court limited its review to determining whether the courts-martial had jurisdiction.[14] Lower federal courts similarly refused to look beyond the jurisdiction of the military courts.[15]

(3) Collateral Review in America From the Civil War to World War II.

(a) With the Civil War, the number of federal collateral challenges to the proceedings of military tribunals filed in the federal courts increased dramatically.[16] Growth, however, did not mean change.[17] In virtually all of the collateral challenges brought between the Civil War and World War II, federal courts limited their review to a search for technical jurisdiction.[18]

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[12]Ex parte Bollman, 8 U.S. (4 Cranch) 75, 93 (1807).

[13]See, e.g., Ex parte Parks, 93 U.S. 18, 22-23 (1876); Ex parte Watkins, 28 U.S. (3 Pet.) 193 (1830).

[14]Dynes v. Hoover, 61 U.S. (20 How.) 65 (1858); Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827); Wise v. Withers, 7 U.S. (3 Cranch) 331 (1806).

[15]See, e.g., In re Biddle, 30 F. Cas. 965 (C.C.D.D.C. 1855) (No. 18,236).

[16]Rosen, supra note 10, at 28.

[17]Id.

[18]See, e.g., Hiatt v. Brown, 339 U.S. 103, 111 (1950); Collins v. McDonald, 258 U.S. 416, 418 (1922); Givens v. (continued...)

(b) Review of the technical jurisdiction of courts-martial consisted of four different aspects. First, federal courts reviewed courts-martial to determine whether the tribunal had jurisdiction over the offense.[19] Second, the courts entertained collateral challenges to the personal jurisdiction of courts-martial.[20] Third, federal courts would collaterally review military proceedings to ensure the courts-martial were lawfully convened and constituted.[21] Fourth, the courts could collaterally review court-martial proceedings to ascertain whether sentences adjudged were duly approved and authorized by law.[22]

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[18](...continued)
Zerbst, 255 U.S. 11, 19-20 (1921); Mullan v. United States, 212 U.S. 516, 520 (1909); Carter v. McClaughry, 183 U.S. 365, 380-81 (1902); Swaim v. United States, 165 U.S. 553, 555 (1897); United States v. Grimley, 137 U.S. 147, 150 (1890); Smith v. Whitney, 116 U.S. 167, 176-77 (1886); Wales v. Whitney, 114 U.S. 564, 570 (1885); Keyes v. United States, 109 U.S. 336, 339 (1883); Ex parte Reed, 100 U.S. 13, 23 (1879).

[19]See, e.g., Dynes v. Hoover, 61 U.S. (20 How.) 65 (1858); Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820); Crouch v. United States, 13 F.2d 348 (9th Cir. 1926); Anderson v. Crawford, 265 F. 504 (8th Cir. 1920); Meade v. Deputy Marshall, 16 F. Cas. 1291 (C.C.D. Va. 1815) (No. 9,372).

[20]See, e.g., Kahn v. Anderson, 255 U.S. 1 (1921); Johnson v. Sayre, 158 U.S. 109 (1895); Morrissey v. Perry, 137 U.S. 157 (1890).

[21]See, e.g., Givens v. Zerbst, 255 U.S. 11 (1921); United States v. Brown, 206 U.S. 240 (1907); McClaughry v. Deming, 186 U.S. 49 (1902); Swaim v. United States, 165 U.S. 553 (1897).

[22]Runkle v. United States, 122 U.S. 543 (1887); Stout v. Hancock, 146 F.2d 741 (4th Cir. 1944), cert. denied, 325 U.S. 850 (1945); In re Brodie, 128 F. 665 (8th Cir.
(continued...)

(c) Before World War II, the federal courts rarely ventured beyond the four aspects of technical jurisdiction. Thus, the civil courts would not review claims of mere errors or irregularities in the proceedings of courts-martial,[23] or matters of defense,[24] or alleged constitutional defects in the military proceedings.[25]

c. Collateral Review From 1941-1953.

(1) General. With the onset of World War II, some lower federal courts began broadening the issues cognizable in collateral attacks on courts-martial to include constitutional claims.[26] Although this expansion was attributable to a number of factors,[27] it was principally in response to the parallel enlargement of

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[22](...continued)
1904); Rose ex rel. Carter v. Roberts, 99 F. 948 (2d Cir.), cert. denied, 176 U.S. 684 (1900).

[23]See, e.g., Mullan v. United States, 212 U.S. 516 (1908) (evidentiary errors); Swaim, 165 U.S. at 553 (evidentiary errors, hostile member on court).

[24]See, e.g., Romero v. Squier, 133 F.2d 528 (9th Cir.), cert. denied, 318 U.S. 785 (1943) (entrapment); Aderhold v. Menefee, 67 F.2d 345 (5th Cir. 1933) (self-defense).

[25]See, e.g., Collins v. McDonald, 258 U.S. 416 (1922) (self-incrimination); Sanford v. Robbins, 115 F.2d 435 (5th Cir.), cert. denied, 312 U.S. 697 (1940) (double jeopardy).

[26]See Rosen, supra note 10, at 37-38.

[27]Id. at 38.

collateral review of criminal cases in the civilian sector.[28]

(2) Development of Civilian Habeas Corpus. Until the early 20th century, the scope of review employed by the federal courts in collateral challenges to civilian criminal convictions roughly mirrored the review afforded in attacks on military convictions.[29] Starting in 1915, the issues cognizable in civilian cases began to broaden. In four decisions--Frank v. Mangum,[30] Moore v. Dempsey,[31] Johnson v. Zerbst,[32] Waley v. Johnston,[33] the Supreme Court gradually expanded the scope of review to include constitutional issues. However, these issues were not subject to de novo examination. Instead, the federal courts would limit their review to determining whether the issues were "fully and fairly considered" in the state criminal proceedings.[34]

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[28]Fratcher, Review by Civil Courts of Judgments of Federal Military Tribunals, 10 Ohio St. L.J. 271, 293-95 (1949); Katz & Nelson, The Need for Clarification in Military Habeas Corpus, 27 Ohio St. L.J. 193, 200-02 (1966); Snedeker, Habeas Corpus and Court-Martial Prisoners, 6 Vand. L. Rev. 288, 296-97 (1953).

[29]See, e.g., In re Moran, 203 U.S. 96 (1906); Ex parte Bigelow, 113 U.S. 328 (1885); Ex parte Parks, 93 U.S. 18 (1876); Ex parte Watkins, 28 U.S. (3 Pet.) 193 (1830).

[30]237 U.S. 309 (1915).

[31]261 U.S. 86 (1923).

[32]304 U.S. 458 (1938).

[33]316 U.S. 102 (1942).

[34]See, e.g., Ex parte Hawk, 321 U.S. 114, 118 (1948). See also Rosen, The Great Writ--A Reflection of Societal Change, 44 Ohio St. L.J. 337, 346 (1983) [hereafter The Great Writ].

(3) Expansion of Collateral Review of Military Cases in the Lower Federal Courts. Influenced by the developments in the civilian sector, some lower federal courts broadened the scope of their inquiry in collateral attacks on military convictions to include constitutional claims.[35] Yet this expansion was by no means uniform. Some federal courts adhered to the traditional scope of review--jurisdiction.[36] Others, including the Supreme Court, explicitly avoided the issue.[37]

d. Burns v. Wilson, 346 U.S. 137 (1953).

(1) The Supreme Court's break with the traditional limits of collateral review came with its decision in Burns v. Wilson.[38] The case involved two petitions for habeas corpus by co-accused--Burns and Dennis--who were separately tried and convicted by general court-martial for rape and murder on the island of Guam. The courts had sentenced both petitioners to death. After exhausting their military remedies, the

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[35]See, e.g., Montalvo v. Hiatt, 174 F.2d 645 (5th Cir.), cert. denied, 338 U.S. 874 (1949); Benjamin v. Hunter, 169 F.2d 512 (10th Cir. 1948); United States ex rel. Weintraub v. Swenson, 165 F.2d 756 (2d Cir. 1948); United States ex rel. Innes v. Hiatt, 141 F.2d 664 (3d Cir. 1944); Schita v. King, 133 F.2d 283 (8th Cir. 1943); Shapiro v. United States, 69 F. Supp. 205 (Ct. Cl. 1947).

[36]See, e.g., United States ex rel. Innes v. Crystal, 131 F.2d 576 (2d Cir. 1943); Ex parte Benton, 63 F. Supp. 808 (N.D. Cal. 1945); Ex parte Potens, 63 F. Supp. 582 (E.D. Wis. 1945).

[37]See, e.g., Wade v. Hunter, 336 U.S. 684 (1949); Romero v. Squier, 133 F.2d 528 (9th Cir.), cert. denied, 318 U.S. 785 (1943).

[38]346 U.S. 137 (1953).

petitioners sought habeas relief in the federal courts. Neither petitioner controverted the technical jurisdiction of their courts-martial. Instead, each rested his petition on various constitutional infirmities. The lower courts dismissed both petitions. Although the Supreme Court affirmed the disposition of the claims, it held that the federal courts could review the petitioner's constitutional challenges. The Court limited the scope of the inquiry, however, to a review of whether the military courts had fully and fairly considered the constitutional claims. The Court held that "had the military courts manifestly refused to consider [the petitioners'] claims, the District Court was empowered to review them de novo."[39] But where, as in the case before it, the military tribunals had heard the petitioners out on every significant allegation, "it is not the duty of the civil courts to simply repeat that process. . . . It is the limited function of the civil courts to determine whether the military has given fair consideration to each of these claims."[40]

(2) Earlier in the same term in which it decided Burns, the Supreme Court issued its landmark civilian habeas corpus decision in Brown v. Allen.[41] Allen is significant because it abandoned the "full and fair consideration" limitation on the review of constitutional issues in collateral challenges to state criminal convictions. The Court held that, while the federal courts may accept a state court's determination of factual issues, it cannot accept as binding state

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[39]Id. at 142.

[40]Id. at 144.

[41]344 U.S. 443 (1953).

adjudications of questions of law.[42] "The state court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right."[43]

(3) Nine years after Allen, the scope of federal court review of state criminal proceedings hit its highwater mark in Townsend v. Sain,[44] Townsend not only required federal courts to independently review all state court decisions on constitutional issues, but also "to relitigate questions of fact whenever 'there is some indication the state process has not dealt fairly or completely with the issues.'"[45]

(4) These developments in civilian habeas jurisprudence are important because they influenced the manner in which federal courts were to treat the Burns "full and fair consideration" test. Federal courts were reluctant to afford greater deference to military criminal proceedings than those in the civilian sphere. And just as the developments in the law of civilian habeas corpus before World War II influenced military

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[42]Id. at 506.

[43]Id. at 508.

[44]372 U.S. 293 (1963).

[45]The Great Writ, supra note 34, at 351, quoting Developments, supra note 4, at 122. Townsend was partially overruled in Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992). Keeney held that a habeas petitioner is entitled to a federal evidentiary hearing only if he can show cause for his failure to properly develop the material facts in the state criminal proceedings and actual prejudice resulting from that failure, or if he can show that a fundamental miscarriage of justice would result from failure to hold such a hearing.

habeas review, the expansion of the writ in the 1950s and 1960s undoubtedly colored the federal courts' perception of the proper scope of review in military cases.[46]

## 8.3 Scope of Collateral Review.

a. The Demise of Burns v. Wilson. Until about 1970, most federal courts strictly applied the Burns test of "full and fair" consideration and refused to review either the factual or legal merits of constitutional claims litigated in the military courts.[47] This approach focused on whether the military courts "manifestly refused" to consider a petitioner's constitutional claims. While a few courts still adhere to the Burns approach, notably the United States Court of Appeals for the Tenth Circuit,[48] most courts do not. Because of a number of factors, including the broadened scope of civilian habeas corpus and the failure of the Supreme Court to apply the Burns test since 1953, most federal courts have devised their own standard of collateral

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[46]See Rosen, supra note 10, at 66.

[47]See, e.g., United States ex rel. Thompson v. Parker, 399 F.2d 774 (3d Cir. 1968), cert. denied, 393 U.S. 1059 (1969); Palomera v. Taylor, 344 F.2d 937 (10th Cir.), cert. denied, 382 U.S. 946 (1965); Reed v. Franke, 297 F.2d 17 (4th Cir. 1961); Bourchier v. Van Metre, 223 F.2d 646 (D.C. Cir. 1955); Swisher v. United States, 237 F. Supp. 921 (W.D. Mo. 1965), aff'd, 354 F.2d 472 (8th Cir. 1966); Begalke v. United States, 286 F.2d 606 (Ct. Cl.), cert. denied, 364 U.S. 865 (1970).

[48]See, e.g., Lips v. Commandant, U.S. Disciplinary Barracks, 997 F.2d 808 (10th Cir. 1993), cert. denied, 114 S. Ct. 920 (1994); Khan v. Hart, 943 F.2d 1261 (10th Cir. 1991); Dodson v. Zelez, 917 F.2d 1250 (10th Cir. 1990); Watson v. McCotter, 782 F.2d 143 (10th Cir.), cert. denied, 476 U.S. 1184 (1986).

review. The result has been a divergence in approach to collateral challenges to court-martial convictions among the lower federal courts.

b. Current Approaches to Collateral Review.

(1) General. The federal courts generally agree about what issues are reviewable in collateral challenges to courts-martial: issues of jurisdiction and constitutional questions.[49] Other issues are not reviewable.[50] The courts are not in agreement, however, about the proper scope of review of these issues--especially constitutional claims--or the deference federal courts should give to military court determinations.

(2) As noted above, a few courts--principally those in the Tenth Circuit--still follow the Burns v. Wilson "full and fair" consideration test.[51] The significance of the Tenth Circuit's adherence to Burns should not be underestimated; the United States Disciplinary Barracks at Fort Leavenworth, Kansas, is in the Tenth Circuit. Thus, Tenth Circuit precedent will

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[49]See, e.g., United States v. Augenblick, 393 U.S. 348 (1969); Relford v. Commandant, 401 U.S. 355 (1971).

[50]See, e.g., Hatheway v. Sec'y of Army, 641 F.2d 1376 (9th Cir.), cert. denied, 454 U.S. 864 (1981); Calley v. Callaway, 519 F.2d 184 (5th Cir.) (en banc), cert. denied, 425 U.S. 911 (1975). See generally United States ex rel. Searcy v. Greer, 768 F.2d 906, 910 (7th Cir.), cert. denied, 474 U.S. 996 (1985).

[51]But see Monk v. Zelez, 901 F.2d 885, 888 (10th Cir. 1990) (purporting to adhere to the deferential Burns test, but permitting review of constitutional claims fully considered by military courts in "appropriate cases," i.e., where the issue is "substantial and largely free of factual questions.").

govern many (if not most) of the petitions for habeas corpus filed by military prisoners. Watson v. McCotter provides an example of the Tenth Circuit's restrictive approach to collateral attacks on courts-martial.

WATSON v. McCOTTER
782 F.2d 143 (10th Cir.),
cert. denied, 476 U.S. 1184 (1986)

Before HOLLOWAY, Chief Judge, LOGAN, Circuit Judge, and WINDER, District Judge.

LOGAN, Circuit Judge.

This appeal is from the district court's summary dismissal of petitioner Michael C. Watson's application for writ of habeas corpus filed under 28 U.S.C. § 2241. Watson currently is serving a ten-year court-martial sentence for rape and forcible sodomy, violations of Articles 120 and 125 of the Uniform Code of Military Justice, 10 U.S.C. §§ 920, 925.

The district court dismissed the petition, without issuing an order to show cause or holding an evidentiary hearing, on the ground that the military tribunals previously had given "full and fair consideration" to Watson's ineffective assistance of counsel claim, despite the absence of any evidentiary hearing on the issue by a military court.

Watson was convicted in 1981 before a general court-martial. He appealed his conviction to the Army Court of Military Review on due process and ineffective assistance of counsel grounds; after a hearing that court affirmed his conviction and sentence. The United States Court of Military Appeals denied further review.

Watson then filed this application for a writ of habeas corpus, a supporting brief, and a request for a hearing in the United States District Court for the District of Kansas, the district in which he is imprisoned. He again raised ineffective assistance of counsel and due process challenges to his confinement. Two days after this filing, the district court sua sponte denied the writ. This appeal raises only the ineffective assistance claim.

When a military decision has dealt "fully and fairly" with an allegation raised in a habeas petition, "it is not open to a federal civil court to grant the writ simply to reevaluate the evidence." Burns v. Wilson, 346 U.S. 137, 142, 73 S. Ct. 1045, 1048, 97 L.Ed. 1508 (1953) (plurality opinion). In Burns the district court had dismissed the petitioners' application for habeas corpus without hearing evidence, because it was satisfied that the court-martial had jurisdiction over the prisoners, crimes, and sentences. Id. at 138, 73 S. Ct. at 1046. The court of appeals gave the petitioners' claims full consideration on the merits; it reviewed the evidence in the trial record and other military court proceedings before deciding to uphold the convictions. Id. at 139, 73 S. Ct. at 1047. In reviewing these actions, the Supreme Court was willing to expand the scope of review available in federal courts slightly beyond purely jurisdictional concerns, but it found that the court of appeals had gone too far. Id. at 146, 73 S. Ct. at 1050. The petitioners had failed to show that the military review was "legally inadequate" to resolve their claims. Id. Without such a showing, the federal court could not reach the merits. Id.

In Burns the military review of the case had included review by the Staff Judge Advocate, a decision of the Board of Review in the office of the Judge Advocate General, a decision of the Judicial Council in the Judge Advocate General's office after briefs and oral argument, a recommendation by the Judge Advocate General, an action by the President confirming the sentences, and a decision by the Judge Advocate General to deny petitions for new trials. Id. at 144, 73 S. Ct. at 1049. The Court deemed it clear, under those circumstances, that the military courts had given full and fair consideration to each claim. Id.

Although there has been inconsistency among the circuits on the proper amount of deference due the military courts and the interpretation and weight to be given the "full and fair consideration" standard of Burns, this circuit has consistently granted broad deference to the military in civilian collateral review of court-martial

convictions. See, e.g., Kehrli v. Sprinkle, 524 F.2d 328, 331 (10th Cir. 1975), cert. denied, 426 U.S. 947, 96 S. Ct. 3165, 49 L.Ed.2d 1183 (1976); King v. Moseley, 430 F.2d 732, 735 (10th Cir. 1970); Kennedy v. Commandant, 377 F.2d 339, 342 (10th Cir. 1967). Although we have applied the "full and fair consideration" standard, we have never attempted to define it precisely. Rather, we have often recited the standard and then considered or refused to consider the merits of a given claim, with minimal discussion of what the military courts actually did.

We will entertain military prisoners' claims if they were raised in the military courts and those courts refused to consider them. See Burns, 346 U.S. at 142, 73 S. Ct. at 1048; Dickenson v. Davis, 245 F.2d 317, 320 (10th Cir. 1957), cert. denied, 355 U.S. 918, 78 S. Ct. 349, 2 L.Ed.2d 278 (1958). We will not review petitioners' claims on the merits if they were not raised at all in the military courts, see, e.g., McKinney v. Warden, 273 F.2d 643, 644 (10th Cir. 1959), cert. denied, 363 U.S. 816, 80 S. Ct. 1253, 4 L.Ed.2d 1156 (1960); Suttles v. Davis, 215 F.2d 760, 763 (10th Cir. 1954). When an issue is briefed and argued before a military board of review, we have held that the military tribunal has given the claim fair consideration, even though its opinion summarily disposed of the issue with the mere statement that it did not consider the issue meritorious or requiring discussion. See King, 430 F.2d at 735.

There is no indication in any of our decisions that the military must provide an evidentiary hearing on an issue to avoid further review in the federal courts. On the contrary, less than an evidentiary hearing has amounted to "full and fair consideration." We decline to adopt a rigid rule requiring evidentiary hearings for ineffective assistance of counsel claims.

We hold that the military did give full and fair consideration to the ineffective assistance of counsel claim at issue in this case. Although the military courts did not afford Watson an evidentiary hearing on his claim, he did receive a hearing on his ineffective assistance claim in his appeal to the Army Court of Military Review. That court's opinion expressly considered the

explanations of Watson's trial counsel in a post-trial affidavit and demonstrated that the military court examined the trial record of the court-martial. In Burns the Supreme Court relied in part on its belief that the military courts had scrutinized the trial record before rejecting the petitioners' claims. Burns, 346 U.S. at 144, 73 S. Ct. at 1049.

Under the circumstances of this case, it was unnecessary for the district court to issue an order to show cause or to hold an evidentiary hearing. It appeared from the application, even without the trial record, that Watson was not entitled to relief. See 28 U.S.C. § 2243. We therefore AFFIRM the district court's dismissal of the application for a writ of habeas corpus.

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(3) In Lips v. Commandant, U.S. Disciplinary Barracks,[52] the United States Court of Appeals for the Tenth Circuit reaffirmed its commitment to the Burns v. Wilson "full and fair" consideration test:

> The starting point in our discussion is Burns v. Wilson, 346 U.S. 137, 73 S.Ct. 1045, 97 L.Ed. 1508 (1953). That case stands for the proposition that federal courts have jurisdiction over applications for habeas corpus by persons incarcerated by the military courts, though "in military habeas corpus the inquiry, the scope of matters open to review, has always been more narrow than in civil cases." Id. at 139, 73 S. Ct. at 1047.
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> Under Burns, if the military gave full and fair consideration to claims asserted in a federal habeas corpus petition, the petition should be denied.

Citing its prior holding in Dodson v. Zelez,[53] the court further stated that:

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[52]997 F.2d 808, 810-11 (10th Cir. 1993), cert. denied, 114 S. Ct. 920 (1994).

[53]917 F.2d 1250 (10th Cir. 1990).

> . . . review by a federal district court of a military conviction is appropriate only if the following four conditions are met: (1) the asserted error is of substantial constitutional dimension; (2) the issue is one of law rather than of disputed fact already determined by the military tribunal; (3) there are no military considerations that warrant different treatment of constitutional claims; and (4) the military courts failed to give adequate consideration to the issues involved or failed to apply proper legal standards.[54]

(4) Most federal courts no longer follow Burns v. Wilson. The prevailing scope of collateral review, which affords military convictions no more deference than civilian ones, is reflected in the following case:

KAUFFMAN v. SECRETARY OF THE AIR FORCE
415 F.2d 991 (D.C. Cir. 1969),
cert. denied, 396 U.S. 1013 (1970)

> Before EDGERTON, Senior Circuit Judge, and TAMM and ROBINSON, Circuit
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> EDGERTON, Senior Circuit Judge:
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> Appellant brought suit in the District Court to have his court-martial conviction and sentence declared void on the ground that they rested upon violations of his constitutional rights. He also asked for restoration to active duty with full rank, and the seniority and allowances to which he would have been entitled had he not been discharged, resting his claim on the record made in the court-martial proceeding. The case was decided upon cross-motions for summary judgment and the government's alternative motion to dismiss for want of jurisdiction in the District Court. The District Court held that it had jurisdiction to entertain an action for declaratory relief attacking a court-martial

[54]Lips, 997 F.2d at 811.

conviction, but granted summary judgment for the government on the ground that the issues raised by appellant were fully and fairly considered in the military proceedings.

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I

FACTS AND MILITARY PROCEEDINGS

Appellant was charged with violations of the Uniform Code of Military Justice, 10 U.S.C. § 801 et seq., growing out of certain contacts between appellant and East German officials. In September 1960, appellant was a captain in the United States Air Force, authorized to travel in Europe for thirty days before reporting to his next duty station at Castle Air Force Base, California. While traveling by train from Hamburg to West Berlin, through East Germany, he was removed from the train, detained, and questioned by East German authorities. He was released to go to West Berlin, "giving his word" that he would return to East Berlin. He returned on October 1, 2, and 3 for social entertainment and further questioning sessions with the East Germans.

Appellant was asked to sign an agreement to provide information to the East German Political Secret Service. He refused. The East Germans wrote the name and address of Klara Weiss, a resident of West Berlin, in his pocket notebook as a cover address for any further communications. He left West Berlin for California on October 4, 1960.

In June of 1961, a defector from East Germany named Gunter Maennel reported to American authorities that he had participated in the interrogation of appellant. An investigation was initiated by the Air Force Office of Special Investigations (OSI), resorting to means which the Court of Military Appeals described as "massive and deliberate violations of appellant's constitutional rights." Appellant was sent to another Air Force Base on temporary duty to enable three OSI agents to break into his off-base residence on four occasions to search the premises. These agents swore that nothing in the way of evidence was found in these four searches. Another OSI agent obtained a

warrant for a fifth search of appellant's residence, claiming that the affidavit was based solely upon evidence obtained in Europe. The fifth search was apparently more efficient, for the agent seized the notebook containing Klara Weiss' name and address, located in appellant's top dresser drawer, and photographed other documents establishing his presence in Germany at the time of the alleged interrogations by the East Germans.

In addition, while appellant was in custody and confined to the base hospital, OSI agents monitored his hospital room and eavesdropped on his conversations, including those with his attorney. This interference with his right to counsel was condemned in a resolution adopted by the Board of Governors of the State Bar of California.

Appellant was then transferred, over his objection, to Weisbaden Air Base, Germany, for pre-trial investigation and trial. He claimed that this transfer was prejudicial because of tension in the area due to the erection of the Berlin Wall, and because counsel of his choice was unable to leave his practice for the period required for the proceedings in Germany. He was, however, represented by distinguished counsel who had served as a judge on the Court of Military Appeals and as a member of the Supreme Court of Utah.

Four charges were lodged against appellant alleging violation of various articles of the Uniform Code of Military Justice. These charges were:

> Charge I: Violation of Article 81, 10 U.S.C. § 881; conspiracy. Specification: Conspiracy with persons known to be members of the East German Secret Service to communicate information relating to the national defense of the United States.
>
> Charge II: Violation of Article 92, 10 U.S.C. § 892; failure to obey order or regulation. Specification 1: Travel through East Germany without proper orders. (Attachment 5, Air Force Manual 35-22). Specification 2: Failure to report attempts by persons known to

be representatives of the Soviet Union and East Germany to secure information contrary to the security and best interests of the United States and to cultivate him socially. (Paragraph 1, Air Force Regulation 205-57, dated 2 July 1959.)

Charge III: Violation of Article 133, 10 U.S.C. § 933; conduct unbecoming an officer. Specification: Agreement to return to East Germany in 1963 for training by the Secret Service and to obtain and communicate certain information.

Charge IV: Violation of Article 134, 10 U.S.C. § 934; conduct tending to discredit the armed forces. Specification: Communication to Gunter Maennel of information relating to the defense of the United States.

The court martial took place on April 10-18, 1962. Appellant was convicted as charged, except for Specification 1 of Charge II regarding travel orders, which was dismissed before trial. He was sentenced to dismissal from the Service, forfeiture of all pay and allowances and confinement at hard labor for 20 years.

The record was reviewed and approved by the convening authority and forwarded to the Judge Advocate General of the Air Force for review by a Board of Review. The Board set aside the finding of guilt as to Charge IV, communication of information to Maennel, as based on hearsay, and reduced appellant's term of confinement to a maximum of 10 years.

On appeal the Court of Military Appeals reversed the convictions on the remaining substantive espionage Charges I and III on the ground that the charges were founded on hearsay and that no overt act of conspiracy had been shown. United States v. Kauffman, 14 U.S.C.M.A. 283, 34 C.M.R. 63 (1963). Conviction on Charge II, failure to report contacts with agents of unfriendly powers, was affirmed upon a finding that it was not affected by the constitutional and

nonconstitutional errors alleged. The case was referred back to the Judge Advocate General with instructions that a rehearing on sentence could be ordered before the original Board of Review or another Board of Review could be convened to reassess the sentence.

The original Board held a hearing on the matter of resentencing, and reduced the term of confinement at hard labor to two years. Appellant's petition for review of this action was denied by the Court of Military Appeals. On June 28, 1964, the reassessed sentence was approved by the Secretary of the Air Force, except that an administrative discharge under other than honorable conditions was substituted for the dismissal from service. By that time, appellant had served his two years of confinement. Total forfeiture of pay and allowances remained in effect.

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III

SCOPE OF REVIEW

The government contends that even if civilian courts have jurisdiction to entertain collateral attacks on military judgments not presented upon petition for habeas corpus, the scope of review is narrower than the scope of collateral review of state and federal convictions. First, it contends that in collateral review of military judgments courts may inquire into only the traditional elements of jurisdiction--whether the court martial was properly constituted, and had jurisdiction of the person and the offense and the power to impose the sentence--and not the constitutional errors held to oust courts of jurisdiction since Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L.Ed. 1461 (1938). Second, the government asserts that even if collateral review extends to constitutional errors, the duty of the civilian court is done if it finds that the military court has considered the serviceman's constitutional claims, even if its conclusions are erroneous by prevailing Supreme Court standards. We find no support for the first proposition, and no persuasive authority for the second.

In Burns v. Wilson, 346 U.S. 137, 73 S. Ct. 1945, 97 L.Ed. 1508, rehearing denied, 346

U.S. 844, 74 S. Ct. 3, 98 L.Ed. 363 (1953), the leading case on the scope of review, only one Justice was willing to affirm dismissal of a serviceman's petition for habeas corpus upon the narrow jurisdictional test. Upon the denial of rehearing in Burns, Justice Frankfurter wrote an opinion asking that the decision be clarified, and expressing doubt "that a conviction by a constitutional court which lacked due process is open to attack by habeas corpus while an identically defective conviction when rendered by an ad hoc military tribunal is invulnerable." 346 U.S. at 851, 74 S. Ct. at 7. We see no argument for such a distinction. Deference to the peculiar needs of the military does not require denying servicemen the contemporary reach of the writ.

The argument that military judgments are subject to less exacting scrutiny on collateral review than state or federal judgments relies upon the statement of a plurality of the Court in Burns v. Wilson, supra, that "when a military decision has dealt fully and fairly with an allegation raised in that application [for a writ of habeas corpus], it is not open to a federal civil court to grant the writ simply to reevaluate the evidence." 346 U.S. at 142, 73 S. Ct. at 1049. (Emphasis supplied.) The Supreme Court has never clarified the standard of full and fair consideration, and it has meant many things to many courts. One commentator has observed that in following Burns, "a court may simply and summarily dismiss a petition upon the ground that the military did not refuse to consider its allegations or it may, with equal ease or upon the same authority, stress the requirement that military consideration shall have been full and fair." Bishop, Civilian Judges and Military Justice, 61 Col.L.Rev. 40, 47 (1961).

We think it is the better view that the principal opinion in Burns did not apply a standard of review different from that currently imposed in habeas corpus review of state convictions. The Court's denial of relief on the merits of the serviceman's claims can be explained as a decision based upon deference to military findings of fact, similar to the general non-reviewability of state factual findings prevailing at the time. But cf. Townsend v. Sain, 372 U.S. 293, 311,

83 S. Ct. 745, 9 L.Ed.2d 770 (1962). Note, Servicemen in Civilian Courts, 76 Yale L.J. 380, 392-395 (1966). Courts taking this view have interpreted Burns to require review of military rulings on constitutional issues for fairness. See, e.g., Application of Stapley, 246 F. Supp. 316 (D.Utah 1965); Gibbs v. Blackwell, 354 F.2d 469 (5th Cir. 1965).

The District Court below concluded that since the Court of Military Appeals gave thorough consideration to appellant's constitutional claims, its consideration was full and fair. It did not review the constitutional rulings of the Court of Military Appeals and find them correct by prevailing Supreme Court standards. This was error. We hold that the test of fairness requires that military rulings on constitutional issues conform to Supreme Court standards, unless it is shown that conditions peculiar to military life require a different rule. The military establishment is not a foreign jurisdiction; it is a specialized one. The wholesale exclusion of constitutional errors from civilian review and the perfunctory review of servicemen's remaining claims urged by the government are limitations with no rational relation to the military circumstances which may qualify constitutional requirements. The benefits of collateral review of military judgments are lost if civilian courts apply a vague and watered-down standard of full and fair consideration that fails, on the one hand, to protect the rights of servicemen, and, on the other, to articulate and defend the needs of the services as they affect those rights.

[The court resolved the merits of the plaintiff's claim in the Government's favor, and affirmed the judgment of the district court.][55]

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[55]See Schlomann v. Ralston, 691 F.2d 401 (8th Cir. 1982), cert. denied, 459 U.S. 1221 (1983); Hatheway v. Sec'y of Army, 641 F.2d 1376 (9th Cir.), cert. denied, 454 U.S. 864 (1981); Curry v. Sec'y of Army, 595 F.2d 873 (D.C. Cir. 1979); Curci v. United States, 577 F.2d 815 (2d Cir. 1978); Baker v. Schlesinger, 523 F.2d 1031 (6th Cir. 1975), cert. denied, 424 U.S. 972 (1976); Allen v. Van Cantfort, 436 F.2d 625 (1st Cir.), cert. denied, 402 U.S. 1008 (1971).

(5) Some courts will apply the Burns test to factual but not legal issues. That is, the courts will not review factual questions "fully and fairly" considered by military courts, but will review legal determinations de novo. The United States Court of Appeals for the Federal Circuit adopts the following approach:

BOWLING v. UNITED STATES
713 F.2d 1558 (Fed. Cir. 1983)

Before BENNETT, SMITH and NIES, Circuit Judges.

BENNETT, Circuit Judge.

Appellant Bowling challenges the decision of the United States Claims Court which, in an opinion and order on November 19, 1982 (amended December 3, 1982), granted defendant's cross-motion for summary judgment and dismissed the plaintiff's petition. Bowling v. United States, 1 Cl.Ct. 15, 552 F. Supp. 54 (1982). We affirm.

Appellant, a former Army enlisted man, was tried by a military judge sitting as a Special Court-Martial in Mannheim, Germany, on September 4, 1974, for unlawful possession and transfer of marijuana in violation of Article 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934 (1976). Appellant was found guilty of both offenses charged, and on September 17, 1974, was sentenced to be reduced to the grade of Private (E-1), to forfeit $217 of pay per month for five months, to be confined at hard labor for five months, and to be discharged from the Army with a bad-conduct discharge. A portion of the confinement was later remitted but the rest of the sentence was executed.

The Brigade Staff Judge Advocate reviewed the trial record and recommended that the findings and sentence be upheld. The Commanding General, pursuant to Articles 60 and 64, UCMJ, 10 U.S.C. §§ 860, 864, then

reviewed the record. He approved the findings and sentence on November 14, 1974.

A third review of the trial record was made by the Army Court of Military Review pursuant to Article 65(b), UCMJ, 10 U.S.C. § 865(b). Again, the findings and sentence were affirmed. Appellant petitioned the United States Court of Military Appeals, which on October 11, 1979, returned the case to the Judge Advocate General of the Army for remand to the Army Court of Military Review to reconsider the sufficiency of the evidence of possession of the marijuana. Upon reconsideration, the Court of Military Review found that appellant's guilt was proven beyond a reasonable doubt and again affirmed the findings and sentence. The Court of Military Appeals denied a second petition for review on February 9, 1981. This sixth consideration of appellant's case since his conviction in 1974 exhausted his opportunities for relief by the military justice system. But, this was not the end of Bowling's appeals.

Appellant's petition for a writ of habeas corpus in the United States District Court for the District of Columbia was denied on September 28, 1981, for his failure to establish the requisite custody within the meaning of 28 U.S.C. § 2241(c)(3).

Next, appellant sued in the United States Court of Claims on November 23, 1981, seeking to have his conviction and sentence vacated, and requesting that he be reinstated in the Army with back pay at his previous grade and be retroactively promoted. Both sides filed for summary judgment. The United States Claims Court assumed the trial jurisdiction of the Court of Claims on October 1, 1982, pursuant to the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25. Accordingly, in the ninth review of appellant's case we are called upon to decide whether the Claims Court decision granting defendant's (appellee's) cross-motion for summary judgment and dismissal of the petition should be upheld.

It is apparent from the foregoing that appellant's case has not lacked for review. All of his arguments raised now have been considered before, and rejected. Presently, however, appellant puts great emphasis on his allegations that he has been deprived of

constitutional rights by errors of the Claims Court. Before we turn to the six alleged errors, we must outline our scope of review in this matter and decide whether the standards of review utilized by the trial court were correct as a matter of law.

In a careful and exhaustive opinion, Judge White of the Claims Court reviewed the applicable law and correctly held that judgments by courts-martial, although not subject to direct review by federal civil courts, may nevertheless be subject to narrow collateral attack in such courts on constitutional grounds if the action is otherwise within a court's jurisdiction, as it is here for back pay and reinstatement. This is true notwithstanding the fact that Article 76 of the UCMJ, 10 U.S.C. § 876, expressly states that all dismissals and discharges under sentences by courts-martial following approval, review, or affirmation are final and conclusive. Schlesinger v. Councilman, 420 U.S. 738, 95 S. Ct. 1300, 43 L.Ed.2d 591 (1975). However, the constitutional claims made must be serious ones to support an exception to the rule of finality. They must demonstrate convincingly that in the court-martial proceedings there has been such a deprivation of fundamental fairness as to impair due process. As stated by the Supreme Court in United States v. Augenblick, 393 U.S. 348, 356, 89 S. Ct. 528, 534 21 L.Ed.2d 537 (1969)--

> apart from trials conducted in violation of express constitutional mandates, a constitutionally unfair trial takes place only where the barriers and safeguards are so relaxed or forgotten . . . that the proceeding is more a spectacle . . . or trial by ordeal . . . than a disciplined contest. [Citations omitted.]

In another case, the Supreme Court spoke again on the importance of fundamental fairness in military justice proceedings, for the constitutional guarantee of due process is applicable both to civilians and soldiers. It said that soldiers must be protected--

> from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as the civil courts. [Burns v. Wilson, 346 U.S. 137, 142-43, 73 S. Ct. 1045, 1049, 97 L.Ed. 1508 (1953).]

But, in that same case, the Court narrowly defined the civil court's scope of review, saying:

> These records make it plain that the military courts have heard petitioners out on every significant allegation which they now urge. Accordingly, it is not the duty of the civil courts simply to repeat that process--to reexamine and reweigh each item of evidence of the occurrence of events which tend to prove or disprove one of the allegations in the applications for habeas corpus. It is the limited function of the civil courts to determine whether the military have given fair consideration to each of these claims. [Id. at 144, 73 S. Ct. at 1050.]

By the foregoing tests, the Claims Court conscientiously went as far, or further, than necessary in consideration of the appellant's claims. Our own precedents hold that questions of fact resolved by military courts cannot be collaterally attacked. See, e.g., Flute v. United States, 535 F.2d 624, 626 (Ct. Cl. 1976). This court will not reweigh the evidence presented at plaintiff's court-martial in order that it might substitute its judgment for that of the military trial court. Artis v. United States, 506 F.2d 1387, 1391 (Ct. Cl. 1974); Taylor v. United States, 199 Ct. Cl. 171 (1972).

The petition presented to the Claims Court relies on the same alleged errors complained of in an Assignment of Errors which was filed with the United States Court of

Military Appeals in the court-martial proceedings. The Claims Court discussed each of these alleged errors in detail in its published opinion so we do not find it necessary to do so here. Now appellant says that the Claims Court made the same errors he alleges that the Court of Military Appeals made.

The first error attributed to the Claims Court is in refusing to hold that the military judge erred at the court-martial by not granting a motion to suppress because the officer authorizing the search was incapable of acting in an impartial capacity. This raises a fourth amendment claim against illegal searches and seizures. It is a well-established rule in both the civil and military courts that a search can be authorized only by an impartial magistrate and not by an officer engaged in ferreting out crime. A determination as to whether the person who authorized the search was impartial was held by the Claims Court to be largely a question of factual inquiry which the military trial and appellate courts all resolved against plaintiff after his counsel had been afforded every reasonable opportunity to establish partiality. Nothing new is given which should dictate a different result now.

The second error alleged is that the Claims Court refused to hold that the military judge made a mistake in denying a motion to suppress because there was an insufficient showing of probable cause for the authorization of a search. This too is a fourth amendment issue. Determination of the existence of probable cause requires a factual inquiry to find if under the circumstances a prudent man would conclude that an offense had been or was being committed. Lack of probable cause was raised and argued in the proceedings all the way up to and including the Court of Military Appeals and the contention was rejected. As this contention received "fair consideration," Burns v. Wilson, 346 U.S. at 144, 73 S. Ct. at 1050, in the military justice system, the adverse fact-finding there is conclusive now.

The third claim of error against the Claims Court is in its refusal to hold that the military judge erred in denying the motion to suppress as the search and seizure were

unlawful because of an improper authorization to search. Alternatively, it is argued that, even if authority was properly delegated, it did not meet fourth amendment requirements of reasonableness. Authorization for the search in question was pursuant to a delegation of authority from the commanding officer. The latter term is defined by Army Regulations, AR 190-22, para. 2-1(a) (June 12, 1970), and AR 600-20, para. 3-2(a) (June 22, 1973). The Claims Court opinion discussed the applicability of these regulations to the facts and concluded that plaintiff's contention, which was rejected by the military courts, was given "fair consideration," and was not unreasonable, and no fundamental error was made. We agree.

The fourth alleged error is that the evidence was insufficient to support a finding of guilty beyond a reasonable doubt. Appellant attacks the credibility of an informant and principal witness against him at the court-martial trial. He also points to the fact that the illegal drug was found in a room occupied jointly with another soldier. The latter was the issue which brought a remand by the Court of Military Appeals for reconsideration of the evidence about possession by the Court of Military Review. The result was an affirmance of the finding of plaintiff's possession of the contraband beyond a reasonable doubt. As to the credibility of the challenged witness, credibility is for the trier of fact who has had an opportunity to see and to hear the witness under oath and cross-examination. As noted heretofore, it is not the responsibility of a civil court to reweigh the factual evidence and in any event those factual determinations made by a court-martial are not of constitutional significance, absent a showing that the trial was not a fair and disciplined contest. United States v. Augenblick, 393 U.S. at 356, 89 S. Ct. at 533-34; Levy v. Parker, 478 F.2d 772, 797 (3d Cir. 1973), aff'd, 417 U.S. 733, 94 S. Ct. 2547, 41 L.Ed.2d 439 (1974) [sic]. This allegation of error also must be rejected.

The fifth error assigned is an alleged fatal variance in the specifications and the evidence. Appellant was charged with and convicted of possessing and transferring

marijuana. The evidence at trial related to hashish, its possession and transfer to another soldier. A chemist testified that the contraband was marijuana in hashish form, both substances being derived from the hemp plant. The term marijuana was held sufficiently general in scope to include hashish. Hamid v. Immigration & Naturalization Service, 538 F.2d 1389 (9th Cir. 1976). We agree that the evidence supports this definition. See also Webster's Third New International Dictionary (Unabridged 1965). Appellant was fully informed of the charges against him so that he was able to present his defense. He was not prejudiced by any error here and even if we assume that there was error it was harmless because the distinction advanced is nominal. Appellant is also fully protected against another prosecution for the same offense.

The sixth and final assignment of error is that the punishment imposed was harsh and inequitable and should be ordered substantially reduced. However, the punishment imposed was less than that authorized by military law for the offenses of which appellant was convicted. Assessment of the penalty is entrusted by law to the discretion of the military authorities. We cannot say that the discretion exercised was abused, unlawful, or reaches constitutional dimensions. Accordingly, we are without jurisdiction to substitute our own discretion for that of the trier of fact who imposed a lawful sentence.

Our conclusion, nine years after appellant's conviction and after eight other intervening reviews of the trial record in the military and civil judicial systems, is that the Claims Court judgment is correct as a matter of law and that the appeal is without merit. Accordingly, the judgment of the Claims Court is affirmed.

AFFIRMED.[56]

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[56]See Sisson v. United States, 814 F.2d 634 (Fed. Cir. 1987); Levy v. Parker, 478 F.2d 772 (3d Cir. 1973), rev'd on other grounds, 417 U.S. 733 (1974). Compare McDonald v. United States, 531 F.2d 490 (Ct. Cl. 1976) (purely legal issues).

(6) The Fifth Circuit, in Calley v. Callaway, has attempted to synthesize into a uniform analysis the divergent approaches taken by the federal courts in collateral review of courts-martial.

CALLEY v. CALLAWAY

519 F.2d 184 (5th Cir. 1975),
cert. denied, 425 U.S. 911 (1976)

AINSWORTH, Circuit Judge:

In this habeas corpus proceeding we review the conviction by military court-martial of Lieutenant William L. Calley, Jr., the principal accused in the My Lai incident in South Vietnam, where a large number of defenseless old men, women and children were systematically shot and killed by Calley and other American soldiers in what must be regarded as one of the most tragic chapters in the history of this nation's armed forces.

Petitioner Calley was charged on September 5, 1969, under the Uniform Code of Military Justice, 10 U.S.C. § 801 et seq., with the premeditated murder on March 16, 1968 of not less than 102 Vietnamese civilians at My Lai (4) hamlet, Song My village, Quang Ngai province, Republic of South Vietnam. The trial by general court-martial began on November 12, 1970, at Fort Benning, Georgia, and the court members received the case on March 16, 1971. (The function of court members in a military court-martial is substantially equivalent to that of jurors in a civil court.) On March 29, 1971, the court-martial, whose members consisted of six Army officers, found Calley guilty of the premeditated murder of not fewer than 22 Vietnamese civilians of undetermined age and sex, and of assault with intent to murder one Vietnamese child. Two days later, on March 31, 1971, the court members sentenced Calley to dismissal from the service, forfeiture of all pay and allowances, and to confinement at hard labor for life. On August 20, 1971, the convening authority, the Commanding General of Fort Benning, Georgia, approved the findings

and sentence except as to the confinement period which was reduced to twenty years. See Article 64 of the Uniform Code of Military Justice (U.C.M.J.), 10 U.S.C. § 864. The Army Court of Military Review then affirmed the conviction and sentence. United States v. Calley, 46 C.M.R. 1131 (1973). The United States Court of Military Appeals granted a petition for review as to certain of the assignments of error, and then affirmed the decision of the Court of Military Review. United States v. Calley, 22 U.S.C.M.A. 534, 48 C.M.R. 19 (1973); see Art. 67(b)(3), U.C.M.J., 10 U.S.C. § 867(b)(3). The Secretary of the Army reviewed the sentence as required by Art. 71(b), U.C.M.J., 10 U.S.C. § 871(b), approved the findings and sentence, but in a separate clemency action commuted the confinement portion of the sentence to ten years. On May 3, 1974, President Richard Nixon notified the Secretary of the Army that he had reviewed the case and determined that he would take no further action in the matter.

> On February 11, 1974, Calley filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Georgia against the Secretary of the Army and the Commanding General, Fort Benning, Georgia. At that time, the district court enjoined respondents from changing the place of Calley's custody or increasing the conditions of his confinement. On February 27, 1974, the district court ordered that Calley be released on bail pending his habeas corpus application. On June 13, 1974, this Court reversed the district court's orders, returning Calley to the Army's custody. Calley v. Callaway, 5 Cir. 1974, 496 F.2d 701. On September 25, 1974, District Judge Elliott granted Calley's petition for a writ of habeas corpus and ordered his immediate release. The Army appealed and Calley cross-appealed. At the Army's request a temporary stay of the district judge's order of immediate release was granted by a single judge of this Court. See

Rule 27(c), Fed.R.App.P. This Court subsequently met en banc, upheld the release of Calley pending appeal, and ordered en banc consideration of the case. We reverse the district court's order granting a writ of habeas corpus and reinstate the judgment of the court-martial.[5]

. . . .

II. Scope of Review of Court-Martial Convictions

We must first consider the extent to which a federal court is empowered to review court-martial convictions on petitions for habeas corpus. The Government contends that the district court exercised an impermissibly broad scope of review of Calley's claims. Relying on Burns v. Wilson, 346 U.S. 137, 73 S. Ct. 1045, 97 L.Ed. 1508 (1953), the Government argues that review by the federal courts is complete after a determination that the military courts have fully and fairly considered Calley's claims, and that, since that has been accomplished by the military courts, further review by way of habeas corpus proceedings is not appropriate.

[The court traced the history of collateral review of courts-martial to Burns v. Wilson.]

Burns v. Wilson

The petitioners in Burns had been found guilty of rape and murder and sentenced to death by court-martial. Burns alleged in his habeas petition several deprivations of constitutional rights, contending that the

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[5]The Army has granted Calley's application for parole and he has been released from confinement. This fact, however, does not deprive the federal courts of habeas corpus jurisdiction, for a person on parole is "in custody" for purposes of habeas corpus jurisdiction. Jones v. Cunningham, 371 U.S. 236, 83 S. Ct. 373, 9 L.Ed.2d 285 (1963). See also 28 U.S.C. § 2253, which grants this court jurisdiction to review on appeal the final order in a habeas corpus proceeding before a district judge.

military had coerced his confession, suppressed evidence favorable to him, denied him effective counsel, detained him illegally and created an atmosphere of terror and vengeance not conducive to a fair decision. See 346 U.S. at 138, 73 S. Ct. at 1047. The court of appeals affirmed denial of the writs, but only after a detailed review of the facts and the court-martial transcripts. Burns v. Lovett, 1952, 91 U.S. App. D.C. 208, 202 F.2d 335.

The Supreme Court affirmed the denial of habeas corpus relief, but stated that the circuit court had "erred in reweighing each item of relevant evidence in the trial record. . . ." 346 U.S. at 146, 73 S. Ct. at 1051. A plurality of the court (Chief Justice Vinson, Justices Burton, Clark and Reed) agreed that the constitutional guarantee of due process was meaningful enough to protect both soldiers and civilians "from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness. . . ." Id. at 142, 73 S. Ct. at 1049. Nonetheless, in reviewing court-martial convictions to ascertain whether due process rights had been abridged, the Court stated that "in military habeas corpus the inquiry, the scope of matters open for review, has always been more narrow than in civil cases." Id. at 139, 73 S. Ct. at 1047. The Court stated that "when a military decision has dealt fully and fairly with an allegation raised in that application [for habeas corpus], it is not open to a federal civil court to grant the writ simply to reevaluate the evidence." 346 U.S. at 142, 73 S. Ct. at 1049. Its review of the case showed that "the military courts have heard petitioners out on every significant allegation which they now urge." Id. at 144, 73 S. Ct. at 1050. The Court concluded:

> Accordingly, it is not the duty of the civil courts to repeat that process--to reexamine and reweigh each item of evidence of the occurrence of events which tend to prove or disprove one of the allegations in the application for habeas corpus. It is the limited

> function of the civil courts to determine whether the military have given fair consideration to each of these claims. (citation omitted) We think they have.

Id. (emphasis added).

Burns thus announced a scope of review in military habeas cases broader than the old jurisdictional test, but narrower than that in state and federal habeas cases. Federal courts have interpreted Burns with considerable disagreement. Soon after the decision in Burns, we noted the "uncertain state of the law" regarding the proper scope of review. Bisson v. Howard, 5 Cir., 1955, 224 F.2d 586, 589-590, cert. denied, 350 U.S. 916, 76 S. Ct. 201, 100 L.Ed. 803. More recently we said that while Burns allowed collateral attack on courts-martial, "the scope of that review was left uncertain." Mindes v. Seaman, 5 Cir., 1971, 453 F.2d 197, 201. We have stated that, since Burns, "the scope of review has been considerably broadened," Betonie v. Sizemore, 5 Cir., 1974, 496 F.2d 1001, 1005; that "[c]ourt-martial convictions alleged to involve errors of constitutional proportion have consistently been held to be subject to court review." Mindes v. Seaman, supra, 453 F.2d at 201. But we have also stated that there is a "very limited field in which the civilian courts can review court-martial proceedings." Bisson v. Howard, supra, 224 F.2d at 587, that "[h]abeas corpus review of convictions by court-martial is limited to questions of jurisdiction (citation omitted), and the limited function of determining whether the military has given fair consideration to petitioners' claims, (citing Burns)." Peavy v. Warner, 5 Cir., 1974, 493 F.2d 748, 749. Other circuits are divided on the proper scope of review.

With this background we summarize our view of the proper scope of review.

## Determining the Proper Scope of Review

The cited cases establish the power of federal courts to review court-martial convictions to determine whether the military acted within its proper jurisdictional sphere.

We are more concerned here, however, with the extent to which federal courts may review the validity of claims that errors in the military trial deprived the accused of due process of law, when the military courts have previously considered and rejected the same contentions. We conclude from an extensive research of the case law that the power of federal courts to review military convictions of a habeas petition depends on the nature of the issues raised, and in this determination, four principal inquiries are necessary.

1. The asserted error must be of substantial constitutional dimension. The first inquiry is whether the claim of error is one of constitutional significance, or so fundamental as to have resulted in a miscarriage of justice. Most courts which have interpreted Burns to allow review of nonjurisdictional claims have given cognizance only to assertions that fundamental constitutional rights were violated. The premise that we cannot review a military conviction without substantial claim of denial of fundamental fairness or of a specific constitutional right is strengthened by the holding in United States v. Augenblick, 393 U.S. 348, 89 S. Ct. 528, 21 L.Ed.2d 537 (1969), in which the Supreme Court held that the Court of Claims erred in considering petitioners' assertions where only an error of law (an asserted violation of the Jencks Act, 18 U.S.C. § 3500), rather than a constitutional defect or due process violation, was present. See 393 U.S. at 351-352, 352-353, 356, 89 S. Ct. at 531, 532, 533-534. As the Supreme Court has commented, "The writ of habeas corpus has limited scope; the federal courts do not sit to re-try . . . cases de novo but, rather, to review for violation of federal constitutional standards." Milton v. Wainwright, 407 U.S. 371, 377, 92 S. Ct. 2174, 2178, 33 L.Ed.2d 1 (1972). See also Cupp v. Naughton, 414 U.S. 141, 94 S. Ct. 396, 38 L.Ed.2d 368 (1973); Donnelly v. DeChristoforo, 416 U.S. 637, 642-643, 94 S. Ct. 1868, 1871, 40 L.Ed.2d 431 (1974); Ross v. Wainwright, 5 Cir., 1971, 451 F.2d 298, 301, cert. denied, 409 U.S. 884, 93 S. Ct. 98, 34 L.Ed.2d 141 (1972); Young v. Alabama, 5 Cir., 1971, 443 F.2d 854, 855,

cert. denied, 405 U.S. 976, 92 S. Ct. 1202, 31 L.Ed. 166 (1941).

Most habeas corpus cases have provided relief only where it has been established that errors of constitutional dimension have occurred. But the Supreme Court held in a recent decision that nonconstitutional errors of law can be raised in habeas corpus proceedings where "the claimed error of law was 'a fundamental defect which inherently results in a complete miscarriage of justice,'" and when the alleged error of law "'present[ed] exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.'" Davis v. United States, 417 U.S. 333, 346, 94 S. Ct. 2298, 2305, 41 L.Ed.2d 109 (1974), quoting Hill v. United States, 368 U.S. 424, 428, 82 S. Ct. 468, 471, 7 L.Ed.2d 417 (1962). Thus, an essential prerequisite of any court-martial error we are asked to review is that it present a substantial claim of constitutional dimension or that the error be so fundamental as to have resulted in a gross miscarriage of justice.

2. The issue must be one of law rather than of disputed fact already determined by the military tribunals. The second inquiry is whether the issue raised is basically a legal question, or whether resolution of the issue hinges on disputed issues of fact. This circuit said in Gibbs v. Blackwell, 5 Cir., 1965, 354 F.2d 469, 471, that "In reviewing military convictions, the courts must be on guard that they do not fail to perceive the difference between reviewing questions of fact and law. This is especially true at the constitutional level." Compare Parker v. Levy, 417 U.S. 733, 94 S. Ct. 2547, 41 L.Ed.2d 439 (1974), where the review of matters resolved against a serviceman "on a factual basis by the court-martial which convicted him" was held to be beyond the proper scope of review. Id. at 760-761, 94 S. Ct. at 2564. The Court of Claims has noted that abstinence from reviewing court-martial proceedings need not necessarily be practiced "where the serviceman presents pure issues of constitutional law, unentangled with an appraisal of a special set of facts." Shaw v. United States, 1966, 357 F.2d 949, 953-954,

174 Ct. Cl. 899. See Burns v. Wilson, supra, 346 U.S. at 142, 145, 146, 73 S. Ct. at 1049, 1050, 1051. Thus, a conclusion that a military prisoner's claim is one of the law and not intertwined with disputed facts previously determined by the military is one important factor which favors broader review.

3. Military considerations may warrant different treatment of constitutional claims. The third inquiry is whether factors peculiar to the military or important military considerations require a different constitutional standard. Where a serviceman's assertion of constitutional rights has been determined by military tribunals, and they have concluded that the serviceman's position, if accepted, would have a foreseeable adverse affect on the military mission, federal courts should not substitute their judgment for that of the military courts. In this regard the Supreme Court stated in Burns that the law of civilian habeas corpus could not be assimilated to the law governing military habeas corpus because military law is sui generis. 346 U.S. at 139-140, 73 S. Ct. at 1047. This point was reemphasized in Schlesinger v. Councilman, 420 U.S. 738, 95 S. Ct. 1300, 43 L.Ed.2d 591 (1975):

> This Court repeatedly has recognized that, of necessity, "[m]ilitary law . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment." Burns v. Wilson, 346 U.S. 137, 140, 73 S. Ct. 1045, 1047, 97 L.Ed. 1508 (1953); Parker v. Levy, 417 U.S. 733, 744, 94 S. Ct. 2547, 2556, 41 L.Ed.2d 439 (1974).

Id. at 746, 95 S. Ct. at 1307. See also Parker v. Levy, 417 U.S. 733, 758, 94 S. Ct. 2546, 2563, 41 L.Ed.2d 439 (1974), where the Court noted that "[t]he fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it." The Supreme Court in Burns

emphasized that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment." 346 U.S. at 140, 73 S. Ct. at 1048. Cf. Mindes v. Seaman, supra, where this circuit noted that one factor determining whether a federal court should review internal military affairs is the type and degree of anticipated interference with the military function and the extent to which military expertise and discretion are involved. 453 F.2d at 201-202. The importance of this policy was recently reiterated in Parker v. Levy, 417 U.S. 733, 94 S. Ct. 2547, 41 L.Ed.2d 439 (1974). In that case, the Court reviewed the traditional deference allowed for rules and regulations within military society. See 417 U.S. at 743-744, 749-752, 756-759, 94 S. Ct. at 2555-2556, 2558-2560, 2562-2564. The armed forces' requirements of obedience and discipline, the Court stated, justified a less stringent standard of review for vagueness and overbreadth attacks on Army regulations. Even as to the First Amendment rights asserted by Captain Levy, the Court stated that "the different character of the military community and of the military mission require [sic] a different application of those [First Amendment] protections." Parker v. Levy, 417 U.S. at 758, 94 S. Ct. at 2563. See also Schlesinger v. Councilman, supra.

There are other reasons why federal courts should not intervene in basically military matters. Congress, with its power to create and maintain the armed forces and to declare war, and the President, with his power as Commander-in-Chief, have great powers and responsibilities in military affairs. Congress has a substantial role to play in defining the right of military personnel, see Burns, supra, 346 U.S. at 140, 73 S. Ct. at 1048, and by enactment of the Uniform Code of Military Justice and the Military Justice Act of 1968 it has assumed that responsibility. See also Schlesinger v. Councilman, supra; Hammond v. Lenfest, 2 Cir., 1968, 398 F.2d 705, 710. A related reason is that an independent appellate court, the Court of Military Appeals composed of nonmilitary

judges, has been established to review military convictions. That court has reaffirmed that fundamental premise that "the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces." United States v. Jacoby, 11 U.S.C.M.A. 428, 430-431, 29 C.M.R. 244 (1960); see also United States v. Tempia, 16 U.S.C.M.A. 629, 633, 37 C.M.R. 249 (1967); United States v. Culp, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963); Bishop, supra, 61 Colum L. Rev. at 56, 65-66. The Court of Military Appeals has, in many instances, extended the constitutional rights of servicemen beyond those accorded to civilians. Safeguarding the serviceman's rights is frequently best left to a body with special knowledge of the military system. Schlesinger v. Councilman, supra, 420 U.S. at 757, 95 S. Ct. at 1313, 1314.

4. The military courts must give adequate consideration to the issues involved and apply proper legal standards. The fourth and final inquiry is whether the military courts have given adequate consideration to the issue raised in the habeas corpus proceeding, applying the proper legal standard to the issue. Decisions by reviewing courts within the military justice system must be given a healthy respect, particularly where the issue involved a determination of disputed issues of fact. But a necessary prerequisite is that the military courts apply a proper legal standard to disputed factual claims. See S. E. C. v. Chenery Corp., 318 U.S. 80, 94, 63 S. Ct. 454, 462, 87 L.Ed 626 (1943). Burns requires that particular respect be given military decisions: "In military habeas corpus cases, even more than in state habeas corpus cases, it would be in disregard of the statutory scheme if the federal civil courts failed to take account of the prior proceedings--of the fair determinations of the military tribunals after all military remedies have been exhausted." 346 U.S. at 142, 73 S. Ct. at 1048-1049.

To summarize, the scope of review may be stated as follows:

Military court-martial convictions are subject to collateral review by federal civil

courts on petitions for writs of habeas corpus where it is asserted that the court-martial acted without jurisdiction, or that substantial constitutional rights have been violated, or that exceptional circumstances have been presented which are so fundamentally defective as to result in a miscarriage of justice. Consideration by the military of such issues will not preclude judicial review for the military must accord to its personnel the protections of basic constitutional rights essential to a fair trial and the guarantee of due process of law. The scope of review for violations of constitutional rights, however, is more narrow than in civil cases. Thus federal courts should differentiate between questions of fact and law and review only questions of law which present substantial constitutional issues. Accordingly, they may not retry the facts or reevaluate the evidence, their function in this regard being limited to determining whether the military has fully and fairly considered contested factual issues. Moreover, military law is a jurisprudence which exists separate and apart from the law governing civilian society so that what is permissible within the military may be constitutionally impermissible outside it. Therefore, when the military courts have determined that factors peculiar to the military require a different application of constitutional standards, federal courts are reluctant to set aside such decisions.

With these principles in mind, we consider the additional issues raised by this appeal.

. . . .

[The court next considered Calley's assertions of prejudicial pretrial publicity, denial of the right to compulsory process, denial of due process, and various other issues.]

## VIII. Conclusion

This Court is convinced that Lieutenant Calley received a fair trial from the military court-martial which convicted him for the premeditated murder of numerous Vietnamese civilians at My Lai. The military courts have fully and fairly considered all of the defenses made by him and have affirmed that he

is guilty. We are satisfied after a careful and painstaking review of this case that no violation of Calley's constitutional or fundamental rights has occurred, and that the findings of guilty were returned by impartial members based on the evidence presented at a fairly conducted trial.

There is no valid reason then for the federal courts to interfere with the military judgment, for Calley has been afforded every right under our American system of criminal justice to which he is entitled.

Accordingly, the order of the district court granting a writ of habeas corpus to Calley is

Reversed.

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c. Recent Developments in Civilian Collateral Review. "Commencing in 1975 and continuing to the present, the Supreme Court has announced a series of decisions limiting the availability of federal habeas relief" from civilian criminal convictions.[57] One of the more notable decisions is Stone v. Powell,[58] in which the Court resurrected the "full and fair consideration" test for fourth amendment claims. The Court held that where a state "has provided an opportunity for full and fair litigation . . . , the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at trial."[59] The Court reasoned that the "overall educative effect of the exclusionary rule would [not] be appreciably diminished if search-and-seizure claims could not be raised in federal habeas corpus review of

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[57]Rosen, supra note 34, at 355.

[58]428 U.S. 465 (1976).

[59]Id. at 481-82.

state convictions" since such proceedings often occur years after the original trial and incarceration of the defendant.[60] Conversely, the societal costs of application of the exclusionary rule "still persist with special force."[61]

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[60]Id. at 493.

[61]Id. at 495. See Cardwell v. Taylor, 461 U.S. 471 (1983); United States ex rel. Shiflet v. Lane, 815 F.2d 457, 463 (7th Cir. 1987); Davis v. Blackburn, 803 F.2d 1371, 1372-73 (5th Cir. 1986); Gilmore v. Marks, 799 F.2d 51, 54-57 (3d Cir. 1986); Knaubert v. Goldsmith, 791 F.2d 722, 725 (9th Cir.), cert. denied, 479 U.S. 867 (1986); United States ex rel. Patton v. Thieret, 791 F.2d 543, 547 (7th Cir.), cert. denied, 479 U.S. 888 (1986); Caldwell v. Cupp, 781 F.2d 714, 715 (9th Cir. 1986); Flittie v. Solem, 751 F.2d 967, 973 (8th cir. 1985); cert. denied, 475 U.S. 1025 (1986); Brofford v. Marshall, 751 F.2d 845, 856 (6th Cir. 1984), cert. denied, 474 U.S. 872 (1985); LeBron v. Vitek, 751 F.2d 311, 312 (8th Cir. 1985); Gregory v. Wyrick, 730 F.2d 542, 543 (8th Cir.), cert. denied, 469 U.S. 855 (1984); Allen v. Dutton, 630 F. Supp. 379, 384-85 (M.D. Tenn. 1984), aff'd, 785 F.2d 307 (6th Cir. 1986).

The Supreme Court has refused, however, to apply the Stone v. Powell "full and fair" consideration test in sixth amendment claims of ineffective assistance of counsel, even where the alleged ineffectiveness was the consequence of a failure to raise a fourth amendment claim. Kimmelman v. Morrison, 477 U.S. 365 (1986); see Goins v. Lane, 787 F.2d 248, 252 (7th Cir), cert. denied, 479 U.S. 846 (1986); Cody v. Solem, 755 F.2d 1323, 1328-29 (8th Cir.), cert. denied, 474 U.S. 833 (1985). Nor has the Court extended Stone to claims that the state had failed to prove guilt beyond a reasonable doubt, Jackson v. Virginia, 443 U.S. 307, 320-24 (1979), or to attacks on racial compositions of grand juries, Rose v. Mitchell, 443 U.S. 545, 559-64 (1979). See Adams v. Lankford, 788 F.2d 1493, 1495 (11th Cir. 1986) (refusing to extend Stone to claimed violation of title III of Omnibus Crime Control & Safe Streets Act, 18 U.S.C. §§ 2516(2), 2518(3)). Stone v. Powell is also inapposite in collateral attacks on federal convictions. See Kaufman v. United States, 394 U.S. 217 (1969). Finally, Stone restrictions on federal habeas jurisdiction in fourth amendment cases do not extend to fifth amendment claims based on alleged Miranda violations. Withrow v. Williams, 507 U.S. 680 (1993).

In addition to Stone, the Court also has tightened the exhaustion requirement,[62] formulated a stricter doctrine of waiver,[63] and broadened the scope of deference to be afforded state court findings of fact.[64] Thus, the availability of federal civilian habeas corpus has been greatly restricted over the last two decades. As in years past, these developments in civilian habeas jurisprudence should significantly influence the review of military cases.

## 8.4 The Doctrine of Exhaustion of Military Justice Remedies.

a. General. The doctrine of exhaustion is one of timing: its application does not preclude federal court review, but merely postpones it until a claimant has pursued available remedies in the military justice system. The doctrine requires that objections to courts-martial be raised in the military trial and any available appellate remedies--including extraordinary proceedings--before collateral relief is sought in the federal courts. This section will review the development of the exhaustion doctrine in collateral proceedings in the federal courts.

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[62]Anderson v. Harless, 459 U.S. 4 (1982); Rose v. Lundy, 455 U.S. 509 (1982).

[63]Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992); Coleman v. Thompson, 501 U.S. 722 (1991); Harris v. Reed, 489 U.S. 255 (1989); Murray v. Carrier, 477 U.S. 478 (1986); Engle v. Isaac, 456 U.S. 107 (1982); Wainwright v. Sykes, 433 U.S. 72 (1977); Francis v. Henderson, 425 U.S. 536 (1976); Davis v. United States, 411 U.S. 233 (1973).

[64]Sumner v. Mata, 455 U.S. 591 (1982).

b. Exhaustion Before 1950.

(1) Prior to 1950, exhaustion of military remedies was not a prerequisite to collateral review in the civilian courts. If a servicemember challenged the jurisdiction of a court-martial, whether pending or complete, the court would entertain his petition for habeas corpus. If the court determined that the court-martial lacked jurisdiction, the servicemember would be released. Exhaustion was not an issue; if the military court was without jurisdiction, it simply could not proceed.[65] By contrast, in Ex parte Royall,[66] the first case reaching the Supreme Court from a state habeas petitioner, the Court required exhaustion of state remedies.

(2) This is not to say federal courts never discussed recourse to military remedies.[67] But the courts did not require a habeas petitioner challenging the jurisdiction of a military tribunal to first present his claim to the very tribunal he asserted had no lawful basis to proceed. In Smith v. Whitney,[68] a case decided the same year as Royall, the Court denied a petition to

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[65]See, e.g., Billings v. Truesdell, 321 U.S. 542 (1944) (improper induction); Morrissey v. Perry, 137 U.S. 157 (1890) (minor); United States ex rel. Pasela v. Fenno, 167 F.2d 593 (2d Cir.), cert. denied, 335 U.S. 806 (1948) (reservist); United States ex rel. Harris v. Daniels, 279 F. 844 (2d Cir. 1922) (jurisdiction over offense); Hines v. Mikell, 259 F. 28 (4th Cir. 1919) (civilian); In re Cadwallader, 127 F. 881 (C.C.E.D. Mo. 1904) (statute of limitations).

[66]117 U.S. 241 (1886).

[67]E.g., Wales v. Whitney, 114 U.S. 564 (1885); Ex parte Anderson, 16 Iowa. 595 (1864).

[68]116 U.S. 167 (1886).

prohibit a pending court-martial on the ground it was not shown to lack jurisdiction, and not because the servicemember had an obligation to first raise his claim before the military court.

c. Exhaustion After 1950.

(1) In Gusik v. Schilder,[69] the Supreme Court finally extended the doctrine of exhaustion of remedies to collateral review of military convictions. Thomas Gusik, a member of a Guard Company in Italy, was convicted by general court-martial of shooting and killing two civilians near his guard post. He was sentenced to life imprisonment, which was later reduced to 16 years. In a petition for habeas corpus, Gusik claimed that he was denied an impartial and thorough pretrial investigation, that the trial judge advocate failed to call material witnesses in his behalf, and that his counsel was ineffective. The Court refused to review Gusik's claims, holding that he first had to present them to The Judge Advocate General of the Army in an application under Article of War 53. The rationale mandating exhaustion of military remedies was the same as that underlying the exhaustion requirement in state habeas corpus:

> The policy underlying that rule [of exhaustion] is as pertinent to the collateral attack of military judgments as it is to collateral attack of civilian judgments rendered in state courts. If an available procedure has not been employed to rectify the alleged error which the federal court is asked to correct, any interference by the federal court may be wholly needless. The procedure established to police the errors of the

[69]340 U.S. 128 (1950).

> tribunal whose judgment is challenged may be adequate for the occasion. If it is, any friction between the federal court and the military or state tribunal is saved. . . . Such a principal of judicial administration is in no sense a suspension of the writ of habeas corpus. It is merely a deferment of resort to the writ until other corrective procedures are shown to be futile.[70]

(2) Despite the doctrine of exhaustion, the Supreme Court granted a number of habeas petitions during the 1950s to civilians who were pending trial by courts-martial.[71] Although the Court never discussed exhaustion in these cases, it later surmised that the doctrine was deemed inappropriate because the cases involved the issue of whether, under Article I of the Constitution, "Congress could allow the military to interfere with the liberty of civilians even for the limited purpose of forcing them to answer to the military justice system."[72]

(3) In Noyd v. Bond,[73] the Court extended the exhaustion requirement to extraordinary remedies available from the United States Court of Military Appeals (COMA). The petitioner, Noyd, was convicted by court-martial of willful disobedience and sentenced to one year's confinement at hard labor. While appealing his conviction in the military courts, Noyd sought habeas relief from the federal courts, challenging the

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[70]Id. at 131-32.

[71]See, e.g., McElroy v. United States ex rel. Guagliardo, 361 U.S. 281 (1960); Reid v. Covert, 354 U.S. 1 (1957); United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955).

[72]Schlesinger v. Councilman, 420 U.S. 738, 759 (1975).

[73]395 U.S. 683 (1969).

authority of the military to confine him pending the appeal of his conviction. Finding that Noyd did not seek extraordinary relief from the COMA, the Court affirmed the lower courts' denial of habeas relief.[74]

(4) Three years after its decision in Noyd, the Court limited the application of the exhaustion doctrine in Parisi v. Davidson.[75] Parisi involved a habeas petition from an administrative denial of a conscientious objector application. Subsequent to the filing of the lawsuit, the petitioner, Parisi, disobeyed an order to board a plane for Vietnam. When court-martial charges were preferred against him, the district court stayed its adjudication of the habeas petition, relying on the doctrine of exhaustion. The Supreme Court held this was error. Because the military courts could not adjudicate Parisi's conscientious objector application, and because a favorable resolution of that claim would be dispositive of the court-martial charges, no cogent basis existed for application of the exhaustion doctrine.[76]

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[74]See United States ex rel. Becker v. Semmons, 357 F. Supp. 1135 (E.D. Wis. 1973).

[75]405 U.S. 34 (1972).

[76]See Cooper v. Marsh, 807 F.2d 988 (Fed. Cir. 1986) (plaintiff need not pursue administrative remedies incapable of providing relief). Compare Woodrick v. Hungerford, 800 F.2d 1413 (5th Cir. 1986) (petitioner claiming breached enlistment contract can be court-martialed for failure to report), cert. denied, 481 U.S. 1036 (1987); Cole v. Commanding Officer, 747 F.2d 217 (4th Cir. 1984) (en banc) (conscientious objector applicant can be court-martialed for disobedience of orders pending processing of application); Conrad v. Schlesinger, 507 F.2d 867 (9th Cir. 1974) (conscientious objector applicant can be court-martialed for narcotics offense pending processing of application).

(5) Thus, the Court's decisions in Gusik and Noyd firmly entrenched the exhaustion doctrine as a prerequisite to collateral review of courts-martial.[77] Parisi did not modify the doctrine; it simply held that court-martial proceedings should not interfere with the orderly adjudication of an antedated and independent federal lawsuit challenging an administrative determination of a conscientious objector claim. By considering the administrative claim, federal courts only indirectly affect the proceedings of the military tribunals.

(6) Since Gusik, the most serious threat to the orderly operation of the military courts has come from servicemembers seeking to enjoin court-martial proceedings on the basis of various jurisdictional and constitutional claims. Although such lawsuits have been reported from as early as World War II,[78] they began in earnest about the time of the Vietnam War. For example, in Levy v. Corcoran,[79] the United States Circuit Court of Appeals for the District of Columbia denied Captain Howard Levy's petition for stay of his court-martial on charges of violating articles 133 and 134 of the Uniform Code of Military Justice. Levy contended that the statutes were unconstitutional. The circuit court

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[77] E.g., Williams v. Sec'y of Navy, 787 F.2d 552, 558-62 (Fed. Cir. 1986); Sisson v. United States, 736 F.2d 1275 (9th Cir. 1984).

[78] In re Meader, 60 F. Supp. 80 (E.D.N.Y. 1945) (court refused to enjoin court-martial on ground Navy intended to use certain illegally seized evidence against accused).

[79] 389 F.2d 929 (D.C. Cir.), cert. denied, 389 U.S. 960 (1967).

dismissed the petition on several grounds, including the absence of equity jurisdiction to interfere with the military proceedings, the existence of an adequate remedy at law through the mechanisms provided by the military justice system, and Captain Levy's inability to establish irreparable injury.

(7) The real impetus for injunction claims was the Supreme Court's decision in O'Callahan v. Parker,[80] in which the Court limited the subject-matter jurisdiction of the military courts to "service-connected" crimes. O'Callahan started a raft of lawsuits challenging pending courts-martial on "service-connection" grounds. The lower courts disagreed as to the proper disposition of such claims, some holding injunctive relief was proper because of the absence of court-martial jurisdiction,[81] while other courts, relying on the doctrines of exhaustion and abstention, denied relief.[82]

(8) The controversy ended in 1975, with the Supreme Court's decisions in Schlesinger v. Councilman,[83] and McLucas v. De Champlain.[84] Relying on the dual

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[80]395 U.S. 258 (1968), overruled, Solorio v. United States, 483 U.S. 435 (1987).

[81]See, e.g., Councilman v. Laird, 481 F.2d 613 (10th Cir. 1973), rev'd sub nom. Schlesinger v. Councilman, 420 U.S. 738 (1975); Cole v. Laird, 468 F.2d 829 (5th Cir. 1972); Moylan v. Laird, 305 F. Supp. 551 (D.R.I. 1969).

[82]See, e.g., Dooley v. Plogar, 491 F.2d 608 (4th Cir. 1974); Sedivy v. Richardson, 485 F.2d 1115 (3d Cir. 1973), cert. denied, 421 U.S. 910 (1975).

[83]420 U.S. 738 (1975).

[84]421 U.S. 21 (1975).

considerations of comity--the necessity of respect for coordinate judicial systems--and the doctrine of exhaustion of remedies, the Court, in Councilman, reversed the judgment of lower federal courts that had enjoined an impending court-martial proceeding on the basis that the offenses charged were not "service-connected." Justice Powell, writing for the Court, observed that the unique relationship between military and civilian society counsels strongly against the exercise of equity power to enjoin courts-martial in much the same manner that the peculiar demands of federalism preclude equitable intervention by the federal courts in state criminal proceedings.[85] Similarly, the practical considerations supporting the exhaustion requirement--the need to allow agencies to develop the facts in which they are peculiarly expert, to correct their own errors, and to avoid duplicative or needless judicial proceedings--compel nonintervention in ongoing court-martial proceedings.[86] Justice Powell concluded that these considerations militate strongly against judicial interference with pending courts-martial:

> [I]mplicit in the congressional scheme embodied in the Code is the view that the military court system generally is adequate to and responsibly will perform its assigned task. We think this congressional judgment must be respected and that it must be assumed that the military court system will vindicate servicemen's constitutional rights. We have recognized this, as well as the practical considerations common to all exhaustion requirements, in holding that federal courts normally will not entertain habeas petitions by military prisoners unless all available

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[85]Schlesinger, 420 U.S. at 756-57.

[86]Id.

> military remedies have been exhausted. . . . The same principles are relevant to striking the balance governing the exercise of equity power. We hold that when a serviceman charged with crimes by military authorities can show no harm other than that attendant to resolution of his case in the military court system, the federal district courts must refrain from intervention, by way of injunction or otherwise.[87]

(9) Later the same year, the Court applied its Councilman holding in McLucas v. De Champlain, in which a federal district court had enjoined a court-martial on constitutional grounds. The plaintiff, De Champlain, was an Air Force master sergeant who was charged with copying and attempting to deliver to an unauthorized person--that is, a Soviet embassy official in Thailand--certain classified documents. The Air Force placed restrictions on De Champlain's civilian counsel's access to the classified records. These restrictions were challenged by De Champlain in the district court. Holding the restrictions "clearly excessive," the district judge ordered the court-martial restrained unless unlimited access to all documents was given to De Champlain's civilian counsel and his staff. The Supreme Court reversed the district court's decision. Relying on Councilman, it held that the restrictions placed on De Champlain's counsel's access to the classified documents could not support an injunction of the court-martial proceedings:

> As to this claim, however, the only harm De Champlain claimed in support of his prayer for equitable relief was that, if convicted, he might remain incarcerated pending review within the military system. Thus, according to De Champlain, intervention is justified now

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[87] Id. at 758.

> to ensure that he receives a trial free of constitutional error, and to avoid the possibility he will be incarcerated, pending review, on the basis of a conviction that inevitably will be invalid. But if such harm were deemed sufficient to warrant equitable interference into pending court-martial proceedings, any constitutional ruling at the court-martial presumably would be subject to immediate relitigation in federal district courts, resulting in disruption to the court-martial and circumvention of the military appellate system provided by Congress.[88]

(10) With the Supreme Court's decisions in Gusik, Noyd, Councilman, and De Champlain, the application of the doctrine of exhaustion of remedies to court-martial proceedings is presently well-settled.[89]

## 8.5 The Doctrine of Waiver.

a. General. The doctrine of waiver is one of forfeiture: where a claimant fails to raise an issue in military court proceedings, he is barred from raising the issue in a subsequent collateral challenge in the federal courts. Waiver generally entails a procedural default. The doctrine arises where the failure to assert an issue during the course of military proceedings precludes subsequent adjudication of the issue in a military forum.

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[88]McLucas, 421 U.S. at 33.

[89]See, e.g., Williams v. Sec'y of Navy, 787 F.2d 552, 558-62 (Fed. Cir. 1986); Sisson v. United States, 736 F.2d 1275 (9th Cir. 1984); Bowman v. Wilson, 672 F.2d 1145 (3d Cir. 1982); Baxter v. Claytor, 652 F.2d 181 (D.C. Cir. 1981); Kaiser v. Sec'y of Navy (E.D. Pa. 1980), aff'd, 649 F.2d 859 (3d Cir.), cert. denied, 454 U.S. 820 (1981); United States ex rel. Cummings v. Bracken, 329 F. Supp. 384 (S.D. Tex. 1971). Accord Wickham v. Hall, 706 F.2d 713 (5th Cir. 1983).

b. Waiver Before Burns v. Wilson. Since the early 19th Century, the civilian courts have applied waiver principles in collateral challenges to court-martial proceedings. However, this application was never entirely consistent. As a general rule, nondiscretionary statutory prerequisites for jurisdiction, such as the minimum size of the court, the character of the membership, and the existence of jurisdiction over the subject-matter and the accused, could not be waived. The theory was that jurisdiction could not be created by consent.[90] Alternatively, potential jurisdictional requirements, which were partially discretionary in nature, such as size of a court-martial within its statutory limits and other matters of defense, could be waived.[91]

c. Waiver Under Burns v. Wilson. After the Supreme Court's decision in Burns, and when application of the "full and fair" consideration test was at its height, claims not raised in military courts were not considered when presented for the first time in collateral proceedings. As the Tenth Circuit succinctly noted in Suttles v. Davis:[92] "Obviously, it cannot be

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[90]See, e.g., Ver Mehren v. Sirmyer, 36 F.2d 876 (8th Cir. 1929); United States v. Brown, 41 Ct. Cl. 275 (1906), aff'd, 206 U.S. 240 (1907).

[91]See, e.g., Mullan v. United States, 212 U.S. 516 (1909); Bishop v. United States, 197 U.S. 334 (1905); Aderhold v. Memefee, 67 F.2d 345 (5th Cir. 1933).

[92]215 F.2d 760, 763 (10th Cir.), cert. denied, 348 U.S. 903 (1954). See also Harris v. Ciccone, 417 F.2d 479, 484 (8th Cir. 1969), cert. denied, 397 U.S. 1078 (1970); United States ex rel. O'Callahan v. Parker, 390 F.2d 360 (3d Cir. 1968), rev'd on other grounds, 395 U.S. 258 (continued...)

said that [the military courts] have refused to fairly consider claims not asserted."

d. Waiver After the Demise of Burns v. Wilson.

(1) With the demise of the "full and fair" consideration test and the concomitant expansion of collateral review, the courts turned to civilian habeas jurisprudence for an alternative waiver doctrine. From 1963 until the mid-1970s, application of the doctrine of waiver was governed in the civilian sphere by the Supreme Court's decision in Fay v. Noia.[93] In Fay, the Court ruled that a federal habeas court is not precluded from reviewing a federal constitutional claim simply because the habeas petitioner failed to raise the issue in the state courts. The Court blunted its ruling to some extent by developing the so-called "deliberate bypass" rule; that is, where a petitioner deliberately bypassed the orderly procedure of the state courts by failing to raise his claim, the federal habeas judge had the discretion to deny relief. A number of federal courts applied the Fay "deliberate bypass" rule in collateral proceedings from military convictions.[94]

(2) In a series of decisions beginning in 1973, the Supreme Court began chipping away at the Fay v. Noia "deliberate bypass" test, and charted a course

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[92](...continued)
(1969); Branford v. United States, 356 F.2d 876 (7th Cir. 1966); Kubel v. Minton, 275 F.2d 789 (4th Cir. 1960).

[93]375 U.S. 391 (1963).

[94]See, e.g., Angle v. Laird, 429 F.2d 892, 894 (10th Cir. 1970), cert. denied, 401 U.S. 918 (1971). See generally P. Bator et al., The Federal Courts and the Federal System 1481-87 (2d ed. 1973).

that would significantly restrict the availability of habeas relief. In Davis v. United States,[95] the Supreme Court denied collateral relief to a federal prisoner, who had challenged the makeup of the grand jury which indicted him, because he had failed to preserve the issue by a motion before his trial as required by the criminal procedure rules. The Court held that absent a showing of cause for the noncompliance and some demonstration of actual prejudice, the claim would be barred in a collateral proceeding. Three years later, in Francis v. Henderson,[96] the Supreme Court was faced with a similar challenge to a grand jury by a state prisoner, who had failed to preserve the issue in the state courts. Following its decision in Davis, the Court held that the petitioner was barred from raising his claim in a federal habeas proceeding, unless he could show cause for his failure to preserve the issue in the state courts and demonstrate actual prejudice.

(3) Whatever vitality was left in the "deliberate bypass" rule was virtually gutted by subsequent Supreme Court decisions in Wainwright v. Sykes,[97] and Engle v. Isaac.[98] In Sykes, the Court held that the "cause and actual prejudice" standard set forth in Davis and Francis also applied to a defendant who failed to object to the admission of an allegedly illegally-procured confession at his state trial. The

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[95]411 U.S. 233 (1973).

[96]425 U.S. 536 (1976).

[97]433 U.S. 72 (1977).

[98]456 U.S. 107 (1982). See generally Comment, The Burger Court & Federal Review for State Habeas Corpus Petitioners After Engle v. Isaac, 31 Kan. L. Rev. 605 (1983).

Court expressly noted that the "cause and prejudice" standard was narrower than the "deliberate bypass" rule of Fay. In Engle, the Supreme Court applied the "cause and prejudice" test to bar a habeas claim based on state courts' improper allocation of the burden of proof. The Court reaffirmed its adherence to the standard "that any prisoner bringing a constitutional claim to the federal courthouse after state procedural default must demonstrate cause and actual prejudice before obtaining relief"[99] or demonstrate that failure to consider the

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[99]456 U.S. at 129. See Morris v. Kemp, 809 F.2d 1499 (11th Cir. 1987); Way v. Wainwright, 786 F.2d 1095 (11th Cir. 1986); Young v. Herring, 777 F.2d 198, 203 (5th Cir. 1985); Booker v. Wainwright, 764 F.2d 1371, 1379 (11th Cir.), cert. denied, 474 U.S. 975 (1985); Cantone v. Superintendent New York Correctional Facility, 759 F.2d 207, 218 (2d Cir.), cert. denied, 474 U.S. 835 (1985); Wiggins v. Procunier, 753 F.2d 1318, 1321 (5th Cir. 1985); Leroy v. Marshall, 757 F.2d 94, 97-100 (6th Cir.), cert. denied, 474 U.S. 831 (1985).

Because Wainwright v. Sykes did not expressly overrule Fay v. Noia, whether Fay had any lasting effect was unclear for a considerable period of time. Some courts, notably the Tenth Circuit, limited Fay to its facts, applying its "deliberate bypass" rule to instances when the habeas petitioner had not sought an appeal in the state courts. See Holcomb v. Murphy, 701 F.2d 1307, 1310 (10th Cir.), cert. denied, 463 U.S. 1211 (1983). Other courts, like the Sixth Circuit, distinguished decisions normally made by the criminal defendant's counsel with consultation with the defendant and those made without consultation, and applied the Fay "deliberate bypass" test to the former. Maupin v. Smith, 785 F.2d 135, 138 n.2 (6th Cir. 1986); Crick v. Smith, 650 F.2d 860, 867 (6th Cir. 1981), cert. denied, 455 U.S. 922 (1982). Other courts abandoned the Fay standard. E.g., Hughes v. Idaho State Bd. of Corrections, 800 F.2d 905 (9th Cir. 1986). The Supreme Court, in Coleman v. Thompson, 501 U.S. 722 (1991), recently resolved the split, expressly holding that the deliberate bypass standard applied "[i]n all cases." Id. at 750.

claim would result in a "fundamental miscarriage of justice."[100]

The Supreme Court's cases since Sykes have consistently applied the "cause and prejudice" standard to the failure to raise a particular claim in the state court proceedings.[101] For years, however, the Court left open the question of whether the Fay "deliberate bypass" standard continued to apply where, as in Fay, the state petitioner had defaulted the entire appeal.[102] In Harris v. Reed,[103] the Court strongly hinted that Fay had been overruled. In Coleman v. Thompson,[104] the Supreme Court took the last step and expressly announced the complete demise of the "deliberate bypass" standard:

> We now make it explicit: In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. Fay was based on a conception of federal/state relations that undervalued the importance of state procedural rules. The several cases after Fay that applied the cause and prejudice standard to a variety of state procedural defaults represent a different view. We now recognize the important interest in finality served by state procedural rules, and the significant harm to

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[100]456 U.S. at 135.

[101]See Harris v. Reed, 489 U.S. 255 (1989); Murray v. Carrier, 477 U.S. 478 (1986).

[102]See Murray, 477 U.S. at 492.

[103]489 U.S. at 262.

[104]501 U.S. 722, 750 (1991).

the States that results from the failure of federal courts to respect them.

(4) Generally, waiver under the "cause and prejudice" standard is dependent on a federal or state procedural rule that requires assertion of a claim, defense, or objection at a particular point in a criminal proceeding and, absent assertion, mandates waiver of the claim, defense, or objection.[105] Examples of procedural default rules in courts-martial are Military Rules of Evidence 304(d)(2)(A) (admission of evidence obtained in violation of right against self-incrimination), 312(d)(2)(A) (admission of evidence obtained in violation of right against unlawful searches and seizures), and 321(a)(2) (admission of evidence of unlawful eyewitness identification). When a state or federal court reviews a nonasserted claim, defense, or objection on its merits despite a procedural default rule, a federal court may similarly review the merits of the claim, defense, or objection in a collateral proceeding.[106] If, however, the

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[105]See, e.g., Engle v. Isaac, 456 U.S. 107, 129 (1982); Washington v. Lane, 840 F.2d 443 (7th Cir. 1988); Alexander v. Dugger, 841 F.2d 371 (11th Cir. 1988) (cause and prejudice standard applies to pro se litigants). Maupin v. Smith, 785 F.2d 135, 138 (6th Cir. 1986); Spencer v. Kemp, 781 F.2d 1458, 1463 (11th Cir. 1986). Some courts require that the state procedural rule serve a legitimate state interest. Maupin, 785 F.2d at 138. See generally Henry v. Mississippi, 379 U.S. 443, 446-48 (1965).

[106]See Ulster County Court v. Allen, 442 U.S. 140 (1979); Harris v. Reed, 822 F.2d 684 (7th Cir. 1987), rev'd, 489 U.S. 255 (1989); Walker v. Endell, 828 F.2d 1378 (9th Cir. 1987); Cooper v. Wainwright, 807 F.2d 881, 886 (11th Cir. 1986); Hux v. Murphy, 733 F.2d 737 (10th Cir. 1984), cert. denied, 471 U.S. 1103 (1985); Phillips v. Smith, 717 F.2d 44 (2d Cir. 1983), cert. denied, 465 U.S. 1027 (1984). Cf. Adams v. Dugger, 816 F.2d 1493, 1497 (11th Cir. 1987) (state should have waived procedural bar); (continued...)

federal or state court rejects a nonasserted claim, defense, or objection both because of a lack of merit and because of the petitioner's failure to abide by the applicable procedural rule, most federal courts will deem the claim, defense, or objection waived in a subsequent collateral proceeding.[107] Finally, if a habeas petitioner presents the "substance" of a federal constitutional claim to a state or federal court and the court ignores the claim, the claim is not waived.[108]

(5) Waiver under the "cause and prejudice" standard may also result when a habeas petitioner fails to develop material facts relating to the petitioner's

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[106](...continued)
Smith v. Bordenkircher, 718 F.2d 1273 (4th Cir. 1983), cert. denied, 466 U.S. 976 (1984) (review proper where state courts would not apply procedural default rule). But see Puleio v. Vose, 830 F.2d 1197, 1200 (1st Cir. 1987) (a nonasserted procedural claim which is thereby waived, is not cured for federal court review in a habeas corpus proceeding, where the state court reviewed the claim under a standard different from that which would be used by the federal court).

[107]See Harris v. Reed, 489 U.S. 255, 264 n.10 (1989). However the state or federal court must "clearly and expressly" state that its judgment rests on the procedural bar. Id. at 263. See also United States ex rel. Weismiller v. Lane, 815 F.2d 1106, 1109 (7th Cir. 1987); Phillips v. Lane, 787 F.2d 208, 211 (7th Cir. 1986); Goins v. Lane, 787 F.2d 248, 251 (7th Cir. 1986); Davis v. Allsbrooks, 778 F.2d 168, 175 (4th Cir. 1985). Cf. McBee v. Grant, 763 F.2d 811, 813 (6th Cir. 1985) (merits of claim, defense, or objection waived if procedural default was at least a "substantial basis" for the decision). But see Hux v. Murphy, 733 F.2d 737 (10th Cir. 1984), cert. denied, 471 U.S. 1103 (1985).

[108]See Anderson v. Harless, 459 U.S. 4 (1982); Monk v. Zelez, 901 F.2d 885 (10th Cir. 1990); United States ex rel. Sullivan v. Fairman, 731 F.2d 450, 453 (7th Cir. 1984).

federal claim. In Keeney v. Tamayo-Reyes,[109] the petitioner, a Cuban immigrant with little education and almost no knowledge of English, claimed his plea of nolo contendere in state court was invalid because his court-appointed translator failed to fully and accurately translate the mens rea element of the crime. The record showed that the petitioner had failed to adequately develop the facts concerning the translation at the state court hearing. The Supreme Court held that the petitioner must establish "cause and prejudice" for such failure to be entitled to a federal evidentiary hearing, unless the petitioner can show that a "fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing."[110]

(6) Once a federal habeas court determines that a petitioner failed to bring a claim in state court or failed to develop the factual basis for the claim in the state forum, the petitioner must show cause for failing to properly assert or develop the claim and actual prejudice from the alleged error.[111] Alternatively, a petitioner may obtain collateral review by showing "that failure to consider the claims will result in a fundamental miscarriage of justice."[112]

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[109]504 U.S. 1 (1992).

[110]Id. at 11.

[111]See, e.g., Rust v. Zent, 17 F.3d 155, 160 (6th Cir. 1994); Snell v. Lockhart, 14 F.3d 1289, 1297 (8th Cir.), cert. denied, 115 S. Ct. 419 (1994); Noltie v. Peterson, 9 F.3d 802, 804 (9th Cir. 1993); Resnover v. Pearson, 965 F.2d 1453, 1458 (7th Cir. 1992), cert. denied, 508 U.S. 962 (1993).

[112]Coleman v. Thompson, 501 U.S. 722, 750 (1991). See Sawyer v. Whitley, 112 S. Ct. 2514 (1992).

(7) "'Cause' is a legitimate excuse for default; 'prejudice' is actual harm resulting from the alleged constitutional violation."[113] Rather than provide these terms precise content, the federal courts have applied them on an ad hoc basis.[114] For example, in Reed v. Ross,[115] the Supreme Court found that the "novelty" of a constitutional claim may constitute sufficient cause for default.[116] In Murray v. Carrier,[117] the Court held that mere attorney ignorance or inadvertence is insufficient cause to avoid a procedural default;[118] however, if an attorney's performance falls below minimum

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[113]Magby v. Wawrzaszek, 741 F.2d 240, 244 (9th Cir. 1984), cert. denied, 490 U.S. 1068 (1989). See Preston v. Maggio, 741 F.2d 99, 101 (5th Cir. 1984), cert. denied, 471 U.S. 1104 (1985).

[114]See Farmer v. Prast, 721 F.2d 602, 606 n.6 (7th Cir. 1983) (citing Engle, supra note 102, for proposition that "cause and prejudice" are not rigid terms but take their meaning from principles of federalism and comity and the need for finality in criminal litigation).

[115]468 U.S. 1 (1984).

[116]See also United States v. Griffin, 765 F.2d 677, 682 (7th Cir. 1985). Accord Weaver v. McKaskle, 733 F.2d 1103, 1106 (5th Cir. 1984).

[117]477 U.S. 478 (1986).

[118]See United States ex rel. Weismiller v. Lane, 815 F.2d 1106, 1109 (7th Cir. 1987); Jones v. Henderson, 809 F.2d 946, 950 (2d Cir. 1987); Cartee v. Nix, 803 F.2d 296, 380-81 (7th Cir. 1986), cert. denied, 480 U.S. 938 (1987).

constitutional standards,[119] cause may be inferred.[120] The element of prejudice is similarly fact-specific.[121]

(8) The Tenth Circuit, in Wolff v. United States,[122] applied the "cause and prejudice" standard to a habeas petitioner challenging, for the first time, the form of immunity given a key prosecution witness at a court-martial. The petitioner's counsel at the court-martial did not object to the witness' testimony. Finding no good cause for the failure to object, the court refused to consider the merits of the claim. Importantly, the court explicitly rejected the petitioner's contention that the "cause and prejudice" standard was inapplicable in collateral attacks on courts-martial.[123] The Wolff decision continues to be

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[119]See Strickland v. Washington, 466 U.S. 668 (1984).

[120]Murray, 477 U.S. at 478. Where, however, there is no constitutional right to counsel (e.g., in state post-conviction proceedings), there can be no deprivation of the right to effective assistance of counsel and hence no "cause" for purposes of the test for waiver. Coleman v. Thompson, 501 U.S. 722, 750 (1991).

[121]See, e.g., United States v. Frady, 456 U.S. 152, 168 (1982); United States ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987); Ferguson v. Knight, 807 F.2d 1239, 1242 (6th Cir. 1987); Henry v. Wainwright, 743 F.2d 761, 763 (11th Cir. 1984); Francois v. Wainwright, 741 F.2d 1275, 1283 (11th Cir. 1984). See generally Comment, Habeas Corpus--The Supreme Court Defines the Wainwright v. Sykes "Cause" and "Prejudice" Standard, 19 Wake Forest L. Rev. 441 (1983). The "plain error" rule is inapplicable in collateral proceedings. United States v. Frady, 456 U.S. 152 (1982); Henderson v. Kibbe, 431 U.S. 145 (1977).

[122]737 F.2d 877 (10th Cir.), cert. denied, 496 U.S. 1076 (1984).

[123]Id. at 879.

followed in the Tenth Circuit[124] and by the courts in the Ninth[125] and Federal[126] Circuits.

[124]Lips v. Commandant, U.S. Disciplinary Barracks, 997 F.2d 808 (10th Cir. 1993), cert. denied, 114 S. Ct. 920 (1994).

[125]Davis v. Marsh, 876 F.2d 1446 (9th Cir. 1989).

[126]Martinez v. United States, 914 F.2d 1486 (Fed. Cir. 1990).

# CHAPTER 9

# OFFICIAL IMMUNITY

## 9.1 Introduction.

a. General. Previous chapters of this text concerned issues involved in litigation against the Government, its agencies, and its officials sued in their official capacities. This chapter will discuss lawsuits against government officials in their individual capacities; that is, lawsuits in which plaintiffs seek money damages from the personal assets of government officials for putative wrongs committed in the performance of governmental functions. In these cases, plaintiffs sue for money damages from the person rather than the office, and when the official is transferred or leaves government service, the lawsuit follows.

b. Distinction Between Suits in Official and in Individual Capacities. When a lawsuit is filed, government attorneys must immediately determine whether the plaintiff seeks relief from government officials individually as opposed to merely in their representative or official capacities. The defenses available to individual defendants and the manner in which their lawsuits are defended differ significantly from the defenses and manner of defense of lawsuits against the government itself. For example, the Department of Justice (DOJ) must expressly approve the representation of officials sued personally; DOJ approval is not required when the lawsuit is against officials in their

representative or official capacities.[1] Furthermore, an individually-sued government official may have only 20 days to answer a complaint, as opposed to the 60 days available to the United States.[2] Finally, the personal defenses of government officials sued individually--such as immunity--must be timely raised or they are waived.[3]

c. Determining Individual-Capacity Lawsuits. As noted in chapter 1,[4] whether a lawsuit is against a government official individually, as opposed to officially, is sometimes difficult to determine. Sophisticated plaintiffs' counsel usually identify the capacity in which the official is being sued in the caption or body of the complaint. More often, however, the nature of a plaintiff's lawsuit is gleaned--if at all--from a close reading of the relief sought and the characterization of the defendant's alleged acts. When in doubt, treat the lawsuit as if it was against the government official individually, or preserve the official's personal defenses until the plaintiff clarifies the focus of the complaint. This is often accomplished by simply requesting clarification from plaintiff's counsel. With respect to the preservation of personal defenses, government litigators often inform the court in their initial filing that they are assuming

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[1]See supra § 1.4.

[2]Fed. R. Civ. P. 12(a). But see Dickens v. Lewis, 750 F.2d 1251 (5th Cir. 1984) (federal sixty-day limit applicable to federal officials sued in individual capacity for acts committed under color of office).

[3]See, e.g., Gomez v. Toledo, 446 U.S. 635 (1980) (immunity is an affirmative defense the government must raise in defendant's answer).

[4]See supra § 1.4.

the complaint is against government officials in their official capacities unless the plaintiff asserts otherwise, and that personal defenses are not waived.

d. Representation and Liability for Judgments. When federal officials are sued personally for acts committed under color of office, they are usually entitled to DOJ representation. Section 1.4 above discusses the manner in which such representation is obtained. Although individually-sued federal officials are entitled to DOJ representation, they generally are liable for money judgments rendered against them.[5] As an exception to this general rule, the United States will fully pay tort judgments entered jointly against the government and individual federal defendants.[6] In most cases, however, federal officials sued in their individual capacity are responsible for any monetary judgments rendered against them.

e. Importance of Official Immunity. Official immunity is important because federal officials can be forced to defend personal lawsuits arising from the performance of their governmental duties and held to pay judgments entered against. Both Congress and the courts recognize that if government officials are sued and held personally liable for every decision made in the course of public administration, officials might become reluctant to make decisions or might act to avoid litigation rather than to serve the public interest. Moreover, such suits forces public officials to expend their time and energy in litigation and not in performing

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[5]28 C.F.R. § 50.15(a)(7)(iii).

[6]See supra § 1.4.

their governmental duties. As a consequence, Congress and the courts have given government officials limited immunities from lawsuits and liability. This chapter examines these immunities.

f. Justifications for Official Immunity. A tension exists between the desire to afford a remedy to citizens injured by the unconstitutional actions of public officials and the need to protect federal officials from lawsuits.[7] On the one hand, citizens injured by the unlawful actions of the government should find a remedy in the law,[8] and public officials, no

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[7]Compare Dicey, The Law of the Constitution 189 (8th ed. 1915), quoted in Jaffee, Suits Against Governments and Officers: Damages Actions, 77 Harv. L. Rev. 209, 215 (1963) ("With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen"), with Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949) (Hand, J.) ("To submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties"). See also Dellinger, Of Rights and Remedies: The Constitution as a Sword, 85 Harv. L. Rev. 1532, 1553-56 (1972); Freed, Executive Official Immunity for Constitutional Violations: An Analysis & A Critique, 72 Nw. L. Rev. 526, 565 (1977); Hill, Constitutional Remedies, 69 Colum. L. Rev. 1109, 1148 (1969).

[8]See, e.g., Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803): "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury." See also James, Tort Liability of Governmental Units and Their Officers, 22 U. Chi. L. Rev. 610, 643 (1955); Katz, The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood, 117 U. Pa. L. Rev. 1, 3, 73 (1969); Keefe, Personal Tort Liability of Administrative Officials, 12 Fordham L. Rev. 130, 131-32 (1943); Schuck, Suing Our Servants: The Court,

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matter how high their office, are not above the law.[9] Alternatively, we should hold public officials strictly accountable for all actions taken on behalf of the government. Notions of fairness,[10] as well as concerns for the efficiency of the public service,[11] militate in

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[8](...continued)
Congress, and the Liability of Public Officials for Damages, 1980 Sup. Ct. Rev. 281, 285; Developments in the Law--Remedies Against the United States and Its Officials, 70 Harv. L. Rev. 827, 836-37 (1957).

[9]See United States v. Lee, 106 U.S. 196, 220 (1882): "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it." See also Nixon v. Fitzgerald, 457 U.S. 731, 766-67 (1982) (White, J., dissenting); Butz v. Economou, 438 U.S. 478, 506 (1978); Vaughn, The Personal Accountability of Public Employees, 25 Am. U. L. Rev. 85, 86-87 (1975). In this regard, deterrence of unlawful governmental conduct is a principal objective of imposing liability on public officials; James, supra note 8, at 643; Keefe, supra note 8, at 131-32; Schuck, supra note 8, at 285; Woolhandler, Patterns of Official Immunity and Accountability, 37 Case W. Res. L. Rev. 396, 413 (1987).

[10]Fairness is an especially compelling concern because public officers and employees are often under a legal duty to take "action associated with a strong likelihood of injury to others." Bermann, Integrating Governmental and Officer Tort Liability, 77 Colum. L. Rev. 1175, 1179 (1977). See also Euler & Farley, Federal Tort Liability: Reform in the Wind, 31 Fed. B.J. & News 39, 41 (1984) ("[S]everal thousand federal servants are currently threatened with personal financial catastrophe for attempting to carry out the duties assigned to them by Congress and the President"); David, The Tort Liability of Public Officers, 12 S. Cal. L. Rev. 127, 128-29 (1939); Freed, supra note 7, at 529; Jaffee, supra note 7, at 223; Jennings, Tort Liability of Administrative Officers, 21 Minn. L. Rev. 263, 267-68 (1936); Keefe, supra note 8, at 131; Schuck, supra note 8, at 265.

[11]See Westfall v. Erwin, 484 U.S. 292 (1988): "The purpose of such official immunity is . . . to insulate (continued...)

favor of some type of immunity from suit.[12] In light of these competing concerns, two justifications support immunities for federal officials sued in their individual capacities:

(1) Protect Decision-Making Process. First, official immunity is intended "to minimize the adverse effect upon a public official's decisionmaking that results from the threat of personal liability."[13]

> It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties--suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless,

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[11](...continued)
the decision making process from the harassment of prospective litigation. The provision of immunity rests on the view that the threat of liability will make federal officials unduly timid in carrying out their official duties, and that effective Government will be promoted if officials are freed of the costs of vexatious and often frivolous damage suits." See also Mitchell v. Forsyth, 472 U.S. 511 (1985); Harlow v. Fitzgerald, 457 U.S. 800, 807, 814 (1983); Freed, supra note 7, at 529-30; James, supra note 8, at 643; Keefe, supra note 8, at 131; Lynch, Butz v. Economou and Federal Official Immunity: Much Ado About Nothing?, 59 U. Det. Urb. L.J. 281, 303-04 (1982); Schuck, supra note 8; Woolhandler; Patterns of Official Immunity and Accountability, 37 Case W. Res. L. Rev. 396, 413 (1987).

[12]See Mitchell v. Forsyth, 472 U.S. 511 (1985); Harlow v. Fitzgerald, 457 U.S. 800, 807, 814 (1982); Freed, supra note 7, at 529-30; Lynch, Butz v. Economou and Federal Officials Immunity: Much Ado About Nothing?, 59 U. Det. J. Urb. L. 281, 303-04 (1982).

[13]Comment, Harlow v. Fitzgerald: The Lower Courts Implement the New Standard for Qualified Immunity under Section 1983, 132 U. Pa. L. Rev. 901, 913-14 (1984) [hereinafter Comment, Harlow v. Fitzgerald].

> vigorous, and effective administration of policies of government.[14]

Subjecting public officials "to the burden of a trial and to the inevitable danger of its outcome, dampens the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties."[15] The threat of litigation and personal liability causes public officials to act in their own interest and not the public's. This litigation threat deters able citizens from accepting public office.[16]

(2) Enhance Government Efficiency. Second, litigation immunities promote government efficiency.[17] Lawsuits against public officials necessarily involve social costs, such as expenses of litigation, diversion of official energy from pressing public issues, and growing federal court dockets.[18] "Efficient government is enhanced . . . by conserving the time and money of officials who might otherwise be mired in extended and

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[14]Barr v. Matteo, 360 U.S. 564, 571 (1959).

[15]Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir.) (Hand, J.), cert. denied, 339 U.S. 949 (1949).

[16]See Harlow v. Fitzgerald, 457 U.S. 800, 807, 814 (1982); Nixon v. Fitzgerald, 457 U.S. 731, 745 (1982); Butz v. Economou, 438 U.S. 478, 506-07 (1978); Scheuer v. Rhodes, 416 U.S. 232, 241 (1974); Barr v. Matteo, 360 U.S. 564, 571-72 (1959); Spalding v. Vilas, 161 U.S. 483, 498-99 (1896).

[17]Comment, Harlow v. Fitzgerald, supra note 13, at 914.

[18]Id. See also Mitchell v. Forsyth, 472 U.S. 511 (1985); Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982); Butz v. Economou, 438 U.S. 478, 507-08 (1978).

perhaps frivolous litigation[,]" and by reducing the caseload of the federal courts.[19]

g. Types of Official Immunity. The courts have recognized two kinds of official immunity defenses: absolute immunity and qualified immunity.[20] Absolute immunity is a complete bar to suit, regardless of whether the protected official acted with malice or in bad faith. Qualified immunity, on the other hand, only protects public officials who act reasonably. The type of immunity to which a public official is entitled depends upon the interplay of four variables: (1) the nature of the plaintiff's claim (i.e., a common law tort or a constitutionally-based damages action);[21] (2) the defendant's office (e.g., judge, prosecutor, soldier);[22] (3) the function or duty the defendant performed giving rise to the plaintiff's claim (e.g., a prosecutor presenting the government's case in court, an executive

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[19]Comment, Harlow v. Fitzgerald, supra note 13 at 814.

[20]See Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982); Nixon v. Fitzgerald, 457 U.S. 731, 746 (1982); Scheuer v. Rhodes, 416 U.S. 232, 238-39 (1974).

[21]Compare Butz v. Economou, 438 U.S. 478 (1978), with Barr v. Matteo, 360 U.S. 564 (1959). Constitutional damages actions include claims filed directly under the Constitution, see Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), and suits under the various civil rights acts. E.g., 42 U.S.C. §§ 1981, 1983, 1985(3) (1982). See generally Harlow v. Fitzgerald, 457 U.S. 800, 815 n.24 (1982); Butz v. Economou, 438 U.S. 478, 504 (1978) (immunity of public officials from Bivens actions parallels their immunity from suits under the civil rights acts).

[22]See, e.g., Stump v. Sparkman, 435 U.S. 349 (1978) (judge); Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutor); Gravel v. United States, 408 U.S. 606 (1972) (congressman and aide).

branch official rendering performance evaluations);[23] and, in some instances, (4) the plaintiff's status (e.g., soldier, federal civilian employee).[24] These

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[23]Compare Mitchell v. Forsyth, 472 U.S. 511 (1985) (Attorney General not entitled to absolute prosecutorial immunity for authorizing wiretaps), with Imbler v. Pachtman, 424 U.S. 409 (1976) (state attorney entitled to absolute prosecutorial immunity for initiating criminal prosecution).

[24]For example, lower federal courts, expanding the reasoning of the Supreme Court in Feres v. United States, 340 U.S. 135 (1950), have held that military officials are absolutely immune from common law tort suits filed by servicemembers for injuries incurred incident to military service. See, e.g., Stauber v. Cline, 837 F.2d 395 (9th Cir. 1988); Bois v. Marsh, 801 F.2d 462 (D.C. Cir. 1986); Trerice v. Summons, 755 F.2d 1081 (4th Cir. 1985); Citizens Nat'l Bank v. United States, 594 F.2d 1154 (7th Cir. 1979); Martinez v. Schrock, 537 F.2d 765 (3d Cir. 1976), cert. denied, 430 U.S. 920 (1977); but see Cross v. Fiscus, 830 F.2d 755 (7th Cir. 1987). See generally Euler, Personal Liability of Military Personnel for Actions Taken in the Course of Duty, 113 Mil. L. Rev. 137 (1986). In Feres, the Supreme Court ruled that servicemembers could not sue the United States under the Federal Tort Claims Act for injuries received incident to military service. See also United States v. Johnson, 107 S. Ct. 2063 (1987); United States v. Shearer, 473 U.S. 52 (1985).

The identity of the plaintiff may also influence the availability of a constitutional remedy. For example, the Supreme Court has refused to infer a Bivens remedy for members of the military who suffer constitutional deprivations incident to their military service. See United States v. Stanley, 483 U.S. 669 (1987); Chappell v. Wallace, 462 U.S. 296 (1983). Some lower federal courts have extended these holdings to preclude suits by soldiers under the civil rights acts. E.g., Bois v. Marsh, 801 F.2d 462 (D.C. Cir. 1986); Crawford v. Texas Army Nat'l Guard, 794 F.2d 1034 (5th Cir. 1986); Martelon v. Temple, 747 F.2d 1348 (10th Cir. 1984), cert. denied, 471 U.S. 1135 (1985); Mollnow v. Carlton, 716 F.2d 627 (9th Cir. 1983), cert. denied, 465 U.S. 1100 (1984). The Supreme Court has similarly refused to permit federal civilian employees to pursue Bivens claims against their superiors, at least where the asserted constitutional deprivation is rectifiable through the

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factors determine whether an individually-sued public official will receive absolute or qualified immunity.

9.2 Types of Damages Claims.

a. General. Plaintiffs can assert three types of damages claims against personally-sued public officials: (1) common law torts; (2) statutory actions for violations of constitutional rights under one of the Civil Rights Acts,[25] and (3) constitutional torts or so-called "Bivens claims."[26] Plaintiffs often lodge a number of different types of damages claims in a single lawsuit, thereby varying the immunities available to defendants. Before discussing the effects of these claims on the immunity defense, however, we will examine the nature of these causes of action.

b. Common Law Torts.

(1) General. Common law torts are, as their name implies, torts created at common law, principally in pre-Revolutionary War England. They came to this country as part of the common law of the various states.[27] Included are such torts as defamation, assault and battery, false imprisonment, malicious prosecution, and intentional infliction of mental distress.

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[24](...continued)
federal civil service system. Bush v. Lucas, 462 U.S. 367 (1983).

[25]E.g., 42 U.S.C. §§ 1981, 1983, 1985.

[26]See Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

[27]See generally Butz v. Economou, 438 U.S. 478, 485-96 (1978); W. Prosser, Law of Torts 28 (4th ed. 1971).

(2) Immunity. As discussed in greater detail below, absolute immunity from state-law tort actions is available where the conduct of federal officials is within the scope of their duties.[28]

c. Statutory Actions.

(1) General. Three statutes, enacted as part of the Civil Rights Acts of 1866 and 1871, provide substantive bases for money damages claims against public officials who violate a plaintiff's constitutional rights: 42 U.S.C. §§ 1981, 1983, and 1985. Section 1981 supports damages suits for racially-based discrimination; section 1983 is a basis for money claims for constitutional violations under color of state law; section 1985, among other things, provides causes of actions for damages for conspiracies to violate civil rights and for interference with the duties of federal officers. 28 U.S.C. § 1343 gives the federal courts jurisdiction under all of these statutes.[29]

(2) 42 U.S.C. § 1981.

(a) The Statute. "Section 1981 was first enacted as part of the Civil Rights Act of 1866 primarily to protect the rights of freed slaves."[30]

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[28]Federal Employees Liability Reform and Tort Compensation Act, 28 U.S.C. § 2679 (1995).

[29]See supra § 3.3g.

[30]Developments in the Law: Section 1981, 15 Harv. C.R.-C.L. L. Rev. 29 (1980) (footnotes omitted) [hereinafter Developments in the Law: Section 1981].

Originally passed under the aegis of the thirteenth amendment, Congress reenacted the statute in 1870 under the fourteenth amendment to remove any doubts about its constitutionality.[31] Early judicial construction of section 1981 limited it to racial discrimination under color of state law.[32] In Jones v. Alfred H. Mayer Co.,[33] the Supreme Court overruled its earlier decisions, holding that section 1981 reached private acts of racial discrimination and was not dependent upon state action. 42 U.S.C. § 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

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(b) Scope of the Remedy.

(i) Section 1981 is a remedy for racial discrimination.[34] For example, section 1981 provides a cause of action for racially-based employment

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[31] Id. at 44. See also Al-Khazraji v. Saint Francis College, 784 F.2d 505, 515 (3d Cir. 1986), aff'd, 107 S. Ct. 2022 (1987).

[32] Hodges v. United States, 203 U.S. 1 (1906). See also Civil Rights Cases, 109 U.S. 3 (1883).

[33] 392 U.S. 409 (1968).

[34] Developments in the Law--Section 1981, supra note 30, at 70-71.

discrimination,[35] and for racial discrimination in making and enforcing private contracts.[36] Moreover, the statute affords a remedy to blacks, as well as whites, who suffer discrimination on the basis of race.[37] Section 1981 is limited, however, to racially-motivated discrimination;[38] it "has been construed as proscribing racial discrimination and only racial discrimination."[39] Thus, the federal courts have held section 1981 inapplicable to discrimination based on sex,[40] age,[41] and religion.[42]

(ii) The Supreme Court broadened the classes of persons protected by section 1981. In

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[35]Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 459-60 (1975); but cf. Brown v. General Serv. Admin., 425 U.S. 820 (1976) (federal civilian employees cannot sue under section 1981 for employment discrimination; their exclusive remedy is Title VII of the Civil Rights Act of 1964).

[36]Runyon v. McCrary, 427 U.S. 160 (1976); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1969).

[37]McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976).

[38]Olivares v. Martin, 555 F.2d 1192, 1195-96 (5th Cir. 1977); Jenkins v. Blue Cross Mut. Hosp. Ins., Inc., 538 F.2d 164, (7th Cir.) (en banc), cert. denied, 429 U.S. 986 (1976).

[39]Foreman v. General Motors Corp., 473 F. Supp. 166, 177 (E.D. Mich. 1979).

[40]DeGraffenreid v. General Motors Assembly Div., 558 F.2d 480, 486 n.2 (8th Cir. 1977); Presseisen v. Swarthmore College, 71 F.R.D. 34, 38 (E.D. Pa. 1976).

[41]Kodish v. United Air Lines, Inc., 628 F.2d 1301, 1303 (10th Cir. 1980).

[42]Runyon v. McCrary, 427 U.S. 160, 167 (1976). See also Saint Francis College v. Al-Khazraji, 107 S. Ct. 2022, 2028 (1987).

Saint Francis College v. Al-Khazraji,[43] the issue was whether a citizen of Iraqi descent could sue for discrimination under the statute. The district court had held that section 1981 did not reach claims of discrimination based on Arabian ancestry because, under current racial classifications, Arabs are Caucasians.[44] The Supreme Court held, however, that the concept of race held by the Congress that enacted section 1981 (and not contemporary notions of race) governs the construction of the statute. In the mid-19th century, racial distinctions were based on ancestry or ethnic characteristics; thus, Arabs were deemed a racially-distinct group.

> Based on the history of § 1981, we have little trouble in concluding that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics. Such discrimination is racial discrimination that Congress intended § 1981 to forbid, whether or not it would be classified as racial in terms of modern scientific theory. . . . If respondent on remand can prove that he was subjected to intentional discrimination based on the fact he was born Arab, rather than solely on the place or nation of his origin, or his religion, he will have made out a case under § 1981.[45]

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[43]481 U.S. 604 (1987). See also Mian v. Donaldson et al., 7 F.3d 1085, 1087 (2d Cir. 1993); Sherlock v. Montefiore Medical Center, 84 F.3d 522, 527 (2d Cir. 1996) (failed to state a cause of action under 42 U.S.C. § 1981 because plaintiff did not allege she was a member of a racial or ethnic minority).

[44]481 U.S. 604 (1987).

[45]Id. at 2028. See also Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987) (discrimination against Jews racial discrimination under 42 U.S.C. § 1982); Jatoi v. (continued...)

(3) 42 U.S.C. § 1983.

(a) The Statute. 42 U.S.C. § 1983 was part of the Civil Rights Act of 1871, which Congress enacted in response to lawless conditions that existed in the South during Reconstruction. The Act was aimed at the activities of the Ku Klux Klan and "the abdication of law enforcement responsibilities by Southern officials," especially in regard to their unwillingness to protect the newly-freed slaves.[46] While section 1983 is now the most widely-litigated and, perhaps, the most important of the post-Civil War civil rights statutes, the provision remained dormant for almost the first century of its existence. In 1961, however, the Supreme Court, in Monroe v. Pape,[47] "resurrected section 1983 from ninety years of obscurity."[48] By doing so, it afforded a broad-based remedy for constitutional torts committed "under color of state law." Since 1961, when the Court issued its

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[45](...continued)
Hurst-Euless-Bedford Hosp. Auth., 807 F.2d 1214 (5th Cir. 1987) (East Indian); Alizadeh v. Safeway Stores, Inc., 802 F.2d 111 (5th Cir. 1986) (Iranian); Monzanares v. Safeway Stores, Inc., 593 F.2d 968 (10th Cir. 1979) (Mexican American).

[46]Developments in the Law--Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1153-56 (1977) [hereinafter Developments in the Law--Section 1983]; see also Note, The Supreme Court Continues Its Journey Down the Ever Narrowing Paths of Section 1983 and the Due Process Clause: An Analysis of Parratt v. Taylor, 10 Pepperdine L. Rev. 579, 580-82 (1983).

[47]365 U.S. 167 (1961).

[48]Developments in the Law--Section 1983, supra note 46, at 1154.

opinion in Monroe, the number of private constitutional tort suits against state and local officials has dramatically increased.[49] The statute provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

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(b) Scope of the Remedy. Section 1983 affords a money damages remedy against defendants who, acting under color of state law, violate a plaintiff's federal constitutional or statutory rights.[50] Claims under section 1983 are conditioned on two elements: first, the conduct complained of must have been committed by a person acting under color of state law, and second, the conduct must have deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or the laws of the United States.[51] Under the latter element, a plaintiff must show that the defendant violated his rights under the Constitution or

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[49]Whitman, Constitutional Torts, 79 Mich. L. Rev. 5, 6 (1980).

[50]Monroe v. Pape, 365 U.S. 167 (1961).

[51]Whitehorn v. Harrelson, 758 F.2d 1416, 1419 (11th Cir. 1985); Emory v. Peeler, 756 F.2d 1547, 1554 (11th Cir. 1985).

a federal statute.[52] To meet the first prerequisite, the plaintiff must show the defendant acted "under color of state law."[53] Thus, by its terms, section 1983 does not provide a remedy when a defendant is acting under color of federal law; it does not generally reach the conduct of the federal government, its agencies, or its officials.[54] Consequently, section 1983 usually is not an effective remedy against officials or members of the active Army or the Army Reserve, since these officials act under the color of federal, not state, law.[55] Officials or members of the National Guard, however, when acting in their state capacities, are subject to suit under section 1983.[56]

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[52]Id.

[53]Griffin v. Breckenridge, 403 U.S. 88, 99 (1971); Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970); Wheeldin v. Wheeler, 373 U.S. 647, 650 n.2 (1963).

[54]District of Columbia v. Carter, 409 U.S. 418, 424-25 (1973); Daly-Murphy v. Winston, 820 F.2d 1470, 1477 (9th Cir. 1987); Chatman v. Hernandez, 805 F.2d 453, 455 (1st Cir. 1986); Rauschenberg v. Williamson, 785 F.2d 985, 988-89 (11th Cir. 1986); Gibson v. United States, 781 F.2d 1334, 1341 (9th Cir. 1986); Micklus v. Carlson, 632 F.2d 227, 239 (3d Cir. 1980); Campbell v. Amax Coal Co., 610 F.2d 701, 702 (10th Cir. 1979); Mack v. Alexander, 575 F.2d 488, 489 (5th Cir. 1978); Frasier v. Hegeman, 607 F. Supp. 318, 323 (N.D.N.Y. 1985).

[55]Ogden v. United States, 758 F.2d 1168, 1174-75 (7th Cir. 1985). But cf. Little Earth of United Tribes, Inc. v. United States Dep't of Housing & Urban Dev., 584 F. Supp. 1292, 1298 (D. Minn. 1983) (federal officials acting in conspiracy with state officials may be subject to liability under section 1983).

[56]See Holdiness v. Stroud, 808 F.2d 417, 421-22 (5th Cir. 1987); Johnson v. Orr, 780 F.2d 386 (3d Cir.), cert. denied, 479 U.S. 828 (1986); Martelon v. Temple, 747 F.2d 1348, 1350 (10th Cir. 1984), cert. denied, 471 U.S. 1135 (1985); Brown v. United States, 739 F.2d 362, 369 (8th Cir. 1984), cert. denied, 473 U.S. 904 (1985).

(4) 42 U.S.C. § 1985.

(a) The Statute. 42 U.S.C. § 1985 provides, in relevant part:

> (1) Preventing officer from performing duty. If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;
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> . . . .
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> (3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constitutional authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; . . . in any case of conspiracy under this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned

by such injury or deprivation against any one or more of the conspirators.

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(b) Scope of the Remedy.

(i) 42 U.S.C. § 1985(1). Section 1985(1) affords a damages remedy against, inter alia, persons who conspire to prevent by force, intimidation, or threat, federal officers from discharging their duties or to injure such officers because of their lawful discharge of the duties of their office.[57] Unlike section 1985(3), discussed below, claims under section 1985(1) are not limited to conspiracies motivated by a racial or other class-based animus.[58] Claims under section 1985(1) are rarely asserted.[59] Occasionally, members of the military will seek relief under 1985(1) for putatively unlawful reassignments or separations in retaliation for performance of military duties.[60] To date, these lawsuits have been unsuccessful.[61]

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[57]See Stern v. United States Gypsum, Inc., 547 F.2d 1329, 1336-37 (7th Cir.), cert. denied, 434 U.S. 975 (1977).

[58]Id. See also Mollnow v. Carlton, 716 F.2d 627, 630 (9th Cir. 1983), cert. denied, 465 U.S. 1100 (1984). Cf. Kush v. Rutledge, 460 U.S. 719 (1983) (section 1985(2)).

[59]Mollnow v. Carlton, 716 F.2d 627, 630 (9th Cir. 1983), cert. denied, 465 U.S. 1100 (1984).

[60]See id.; Alvarez v. Wilson, 600 F. Supp. 706 (N.D. Ill. 1985).

[61]Id. But cf. Spagnola v. Mathis, 809 F.2d 16, 28-29 (D.C. Cir. 1986) (dicta) (civilian employee allegedly transferred in retaliation for exercise of right to free speech may state claim under § 1985(1)).

(ii) 42 U.S.C. § 1985(3).

(A) General. Section 1985(3) was originally part of the Civil Rights Act of 1871.[62] In Collins v. Hardyman,[63] the Supreme Court limited the reach of the statute to conspiracies to violate civil rights under color of state law. In Griffin v. Breckenridge,[64] however, the Court overruled Collins and held that section 1985(3) provided a civil remedy for wholly private conspiracies to deprive persons of their civil rights.

(B) Elements. To obtain relief under section 1985(3), a plaintiff must allege and prove four elements:

> (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.[65]

(C) Conspiracy. By its terms, section 1985(3) requires a conspiracy and some act in furtherance of the conspiracy. A conspiracy, of course,

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[62]See Great American Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 370 (1979); Griffin v. Breckenridge, 403 U.S. 88 (1971).

[63]341 U.S. 651 (1951).

[64]403 U.S. 88 (1971).

[65]United Brotherhood of Carpenters Local 610 v. Scott, 463 U.S. 825, 828-29 (1983); Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971).

requires the participation of at least two persons.[66] And a failure to allege the existence of a conspiracy or acts in its furtherance is fatal to a 1985(3) claim.[67] Unlike section 1983, section 1985(3) can reach certain private conspiracies; it is not limited to actions taken under color of state law.[68] The circumstances under which 1985(3) encompasses private conspiracies are discussed below. Moreover, some courts have held that 1985(3) does not reach conspiracies involving federal officials.[69] The better view, however, is that if section 1985(3) can reach private conspiracies, it can reach conspiracies involving federal officials.[70]

(D) Equal Protection of the Laws or Equal Privileges and Immunities Under the Laws. The second element of a section 1985(3) claim requires

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[66]42 U.S.C. § 1985(3); Black's Law Dictionary 280-81 (5th ed. 1979).

[67]See Great American Fed. Savings & Loan Ass'n v. Novotny, 442 U.S. 366, 378 (1979); Slotnick v. Garfinkle, 632 F.2d 163, 165 (1st Cir. 1980); Gillespie v. Civiletti, 629 F.2d 637, 641 (9th Cir. 1980); Wilkens v. Rogers, 581 F.2d 399, 404 (4th Cir. 1978); McClellan v. Mississippi Power & Light Co., 545 F.2d 919, 923 (5th Cir. 1977) (en banc); Fletcher v. Hook, 446 F.2d 14, 15 (3d Cir. 1971).

[68]Griffin v. Breckenridge, 403 U.S. 88, 101 (1971).

[69]E.g., Seibert v. Baptist, 594 F.2d 423, 429 (5th Cir. 1979), cert. denied, 446 U.S. 918 (1980); Savage v. United States, 450 F.2d 449, 451 (8th Cir. 1971), cert. denied, 405 U.S. 1043 (1972); Bethea v. Reid, 445 F.2d 1163, 1164 (3d Cir.), cert. denied, 404 U.S. 1061 (1971); Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950).

[70]See, e.g., Hobson v. Wilson, 737 F.2d 1, 19-20 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985); Alvarez v. Wilson, 600 F. Supp. 706, 710-11 (N.D. Ill. 1985).

that the conspiracy be "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws. . . ."[71] To give content to this element and to prevent the statute from becoming a general federal tort law applicable to all conspiratorial tortious interference with the rights of others, the Supreme Courts has construed section 1985(3) to reach only conspiracies motivated by some racial or other class-based discriminatory animus.

> That the statute was meant to reach private action does not, however, mean that it is intended to apply to all tortious, conspiratorial interferences with the rights of others. . . . The constitutional shoals that would lie in the path of interpreting section 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose--by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment. . . . The language requiring intent to deprive of <u>equal</u> protection, or <u>equal</u> privileges and immunities, means that there must be some racial or perhaps otherwise class-based invidiously discriminatory animus behind the conspirators' action.[72]

Simply put, the conspiracy must be directed against an individual because of membership in a particular class; absent a demonstration of "prejudice against a class <u>qua</u> class," no cause of action exists under section

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[71]United Brotherhood of Carpenters Local 610 v. Scott, 463 U.S. 825, 829 (1983).

[72]Griffin v. Breckenridge, 403 U.S. 88, 101-02 (1971) (emphasis in the original).

1985(3).[73] A tort personal to a particular plaintiff is not sufficient.[74] A discriminatory animus that is racially based clearly meets this prerequisite of section 1985(3).[75] So does a conspiracy directed against persons who advocate equal rights for racial minorities.[76] The Supreme Court has withheld judgment, however, on whether section 1985(3) reaches forms of discriminatory animus other than those based on race.[77] The Court has held that section 1985(3) does not reach conspiracies motivated by economic or commercial animus or directed against a class of nonunion employees.[78] In

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[73]Silkwood v. Kerr-McGee Corp., 637 F.2d 743, 748 (10th Cir. 1980), cert. denied, 454 U.S. 833 (1981). See also Brown v. Reardon, 770 F.2d 896, 905-07 (10th Cir. 1985).

[74]See, e.g., Great American Fed. Savings & Loan Ass'n v. Novotny, 442 U.S. 366, 378 (1979); Canlis v. San Joaquin Sheriff's Posse Comitatus, 641 F.2d 711, 719-21 (9th Cir.), cert. denied, 454 U.S. 967 (1981); Macko v. Bryon, 641 F.2d 447, 450 (6th Cir. 1981); McCord v. Bailey, 636 F.2d 606, 613 (D.C. Cir. 1980), cert. denied, 451 U.S. 983 (1981); Williams v. St. Joseph Hosp., 629 F.2d 448, 451 (7th Cir. 1980); Lessman v. McCormick, 591 F.2d 605, 608 (10th Cir. 1979); Rogers v. Tolson, 582 F.2d 315, 317 (1st Cir. 1978); McClellan v. Mississippi Power & Light Co., 545 F.2d 919, 928 (5th Cir. 1977) (en banc); McNally v. Pulitzer Publ. Co., 532 F.2d 69, 74-75 (8th Cir.), cert. denied, 429 U.S. 855 (1976).

[75]Griffin v. Breckenridge, 403 U.S. 88, 103 (1971).

[76]Id.; United Brotherhood of Carpenters Local 610 v. Scott, 463 U.S. 825, 835-37 (1983); Hobson v. Wilson, 737 F.2d 1, 20-24 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985); Waller v. Butkovich, 584 F. Supp. 909, 936-38 (M.D.N.C. 1984).

[77]See Hobson v. Wilson, 737 F.2d 1, 16 n.44 (D.C. Cir. 1984), cert.denied, 470 U.S. 1084 (1985). See also Gibson v. United States, 781 F.2d 1334, 1341 (9th Cir. 1986) (section 1985(3) limited to claims of racial animus).

[78]United Brotherhood of Carpenters Local 610 v. Scott, (continued...)

the meantime, lower federal courts have held that political and religious groups constitute classes under 1985(3),[79] while homosexuals and the handicapped do not.[80]

(E) Injury or Deprivation of a Federal Right or Privilege. The final element of a section 1985(3) claim is injury to person or property or the violation of a federal constitutional or statutory right. With respect to violations of constitutional rights, some constitutional provisions, such as the first amendment, restrain only governmental action, while others, such as the thirteenth amendment's prohibition against slavery and the right of interstate travel, extend to private as well as governmental interference. Private conspiracies--those not involving any state action--are only actionable under section 1985(3) when the alleged constitutional violations can be committed by private parties.

> In other words, the rights protected by section 1985(3) exist independently of the section and only to the extent that the Constitution creates them. Thus, when state action is involved, the whole spectrum of rights against state encroachment that the Constitution sets forth comes into play. When

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[78](...continued)
463 U.S. 825, 838 (1983). See also Libertad v. Welch, 53 F.3d 428, 446 (1st Cir. 1995) (citing Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 267-68 (1993)).

[79]See Keating v. Carey, 706 F.2d 377, 386-88 (2d Cir. 1983); Ward v. Connor, 657 F.2d 45, 47-48 (4th Cir. 1981), cert. denied, 455 U.S. 907 (1982).

[80]Wilhelm v. Continental Title Co., 720 F.2d 1173, 1176 (10th Cir. 1983), cert. denied, 465 U.S. 1103 (1984); De Santis v. Pacific Telephone & Telegraph Co., 608 F.2d 327, 333 (9th Cir. 1979).

> no state action is involved, only those constitutional rights that exist against private actors may be challenged under the section.[81]

Thus, the courts have permitted 1985(3) actions against private conspirators for alleged violations of the right to interstate travel and the thirteenth amendment.[82] Conversely, the courts have not allowed 1985(3) actions against private conspirators for asserted violations of the first amendment,[83] and the fourteenth amendment's equal protection clause,[84] since these provisions restrain governmental, not private, action.

(5) Immunity. The immunity of public officials from statutory actions parallels their immunity from constitutional tort claims, discussed below.[85] Depending upon the defendant's office, the official duties that gave rise to the lawsuit, and the

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[81]Hobson v. Wilson, 737 F.2d 1, 15 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985).

[82]Griffin v. Breckenridge, 403 U.S. 88 (1971).

[83]United Brotherhood of Carpenters Local 610 v. Scott, 463 U.S. 825, 831-34 (1983); Provisional Gov't of the Republic of New Afrika v. American Broadcasting Co., 609 F. Supp. 104, 109 (D.D.C. 1985).

[84]Doski v. M. Goldseker Co., 539 F.2d 1326 (4th Cir. 1976); Cohen v. Illinois Inst. of Tech., 524 F.2d 818 (7th Cir. 1975), cert. denied, 425 U.S. 943 (1976).

[85]See Harlow v. Fitzgerald, 457 U.S. 800, 815 n.24 (1982); Butz v. Economou, 438 U.S. 478, 504 (1978); Van Sickle v. Holloway, 791 F.2d 1431, 1435 (10th Cir. 1986); Pollnow v. Glennon, 757 F.2d 496, 500-01 n.5 (2d Cir. 1985); Creamer v. Porter, 754 F.2d 1311, 1317 (5th Cir. 1985); Bates v. Jean, 745 F.2d 1146, 1151 (7th Cir. 1984); Briggs v. Malley, 748 F.2d 715, 718 (1st Cir. 1984), aff'd, 475 U.S. 335 (1986).

plaintiff's status, defendants sued under the Civil Rights Acts will be entitled to either a qualified or an absolute immunity from suit.

d. Constitutional Torts.

(1) General. Constitutional torts are actions for damages brought directly under the Constitution; they are not based on state common law or on federal statute. By these actions, plaintiffs seek to recover damages from public officials[86] for violations of their constitutional rights. These torts were first recognized by the Supreme Court in Bivens v. Six Unknown Named Agents,[87] and thus, they have become known generically as "Bivens actions."

(2) Historical Origins of the Bivens Doctrine.

(a) The first lawsuit for damages under the Constitution to reach the Supreme Court was Bell v. Hood,[88] which forecasted the Court's later decisions in Bivens. In Bell, the plaintiffs alleged that FBI agents had unlawfully entered their homes, seized their papers, and imprisoned them without a warrant.[89] The plaintiffs sought damages in excess of $3,000 from the agents for violating their rights under the fourth and fifth

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[86]See Vincent v. Trend Western Technical Corp., 828 F.2d 563 (9th Cir. 1987) (an independent contractor was not a "federal official" against whom his employee could bring a Bivens' suit).

[87]403 U.S. 388 (1971).

[88]327 U.S. 678 (1946).

[89]Id. at 679 n.1.

amendments to the Constitution. They asserted federal question jurisdiction. The lower courts dismissed the plaintiffs' complaint for want of federal jurisdiction on the ground that the action was not one that arose under the Constitution or laws of the United States.[90] The Supreme Court reversed. Distinguishing the issues of lack of subject-matter jurisdiction and failure to state a claim, the Court held that the district court had subject-matter jurisdiction over the plaintiffs' complaint. Whether the plaintiffs could ultimately recover on their claim was immaterial; the plaintiffs' complaint did arise under the Constitution, which was sufficient for purposes of federal question jurisdiction.[91] The Court withheld judgment on whether the plaintiffs had in fact stated a claim for which relief could be granted.[92] On remand, the district court dismissed the plaintiffs' suit for failure to state a claim upon which relief could be granted.[93] The district court held that, since there is no federal common law,[94] absent a constitutional or statutory provision giving a person the right to recover damages for violations of civil rights, no cognizable claim existed.[95] Thereafter, lower federal courts generally accepted the district court's opinion as dispositive of the issue.[96] The stage

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[90]Id. at 680.

[91]Id. at 682-83.

[92]Id. at 684.

[93]Bell v. Hood, 71 F. Supp. 813 (S.D. Calif. 1947).

[94]Id. at 817.

[95]Id. at 817, 820-21.

[96]Katz, supra note 8, at 3 n.12.

had been set, however, for the Supreme Court's decision in Bivens.

(b) As alluded to above, in Monroe v. Pape,[97] the Supreme Court created the first truly effective constitutional tort remedy through its revitalization of section 1983. Monroe, however, did not reach the unconstitutional actions of federal officials since section 1983 only provides redress against officials acting under color of state, rather than federal, law.[98] Thus, federal officials were left unscathed by the Court's decision in Monroe.

(c) That the Supreme Court had not provided a constitutional damages remedy against federal officials became the subject of intense academic criticism.[99] Moreover, the fact state officials could be held accountable for federal constitutional violations, but federal officials could not, certainly must have influenced the Court to develop a form of damages remedy against federal officials who acted unconstitutionally. Indeed, it was ironic that the Bill of Rights, which the Court had once construed only to reach the activities of the federal government and not the states,[100] could now be asserted to hold state, but not federal, officials

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[97]365 U.S. 167 (1961).

[98]See supra notes 47-56 and accompanying text.

[99]See, e.g., Hill, supra note 7; Katz, supra note 8.

[100]Barron ex rel. Tiernan v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833).

personally accountable for violations of civil rights.[101] In a trilogy of cases, known as the Bivens doctrine, the Supreme Court finally created a remedy by which federal officials could be held accountable for their constitutional violations. The Bivens doctrine does not provide a cause of action for damages against an agency of the federal government, but only against federal employees who allegedly violate the Constitution.[102]

(3) The "Bivens" Doctrine. The question whether federal officials could be sued directly under the Constitution was an issue left open by the Supreme Court in Bell v. Hood. Twenty-five years later, the Court squarely addressed the question in Bivens v. Six Unknown Named Agents,[103] holding that federal courts had the power to create affirmative remedies to vindicate violations of constitutional rights. Over the next ten years, the Court molded and expanded its doctrine so that by 1980 it effectively became the functional equivalent of a judicially-legislated section 1983 action against federal officers. The three cases that now form the Bivens trilogy are Bivens, Davis v. Passman,[104] and Carlson v. Green.[105]

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[101]See, e.g., Katz, supra note 8, at 73 ("[A] citizen abused by federal officers will find that the Constitution, which once protected only against federal and not state action, now only protects against state and not against federal action") (footnote omitted).

[102]F.D.I.C. v. Meyer, 114 S. Ct. 996 (1994).

[103]403 U.S. 388 (1971).

[104]442 U.S. 228 (1979).

[105]446 U.S. 14 (1980).

(a) Bivens v. Six Unknown Named Agents.[106]

(i) The leading case in the constitutional tort trilogy is, of course, the Supreme Court's decision in Bivens. "In Bivens, the Court ushered into our law the principle that citizens can bring an action to recover damages for [constitutional] violations from federal officers acting in their official capacity, notwithstanding the absence of a congressionally authorized cause of action."[107]

(ii) In a case remarkably similar on its facts to Bell v. Hood, the plaintiff, Webster Bivens, sued federal narcotics agents for entering and searching his apartment; arresting him in front of his wife and children; threatening his entire family; and taking him to the federal courthouse for interrogation, booking, and a strip search all without a warrant or probable cause. Bivens sought damages directly under the fourth amendment for the "humiliation, embarrassment, and mental suffering" he experienced as a result of the defendants' putatively illegal conduct.[108] The district court dismissed Bivens' complaint for failure to state a cause of action. The court of appeals affirmed. Rejecting the defendants' contention that Bivens was limited to a common law damages claim, the Supreme Court reversed. In an unprecedented decision, the Court held that plaintiffs could sue

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[106]403 U.S. 388 (1971).

[107]Reuber v. United States, 750 F.2d 1039, 1054 (D.C. Cir. 1984).

[108]Bivens v. Six Unknown Named Agents, 403 U.S. 388, 389-90.

federal officials for money damages for violations of the fourth amendment.[109]

(iii) In its opinion, the Court alluded to two limitations on its newly-created doctrine, which were to assume prominence more than a decade later: First, the Court implied that a constitutional tort action might not be recognized in the face of "special factors counselling hesitation" against such a remedy.[110] Second, the Court noted that constitutional torts may not be appropriate where the plaintiff has another remedy, deemed to be "equally effective in the view of Congress."[111] The Court withheld judgment on the scope of immunity, if any, the defendants might have from the suit.[112]

(b) Davis v. Passman.[113] The Supreme Court did not address the Bivens doctrine for eight years. In the interim, the lower federal courts broadly construed the remedy "as authorizing damage actions against federal officers for a variety of alleged constitutional violations."[114] In 1979, in Davis v. Passman, the Supreme Court let the lower courts know that they were on the right path. In Davis, the Supreme Court held that a cause of action and a damages remedy could be implied under the Constitution when the due

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[109]Id. at 396-97.

[110]Id. at 396.

[111]Id. at 397.

[112]Id.

[113]442 U.S. 228 (1979).

[114]Freed, supra note 7, at 544.

process clause of the fifth amendment is violated. The case involved former Louisiana Congressman Otto Passman, who fired his deputy administrative assistant, Shirley Davis, because she was a woman. Davis sued Passman for damages for violating her right to equal protection under the fifth amendment. Reversing the decision of the court of appeals, the Supreme Court found that Davis had stated a claim for which relief could be granted. Moreover, noting that Congress had exempted itself from the provisions of Title VII of the Civil Rights Act of 1964 (which prohibits sex discrimination in employment), the Court found that Davis, like Bivens before her, had no alternative form of judicial relief: "For Davis, like Bivens, 'it is damages or nothing.'"[115] As in Bivens, the Court made reference to the two limitations on its constitutional tort doctrine ("special factors counselling hesitation" and "equally effective alternative remedy").[116]

(c) Carlson v. Green.[117]

(i) In Carlson v. Green, the final case of the Bivens trilogy, the Court's constitutional tort doctrine reached its zenith. The case involved the mother of a deceased federal prisoner who sued prison officials for damages under the eighth amendment, claiming that her son died in the prison from a lack of adequate medical care. She asserted that the failure of the prison officials to provide her son proper medical

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[115]Id. at 228, quoting Bivens v. Six Unknown Named Agents, 403 U.S. 388, 410 (Harlan, J., concurring).

[116]Id. at 245-47.

[117]446 U.S. 14 (1980).

treatment for a chronic asthmatic condition resulting in his death amounted to cruel and unusual punishment. The Supreme Court held that the plaintiff had stated a cause of action for damages for violation of the eighth amendment to the Constitution.

(ii) Carlson is important because the Supreme Court used the case to greatly expand the boundaries of its constitutional tort doctrine. The Court took the vague limitations, to which it had alluded in Bivens and Davis, and made them the outer perimeters of its Bivens remedy:

> Bivens established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right. Such a cause of action may be defeated in a particular case, however, in two situations. The first is when defendants demonstrate "special factors counselling hesitation in the absence of affirmative action by Congress." . . . The second is when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and equally as effective. . . .[118]

Under this formulation of the Bivens doctrine, actions for violations of constitutional rights are presumed to exist absent one of the limitations on the doctrine.

(iii) Unlike the plaintiffs in Bivens and Passman, the plaintiff in Carlson had an alternative remedy: the Federal Tort Claims Act [FTCA].

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[118] Id. at 18-19 (emphasis in the original).

The Court, however, refused to find that the possible existence of a cause of action under the FTCA precluded the plaintiff's constitutional tort claim. Nothing in the Act or its history suggested that Congress had intended it to be the exclusive remedy.[119] Moreover, the Court deemed the FTCA not to be an equally effective remedy for four reasons: (1) the deterrent effect of Bivens claims on individual federal officials is not present under the FTCA; (2) punitive damages, available under Bivens, are not recoverable under the FTCA; (3) a plaintiff may opt for a jury trial in a Bivens suit but not in an FTCA action; and (4) suits under the FTCA rest on the vagaries of state law, and the liability of federal officials should be governed by uniform rules established at federal law.[120]

(4) Application of the Limits of the Bivens Doctrine.

(a) General. In 1983, in two decisions of vital importance to the military, Chappell v. Wallace,[121] and Bush v. Lucas[122] the Supreme Court applied for the first time the limitations on the Bivens doctrine articulated in Carlson v. Green. Chappell involved a suit for damages by enlisted personnel

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[119]Id. at 20.

[120]Id. at 21-23. But cf. Hessbrook v. Lennon, 777 F.2d 999 (5th Cir. 1985) (plaintiff must first exhaust administrative remedies under FTCA before bringing constitutional tort suit); Sanchez v. Rowe, 651 F. Supp. 571, 575-76 (N.D. Tex. 1986) (under 28 U.S.C. § 2676, a plaintiff cannot recover both under the FTCA and Bivens for the same act or omission).

[121]462 U.S. 296 (1983).

[122]462 U.S. 367 (1983).

against their commanding officers for alleged constitutional wrongs, and Bush dealt with a constitutional tort action brought by a civilian employee of the federal government against his supervisors. In both cases, the Court found special factors counseling hesitation against the implication of a constitutional tort remedy.

(b) Chappell v. Wallace: Intra-Military Constitutional Tort Claims.

CHAPPELL v. WALLACE
462 U.S. 296 (1983)

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to determine whether enlisted military personnel may maintain suits to recover damages from superior officers for injuries sustained as a result of violations of constitutional rights in the course of military service.

I

Respondents are five enlisted men who serve in the United States Navy on board a combat naval vessel. Petitioners are the commanding officer of the vessel, four lieutenants and three noncommissioned officers.

Respondents brought action against these officers seeking damages, declaratory judgment, and injunctive relief. Respondents alleged that because of their minority race petitioners failed to assign them desirable duties, threatened them, gave them low performance evaluations, and imposed penalties of unusual severity. Respondents claimed, inter alia, that the actions complained of "deprived [them] of [their] rights under the Constitution and laws of the United States, including the right not to be discriminated against because of [their] race, color or previous condition of servitude. . . ." Respondents also alleged a conspiracy among

petitioners to deprive them of rights in violation of 42 U.S.C. § 1985.

The United States District Court for the Southern District of California dismissed the complaint on the grounds that the actions respondents complained of were nonreviewable military decisions, that petitioners were entitled to immunity and that respondents had failed to exhaust their administrative remedies.

The United States Court of Appeals for the Ninth Circuit reversed. 661 F.2d 729 (CA9 1981). The Court of Appeals assumed that Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), authorized the award of damages for the constitutional violations alleged in their complaint, unless the actions complained of were either not reviewable or petitioners were immune from suit. The Court of Appeals set out certain tests for determining whether the actions at issue are reviewable by a civilian court and, if so, whether petitioners are nonetheless immune from suit. The case was remanded to the District Court for application of these tests.

We granted certiorari, 459 U.S. 966 (1982), and we reverse.

II

This Court's holding in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, supra, authorized a suit for damages against federal officials whose actions violated an individual's constitutional rights, even though Congress had not expressly authorized such suits. The Court, in Bivens and its progeny, has expressly cautioned, however, that such a remedy will not be available when "special factors counselling hesitation" are present. Id., at 396. See also Carlson v. Green, 446 U.S. 14, 18 (1980). Before a Bivens remedy may be fashioned, therefore, a court must take into account any "special factors counselling hesitation." See Bush v. Lucas, [462 U.S. 367, 378 (1983)].

The "special factors" that bear on the propriety of respondents' Bivens action also formed the basis of this Court's decision in Feres v. United States, 340 U.S. 135 (1950).

There the Court addressed the question "whether the Federal Tort Claims Act extends its remedy to one sustaining 'incident to [military] service' what under other circumstances would be an actionable wrong." Id., at 138. The Court held that, even assuming the Act might be read literally to allow tort actions against the United States for injuries suffered by a soldier in service, Congress did not intend to subject the Government to such claims by a member of the armed forces. The Court acknowledged "that if we consider relevant only a part of the circumstances and ignore the status of both the wronged and the wrongdoer in these cases," id., at 142, the Government would have waived its sovereign immunity under the Act and would be subject to liability. But the Feres Court was acutely aware that it was resolving the question of whether soldiers could maintain tort suits against the government for injuries arising out of their military service. The Court focused on the unique relationship between the government and military personnel--noting that no such liability existed before the Federal Tort Claims Act--and held that Congress did not intend to create such liability. The Court also took note of the various "enactments by Congress which provide systems of simple, certain, and uniform compensation for injuries or death of those in the armed services." Id., at 144. As the Court has since recognized, "[i]n the last analysis, Feres seems best explained by the 'peculiar and special relationship of the soldier to his superiors, the effects on the maintenance of such suits on discipline. . . .'" United States v. Muniz, 374 U.S. 150, 162 (1963), quoting United States v. Brown, 348 U.S. 110, 112 (1954). See also Parker v. Levy, 417 U.S. 733, 743-744 (1974); Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 673 (1977). Although this case concerns the limitations on the type of nonstatutory damage remedy recognized in Bivens, rather than Congress' intent in enacting the Federal Tort Claims Act, the Court's analysis in Feres guides our analysis in this case.

The need for special regulations in relation to military discipline, and the consequent need and justification for a

special and exclusive system of military justice, is too obvious to require extensive discussion; no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting. See Parker v. Levy, supra, 417 U.S., at 743-744; Orloff v. Willoughby, 345 U.S. 83, 94 (1953). In the civilian life of a democracy many command few; in the military, however, this is reversed, for military necessity makes demands on its personnel "without counterpart in civilian life." Schlesinger v. Councilman, 420 U.S. 738, 757 (1975). The inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection. The Court has often noted "the peculiar and special relationship of the soldier to his superiors," United States v. Brown, supra, 348 U.S., at 112; see In re Grimley, 137 U.S. 147, 153 (1890), and has acknowledged that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty. . . ." Burns v. Wilson, 346 U.S. 137, 140 (1953) (plurality opinion). This becomes imperative in combat, but conduct in combat inevitably reflects the training that precedes combat; for that reason, centuries of experience has developed a hierarchical structure of discipline and obedience to command, unique in its application to the military establishment and wholly different from civilian patterns. Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the military establishment.

Many of the Framers of the Constitution had recently experienced the rigors of military life and were well aware of the differences between it and civilian life. In drafting the Constitution they anticipated the kinds of issues raised in this case. Their response was an explicit grant of plenary authority to Congress "To raise and support

Armies"; "To provide and maintain a Navy"; and "To make Rules for the Government and Regulation of the land and naval Forces." Art. I, § 8, cls. 12-14. It is clear that the Constitution contemplated that the Legislative Branch has plenary control over rights, duties, and responsibilities in the framework of the military establishment, including regulations, procedures and remedies related to military discipline; and Congress and the courts have acted in conformity with that view.

Congress' authority in this area, and the distance between military and civilian life, was summed up by the Court in Orloff v. Willoughby, supra, 345 U.S., at 93-94:

> "[J]udges are not given the task of running the Army. The responsibility for setting up channels through which . . . grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."

Only recently we restated this principle in Rostker v. Goldberg, 453 U.S. 57, 64-65 (1981):

> "The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference."

In Gilligan v. Morgan, 413 U.S. 1 (1973), we addressed the question of whether Congress' analogous power over the militia, granted by Art. I, § 8, cl. 16, would be impermissibly compromised by a suit seeking to have a Federal District Court examine the "pattern of training, weaponry and orders" of a state's National Guard. In denying relief we stated:

> "It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible--as the Judicial Branch is not--to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability." Id., at 10 (emphasis in original).

Congress has exercised its plenary constitutional authority over the military, has enacted statutes regulating military life, and has established a comprehensive internal system of justice to regulate military life, taking into account the special patterns that define the military structure. The resulting system provides for the review and remedy of complaints and grievances such as those presented by respondents. Military personnel, for example, may avail themselves of the procedures and remedies created by Congress in Article 138 of the Uniform Code of Military Justice, 10 U.S.C. § 938, which provides:

> "Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine

> into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon."

The Board for the Correction of Naval Records, composed of civilians appointed by the Secretary of the Navy, provides another means with which an aggrieved member of the military "may correct any military record . . . when [the Secretary of the Navy acting through the Board] considers it necessary to correct an error or remove an injustice." 10 U.S.C. § 1552(a). Respondents' allegations concerning performance evaluations and promotions, for example, could readily have been challenged within the framework of this intramilitary administrative procedure. Under the Board's procedures, one aggrieved as respondents claim may request a hearing; if the claims are denied without a hearing, the Board is required to provide a statement of its reasons. 32 C.F.R. §§ 723.3(e)(2), (4), (5), 723.4, 723.5. The Board is empowered to order retroactive back pay and retroactive promotion. 10 U.S.C. § 1552(c). Board decisions are subject to judicial review and can be set aside if they are arbitrary, capricious or not based on substantial evidence. See Grieg v. United States, 640 F.2d 1261 (Ct. Cl. 1981), cert. denied, 455 U.S. 907 (1982); Sanders v. United States, 594 F.2d 804 (Ct. Cl. 1974).

The special status of the military has required, the Constitution has contemplated, Congress has created and this Court has long recognized two systems of justice, to some extent parallel: one for civilians and one for military personnel. Burns v. Wilson, supra, 346 U.S., at 140. The special nature of military life, the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel, would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command. Here, as in Feres, we must be "concern[ed] with the disruption of '[t]he peculiar and special relationship of

the soldier to his superiors' that might result if the soldier were allowed to hale his superiors into court," Stencel Aero Engineering Corp. v. United States, supra, 431 U.S., at 676 (Marshall, J., dissenting), quoting United States v. Brown, supra, 348 U.S., at 112.

Also, Congress, the constitutionally authorized source of authority over the military system of justice, has not provided a damage remedy for claims by military personnel that constitutional rights have been violated by superior officers. Any action to provide a judicial response by way of such a remedy would be plainly inconsistent with Congress' authority in this field.

Taken together, the unique disciplinary structure of the military establishment and Congress' activity in the field constitute "special factors" which dictate that it would be inappropriate to provide enlisted military personnel a Bivens-type remedy against their superior officers. See Bush v. Lucas, supra.

III

Chief Justice Warren had occasion to note that "our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes." E. Warren, The Bill of Rights and the Military, 37 N.Y.U.L. Rev. 181, 188 (1962). This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service. See, e.g., Brown v. Glines, 444 U.S. 348 (1980); Parker v. Levy, 417 U.S. 733 (1974); Frontiero v. Richardson, 411 U.S. 677 (1973). But the special relationships that define military life have "supported the military establishment's power to deal with its own personnel. The most obvious reason is that courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have." E. Warren, supra, 37 N.Y.U.L. Rev., at 187.

We hold that enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations. The judgment of

the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion.

Reversed and Remanded.[123]

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(i) The Supreme Court reaffirmed its decision in Chappell in United States v. Stanley.[124] The case involved a suit by a former soldier who sought damages for the violation of his constitutional rights arising from his participation in a drug experimentation program in the late 1950's. The plaintiff, James Stanley, received secretly-administered doses of LSD under an Army program to study the effects of the drug on human subjects. The lower courts refused to dismiss the suit based on Chappell, holding that Chappell only

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[123]See also Holdiness v. Stroud, 808 F.2d 417 (5th Cir. 1987); Chatman v. Hernandez, 805 F.2d 453 (1st Cir. 1986); Mickens v. United States, 760 F.2d 539 (4th Cir. 1985), cert. denied, 474 U.S. 1104 (1986); Ogden v. United States, 758 F.2d 1168 (7th Cir. 1985); Trerice v. Summons, 755 F.2d 1081 (4th Cir. 1985); Martelon v. Temple, 747 F.2d 1348 (10th Cir. 1984), cert. denied, 471 U.S. 1135 (1985); Brown v. United States, 739 F.2d 362 (8th Cir. 1984), cert. denied, 473 U.S. 904 (1985); Mollnow v. Carlton, 716 F.2d 627 (9th Cir. 1983), cert. denied, 465 U.S. 1100 (1984); Gaspard v. United States, 713 F.2d 1097 (5th Cir. 1983), cert. denied, 466 U.S. 975 (1984); Jaffee v. United States, 663 F.2d 1226 (3d Cir. 1981) (en banc), cert. denied, 456 U.S. 972 (1982); Ayala v. United States, 624 F. Supp. 259, 262 (S.D.N.Y. 1985); Alvarez v. Wilson, 600 F. Supp. 706 (N.D. Ill. 1985); Benvenuti v. Department of Defense, 587 F. Supp. 348 (D.D.C. 1984), aff'd, 802 F.2d 469 (Fed. Cir. 1986).

[124]483 U.S. 669 (1987). See also Michael New v. Perry, 919 F. Supp. 491, 495 (D.D.C. 1996) (civilian courts must hesitate before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superiors.)

bars Bivens actions when "a member of the military brings a suit against a superior officer for wrongs which involve direct orders in the performance of military duty and the discipline and order necessary thereto."[125] The Supreme Court reversed. Opining that the lower courts "took an unduly narrow view" of Chappell,[126] the Court held that Chappell was coextensive with the Feres doctrine[127] and that "no Bivens remedy is available [to service members] for injuries that 'arise out of or are in the course of activity incident to service.'"[128]

> Today, no more than when we wrote Chappell, do we see any reason why our judgment in the Bivens context should be any less protective of military concerns that it has been with respect to FTCA suits, where we adopted the "incident to service rule." In fact, if anything we might have felt more free to compromise military concerns in the latter context, since we were confronted with an explicit congressional authorization for judicial involvement that was, on its face, unqualified; whereas here we are confronted with an explicit constitutional authorization for Congress "[t]o make Rules for the Government and Regulation of the land and Naval Forces," U.S. Const. Art. I, § 8, cl.

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[125]Stanley v. United States, 574 F. Supp. 474, 479 (S.D. Fla. 1983), aff'd, 786 F.2d 1490 (11th Cir. 1986).

[126]United States v. Stanley, 483 U.S. 669 (1987).

[127]See Feres v. United States, 340 U.S. 135 (1950).

[128]United States v. Stanley, 483 U.S. 669 (1987). (Note: notwithstanding the judicial bar imposed by Chappell v. Wallace, Stanley obtained private relief legislation mandating binding arbitration. On March 4, 1996, the arbitration panel awarded Stanley $400,577.00 in damages).

14, and rely upon inference for our own authority to allow money damages.[129]

(ii) The lower federal courts have extended Chappell to preclude constitutional tort suits between officers,[130] and those between enlisted personnel.[131] Moreover, while in Chappell the Supreme Court reserved ruling on whether suits between servicemembers under 42 U.S.C. § 1985(3) should be permitted, the lower federal courts have construed Chappell to bar intra-service lawsuits under the Civil Rights Acts.[132]

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[129]Id. at 677 (emphasis in the original; footnote omitted). The Court also held that neither the degree of disruption to military activities a particular lawsuit causes nor the existence of other remedies are relevant in determining whether Chappell bars suit. As long as the injury arises incident to service, a Bivens remedy is unavailable. Id. at 678.

Four justices dissented. While generally agreeing with the proposition that Chappell precludes Bivens actions for injuries arising incident to service, Justice O'Connor believed the conduct in the case was "so far beyond the bounds of human decency that as a matter of law it simply cannot be considered a part of the military mission." Id. at 3065. Justice Brennan, joined by Justices Marshall and Stevens, seemingly would limit Chappell to cases where the command relationship is directly implicated. Id. at 3073-76.

[130]Mickens v. United States, 760 F.2d 539 (4th Cir. 1985), cert. denied, 474 U.S. 1104 (1986); Mollnow v. Carlton, 716 F.2d 627 (9th Cir. 1983), cert. denied, 465 U.S. 1100 (1984); Benvenuti v. Department of Defense, 587 F. Supp. 349 (D.D.C. 1984), aff'd, 802 F.2d 469 (Fed. Cir. 1986). See also Randall v. United States, 30 F.3d 518 (4th Cir. 1994), cert. denied, 115 S. Ct. 1956 (1995).

[131]Trerice v. Summons, 755 F.2d 1081 (4th Cir. 1985).

[132]Bois v. Marsh, 801 F.2d 462 (D.C. Cir. 1986) (42 U.S.C. § 1985(3)); Crawford v. Texas Army Nat'l Guard, 794 F.2d 1034 (5th Cir. 1986) (42 U.S.C. § 1983); Martelon v. (continued...)

(c) Constitutional Tort Claims of Federal Civilian Employees.

(i) Bush v. Lucas.[133] On the same day it decided Chappell, the Supreme Court issued its opinion in Bush v. Lucas, which foreclosed constitutional tort suits for adverse personnel actions by federal civilian employees against their superiors. In Bush, the plaintiff was a NASA employee who was allegedly demoted in retaliation for statements he had made to the press. The plaintiff was restored to his previous grade and was awarded back pay following his appeals through the Civil Service System. Although he had been made whole through his administrative remedies, the plaintiff sued the supervisor who had demoted him, seeking damages for the violation of his first amendment rights. The Supreme Court, however, refused to permit a constitutional tort remedy for federal employees who are wrongfully disciplined by their superiors. The Court held that the unique status of federal employment and the comprehensive, statutory remedial scheme for civil servants unfairly disciplined were special factors counselling hesitation against the implication of a constitutional tort remedy:

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[132](...continued)
Temple, 747 F.2d 1348 (10th Cir. 1984) (42 U.S.C. § 1983), cert. denied, 471 U.S. 1135 (1985); Brown v. United States, 739 F.2d 362 (8th Cir. 1984) (42 U.S.C §§ 1981, 1983), cert. denied, 473 U.S. 904 (1985); Mollnow v. Carlton, 716 F.2d 627 (9th Cir. 1983) (42 U.S.C. § 1985(1)), cert. denied, 465 U.S. 1100 (1984); Alvarez v. Wilson, 600 F. Supp. 706 (N.D. Ill. 1985) (42 U.S.C. § 1985(3)). But cf. Penagaricano v. Llenza, 747 F.2d 55, 59 (1st Cir. 1984) (implying that Chappell does not bar section 1983 claim).

[133]462 U.S. 367 (1983).

Given the history of the development of civil service remedies and the comprehensive nature of the remedies currently available, it is clear that the question we confront today is quite different from the typical remedial issue confronted by a common-law court. The question is not what remedy the court should provide for a wrong that would otherwise go unredressed. It is whether an elaborate remedial system that has been constructed step by step with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue. That question obviously cannot be answered simply by noting that existing remedies do not provide complete relief for the plaintiff. The policy judgment should be informed by a thorough understanding of the existing regulatory structure and the respective costs and benefits that would result from the addition of another remedy for violations of employees' First Amendment rights.

. . . Congress is in a far better position than a court to evaluate the impact of a new species of litigation between federal employees on the efficiency of the civil service. Not only has Congress developed considerable familiarity with balancing governmental efficiency and the rights of employees but it also may inform itself through factfinding procedures such as hearings that are not available to the courts.

. . . .

Thus, we do not decide whether or not it would be good policy to permit a federal employee to recover damages from a supervisor who has improperly disciplined him for exercising his First Amendment rights. . . . [W]e decline "to create a new substantive legal liability without legislative aid and as at the common law" . . . , because we are convinced that Congress is in a better position to decide

> whether or not the public interest would be served by creating it.[134]

(ii) Application of Bush v. Lucas in the Lower Federal Court. The lower federal courts have applied Bush to bar claims based on constitutional provisions other than the first amendment.[135] The courts have also held that Bush bars constitutional claims of federal employees whose civil service remedies are time barred.[136] The lower courts have split, however, on whether Bush precludes Bivens claims for minor disciplinary sanctions that afford less than plenary review in the civil service system.[137] Similarly, the

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[134]Id. at 388-390 (citations and footnotes omitted). See also David v. United States, 820 F.2d 1038 (9th Cir. 1987); McAlister v. Ulrich, 807 F.2d 752 (8th Cir. 1986); Ellis v. United States Postal Serv., 784 F.2d 835 (7th Cir. 1986); Vest v. United States Dep't of the Interior, 729 F.2d 1284 (10th Cir. 1984); Williams v. Casey, 657 F. Supp. 921 (S.D.N.Y. 1987); Walsh v. United States, 588 F. Supp. 523 (N.D.N.Y. 1983); Avitzur v. Davidson, 549 F. Supp. 399 (N.D.N.Y. 1982).

[135]Gremillion v. Chivatero, 749 F.2d 276 (5th Cir. 1985); Metz v. McKinley, 583 F. Supp. 683 (S.D. Ga.), aff'd, 747 F.2d 709 (11th Cir. 1984); cf. Palermo v. Rorex, 806 F.2d 1266 (5th Cir. 1987) (allegation of malice); Premachandra v. United States, 739 F.2d 392 (8th Cir. 1984) (FTCA claim).

[136]Wilson v. United States, 585 F. Supp. 202, 208 n.7 (M.D. Pa. 1984).

[137]Compare Philippus v. Griffin, 759 F.2d 806 (10th Cir. 1985) (letter alleging plaintiff's misconduct); Wells v. FAA, 755 F.2d 804 (11th Cir. 1985) (temporary loss of flight status); Pinar v. Dole, 747 F.2d 899 (4th Cir. 1984) (two-day suspension and letter of reprimand), cert. denied, 471 U.S. 1016 (1985); Hallock v. Moses, 731 F.2d 754 (11th Cir. 1984) (transfer); Broadway v. Block, 694 F.2d 979 (5th Cir. 1982) (transfer); Walker v. Gibson, 604 F. Supp. 916 (N.D. Ill. 1985) (harassment), with Freedman v. Turnage, 646 F. Supp. 1460 (W.D.N.Y. 1986) (continued...)

courts have disagreed about whether Bush is applicable to suits of federal employees not subject to the civil service system or entitled to full civil service remedies.[138] Moreover, several courts have held Bush inapplicable to alleged constitutional wrongs that are not redressable by the civil service system.[139] In

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[137](...continued)
(11-day suspension). Two panels of the Court of Appeals, District of Columbia Circuit, have disagreed over this issue. Compare Hubbard v. Administrator, EPA, 809 F.2d 1 (D.C. Cir. 1986), with Spagnola v. Mathis, 809 F.2d 16 (D.C. Cir. 1986). The court will consider the issue en banc. Id.

[138]Compare Daly-Murphy v. Winston, 820 F.2d 1470 (9th Cir. 1987) (claim of VA doctor barred); Harding v. United States Postal Serv., 802 F.2d 766 (4th Cir. 1986) (claim of USPS employee barred); Gaj v. United States Postal Serv., 800 F.2d 64 (3d Cir. 1986) (claim of USPS employee barred); Franks v. Nimmo, 796 F.2d 1230 (10th Cir. 1986) (claim of VA doctor barred); McCollum v. Bolger, 794 F.2d 602 (11th Cir. 1986) (claim of USPS employee barred); Heaney v. United States Veterans Admin., 756 F.2d 1215 (5th Cir. 1985) (claim of VA doctor barred); Dynes v. AAFES, 720 F.2d 1495 (11th Cir. 1983) (claim of AAFES employee barred); Castella v. Long, 701 F. Supp. 578, 582-84 (N.D. Tex.), aff'd, 862 F.2d 872 (5th Cir. 1988), cert. denied, 110 S. Ct. 330 (1989) (claims of AAFES employee barred); Dailey v. Carlin, 654 F. Supp. 146 (E.D. Mo. 1987) (claim of probationary employee barred), with Kotarski v. Cooper, 799 F.2d 1342 (9th Cir. 1986) (claim of probationary employee not barred); Windsor v. The Tennessean, 726 F.2d 277 (6th Cir.) (claim of assistant US attorney not barred), cert. denied, 469 U.S. 826 (1984); Harris v. Moyer, 620 F. Supp. 1262 (N.D. Ill. 1985) (claim of probationary employee not barred); Nietert v. Kelley, 582 F. Supp. 1536 (D. Colo. 1984) (claim of AAFES employee not barred).

[139]See Bush v. Lucas, 462 U.S. 367, 391 (1983) (Marshall, J., concurring) ("[T]here is nothing in today's decision to foreclose a federal employee from pursing a Bivens remedy where his injury is not attributable to personnel actions which may be remedied under the federal statutory scheme."); Pope v. Bond, 613 F. Supp. 708, 714 (D.D.C. 1985).

Schweiker v. Chilicky,[140] however, the Supreme Court applied its Bush v. Lucas analysis to hold that a Congressionally established system for restoring denied social security benefits prohibited Bivens actions. The plaintiffs in Schweiker brought a Bivens action against the federal officials who allegedly unconstitutionally denied the plaintiffs their statutory benefits. The Court explained that no practical distinction existed between the statutory scheme to appeal denial of social security benefits and the statutory scheme to remedy wrongs suffered by civilian employees. To allow a Bivens action in either situation would circumvent the elaborate statutory system established by Congress. Thus, as the following case illustrates, a plaintiff does not have a Bivens action merely because Congress has not provided a specific remedy in a comprehensive statutory scheme:

**McINTOSH v. TURNER**
**861 F.2d 524 (8th Cir. 1988)**

ARNOLD, Circuit Judge.

> When this case was last before us, we affirmed a judgment against the defendant Edward O. Turner, a civilian employee of the United States Army, for $110,005 plus interest and costs. In our view, a jury had permissibly found that Turner violated the plaintiffs' rights under the Due Process Clause of the Fifth Amendment by depriving them, without due process of law, of their right to be considered for promotion on a fair and unbiased basis. McIntosh v. Weinberger, 810 F.2d 1411 (8th Cir. 1987). We specifically rejected the defendant's argument, grounded primarily on Bush v. Lucas, 462 U.S. 367, 103 S. Ct. 2404, 76 L.Ed.2d 648 (1983), that no action could be brought in this situation for a constitutional tort

[140]487 U.S. 412 (1988).

because of Congress' detailed regulation of the relationship between plaintiffs and their employer, the federal government. 810 F.2d at 1434-36.

The defendant then successfully sought review in the Supreme Court. That Court granted his petition for certiorari, vacated our judgment, and remanded the cause to us for reconsideration in light of its recent decision in Schweiker v. Chilicky, 487 U.S. 412 (1988). Turner v. McIntosh, 487 U.S. 1212 (1988).

We have considered the case in light of Chilicky and now conclude that plaintiffs' constitutional-tort theory cannot survive the teaching of that case. Chilicky arose in the quite different context of social security benefits, but it nonetheless has distinctly unfavorable implications for Bivens actions in any field in which Congress has acted pervasively. The Chilicky Court, speaking generally, counselled the lower courts to "respond[ ] cautiously to suggestions that Bivens remedies be extended into new contexts." 108 S. Ct. at 2467. And in particular, when Congress has heavily regulated a certain subject--like federal employment--but has said nothing about a right of action for constitutional violations, no such right of action should be recognized under Bivens unless "congressional inaction has . . . been inadvertent." Id. at 2468.

> When the design of a government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional Bivens remedies.

The result is a sort of presumption against judicial recognition of direct actions for violations of the Constitution by federal officials or employees. If Congress has not explicitly created such a right of action, and if it has created other remedies to vindicate (though less completely) the particular rights being asserted in a given case, the chances are that the courts will leave the parties to the remedies Congress has expressly created for them. Only if Congress's omission to recognize a constitutional tort claim as

"inadvertent" will the courts be free to allow such a claim. It may be true that injured citizens will thus receive less than "'complete relief,'" 108 S. Ct. at 2468, but that is a decision that Congress has both the power and the competence to make. To some it may seem odd that congressional silence can, in effect, limit the right to be fully compensated for constitutional wrongs, but that is the message of Chilicky, and we are obliged to heed it.

What does all this mean for the present case? When the case was before us the first time, we were influenced by the Supreme Court's statement in Bush that the plaintiff employee there had been given "meaningful remedies" by Congress. Bush v. Lucas, supra, 462 U.S. at 368, 103 S. Ct. at 2406. The word "meaningful," we thought, required us to determine whether Congress has provided substantial relief for the constitutional wrong complained of, relief at least roughly comparable to, though falling somewhat short of, that available in a Bivens action. Defendant suggested that the plaintiffs in the present case could have sought corrective action by the Office of the Special Counsel (OSC) of the Merit Systems Protection Board. We did not consider this remedy adequate to bar a Bivens action. Among other points, we noted that an aggrieved employee cannot invoke OSC processes as of right--the Special Counsel has discretion to decide whether to institute a proceeding, 5 U.S.C. §§ 1206(b)(3)(A), (h)--and that OSC cannot award affirmative relief to an aggrieved employee--it can only discipline the offending party, 5 U.S.C. § 1207(b). 810 F.2d at 1435-36. In holding this remedy inadequate, we relied principally on Kotarski v. Cooper, 799 F.2d 1342 (9th Cir. 1986).

Having reconsidered this reasoning in light of Chilicky, we feel compelled to abandon it. Congress conspicuously referred to violation of an employee's constitutional rights as one of the prohibited personnel practices for which the OSC disciplinary process was available. H.R.Rep. No. 1717, 9th Cong., 2d Sess. 131 (1978), U.S. Code Cong. & Admin. News 1978, 2723. It did not provide for a damages action for such a violation. In view of the explicit reference to

constitutional rights in the legislative history, we cannot say that the omission of a damages remedy was inadvertent. The teaching of Chilicky therefore requires us to decline to entertain a Bivens action. Congress knew that wrongs of this kind would occur, and it apparently believed that the OSC process would adequately address them. That, at least, is a fair inference from the legislative history of the Civil Service Reform Act of 1978, which specifically creates the OSC process and is silent as to damages. It might be argued that Congress must have known about Bivens, and that congressional silence therefore means that Bivens is unaffected. But that argument is flatly inconsistent with Chilicky.

We could elaborate our reasons for this conclusion at greater length, but instead we choose simply to refer the reader to Spagnola v. Mathis, 859 F.2d 223 (D.C. Cir. 1988) (per curiam) (en banc). The case is directly on point. It holds that the OSC remedy is adequate to bar a Bivens action, and explains how this holding is required by Chilicky. We are not bound by Spagnola, of course, but we find it reasonably persuasive, and we would be reluctant, anyway, to create a conflict between circuits. The attitude of one circuit to the holdings of one of its sisters, we think, should be one of reasonable deference. We should not differ from those holdings unless we believe that rationale is seriously flawed. We have no such conviction in the present case. Indeed, it would be hard to come up with a fair interpretation of Chilicky that would justify a result contrary to that reached by the D.C. Circuit. Our decision to follow Spagnola is reinforced by the fact that it is a unanimous en banc opinion, a rare bird in any circuit.

Accordingly, the judgment in favor of the plaintiffs on their Bivens claim must be reversed, and the cause remanded to the District Court with directions to dismiss that claim with prejudice. The request of plaintiffs-appellees for oral argument is denied. We cannot think of anything they might say that would counteract the manifest force of Chilicky and Spagnola.

It is so ordered. [Footnotes omitted.]

(iii) Civilian Employee Discrimination Claims. In Brown v. General Services Administration,[141] the Supreme Court did not permit a federal civilian employee of the General Services Administration to bring a claim for racial discrimination in employment under 42 U.S.C. § 1981, holding that Title VII of the Civil Rights Act of 1964 provides the exclusive judicial remedy for claims of discrimination in federal employment. Some lower federal courts have construed Brown to reach constitutional tort claims. "To the extent . . . Bivens claims are founded in actions proscribed by Title VII, they may not be maintained because Title VII provides the exclusive remedy."[142]

(5) Immunity. As in statutory actions, federal officials are entitled to either a qualified or an absolute immunity from constitutional tort suits. Again, the defendant's office, the duties performed that caused the suit, and the plaintiff's status will govern the nature of the immunity. In addition, these factors will influence the boundaries of constitutional tort claims; that is, they will trigger the limitations on (or exceptions to) the Bivens doctrine.

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[141]425 U.S. 820 (1976).

[142]Clemente v. United States, 766 F.2d 1358, 1364 n.7 (9th Cir. 1985), cert. denied, 474 U.S. 1101 (1986). See also White v. General Serv. Admin., 652 F.2d 913, 917 (9th Cir. 1981). Compare Kotarski v. Cooper, 799 F.2d 1342 (9th Cir. 1986) (Bivens claim not barred where Title VII affords no relief), cert. denied, 487 U.S. 1212 (1988); cf. Thomas v. Shipka, 818 F.2d 496 (6th Cir. 1987) (availability of § 1983 bars Bivens claim).

## 9.3 Immunities: General.

a. Introduction. While "[d]amages actions for misconduct . . . have been available for hundreds of years against" public officials,[143] both courts and legislatures have recognized that many public officers require protection from lawsuits to properly perform their jobs.[144] As a consequence, they have developed a number of immunities to insulate government officers and employees from lawsuits brought against them in their individual capacities. Before discussing the specific immunities available to government officials, however, we must first consider some of the issues common to official immunity in general.

b. Threshold Determination--Scope of Duty. For a public official to have any form of immunity, the official first must show that the actions that gave rise to the lawsuit were in some manner connected to governmental duties.[145] Immunity defenses are not available in suits arising from an official's "private" life--such as an off-duty automobile accident or a default on a personal loan. Of course, cases in which the issue of the scope of an official's duties is raised are not so clear-cut; the perimeters of official duties are often difficult to define. Some of the problems involved in defining scope of duties will be considered in connection with the specific immunities discussed below.

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[143]Jaffee, supra note 7, at 215.

[144]See supra notes 7-19 and accompanying text.

[145]See, e.g., Araujo v. Welch, 742 F.2d 802 (3d Cir. 1984); Green v. James, 473 F.2d 660 (9th Cir. 1973).

c. Duty to Plead--Affirmative Defense. Unlike sovereign immunity, which is jurisdictional in character and can be raised at any point in a lawsuit, official immunity is an affirmative defense, which must be pleaded or is waived.[146] The absence of official immunity is not an element of a plaintiff's claim against a government official, and it need not be alleged by the plaintiff to state a legally sufficient cause of action.[147]

d. Summary Judgment. As alluded to earlier,[148] official immunity is not only intended to protect public officials from liability, but from litigation itself. Tremendous social costs are associated with litigation against public officials, such as diverting official energy from pressing public issues, deterring able citizens from accepting public office, and inhibiting the fearless and vigorous administration of government.[149] In addition, the costs of litigation itself drain the

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[146]See Gomez v. Toledo, 446 U.S. 635, 640 (1980); Walsh v. Mellas, 837 F.2d 789 (7th Cir. 1988) (qualified immunity must be affirmatively plead and brought to the court's attention); Satchell v. Dilworth, 745 F.2d 781, 784 (2d Cir. 1984); Standridge v. City of Seaside, 545 F. Supp. 1195, 1198 n.1 (N.D. Cal. 1982). But see Elliott v. Perez, 751 F.2d 1472 (5th Cir. 1985). See generally Fed. R. Civ. P. 8(c).

[147]Gomez v. Toledo, 446 U.S. 635, 640 (1980).

[148]See supra § 9.1.

[149]See Harlow v. Fitzgerald, 457 U.S. 800, 807, 814 (1982); Butz v. Economou, 438 U.S. 478 (1978); Barr v. Matteo, 360 U.S. 564, 571-72 (1959); Spalding v. Vilas, 161 U.S. 483, 498-99 (1896).

public fisc.[150] In recognition of these costs, the Supreme Court encourages the quick resolution of insubstantial claims against government officials through summary judgment.[151] How the Court has facilitated summary judgment--notably in cases involving qualified immunity--will be examined below.[152]

e. Appeals.

(1) General. What happens if a district court denies a motion for summary judgment based on official immunity? Must the public official go through the agony of a protracted lawsuit, against which immunity was intended to protect, before appealing the district court's decision? As a general rule, absent statutory authorization, only final judgments of the district courts can be appealed.[153] And "[a] 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[154] Denials of summary judgments usually are considered to be interlocutory in character and not appealable as a matter of right. In 1949, however, the Supreme Court carved an exception to the rule that only the final decision in a case is

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[150]See generally Comment, Harlow v. Fitzgerald, supra note 13, at 914.

[151]Harlow v. Fitzgerald, 457 U.S. 800, 815-16 (1982); Butz v. Economou, 438 U.S. 478, 507-08 (1978). See generally Fed. R. Civ. P. 56.

[152]See infra § 9.6.

[153]28 U.S.C. § 1291 (1982).

[154]Catlin v. United States, 324 U.S. 229, 233 (1945). See also Bell v. New Jersey, 461 U.S. 773, 777-80 (1983); Cobbeldick v. United States, 309 U.S. 323 (1940).

appealable, which later served as a vehicle for the immediate appeal of adverse immunity determinations.

(2) Collateral Order Doctrine. In Cohen v. Beneficial Industrial Loan,[155] the Supreme Court created the collateral order doctrine, under which litigants may immediately appeal orders of an interlocutory nature that serve to deny important collateral rights. In Cohen, the issue was whether, in a diversity action, a state statute requiring a plaintiff who brings a stockholders' derivative suit to file a bond to pay the attorneys fees and costs of the defendant if the case is unsuccessful was applicable in the federal courts. At stake was a large bond. If the district court held the state statute applicable, the plaintiff would have had the burden of securing and financing an expensive bond before the action could proceed. If the statute was held inapplicable and no bond were posted, a post-trial appellate ruling that a bond was required would have been of no moment since the plaintiff might not be good for the fees and costs of the litigation, and the defendant would have been forced to expend considerable sums without protection. The Supreme Court held that the trial court's resolution of the applicability of the bond was immediately appealable. In doing so, the Court set forth three elements required for an appealable collateral order: (1) the order appealed from conclusively determines the disputed question; (2) the issue is separate from the merits of the action; and

[155]337 U.S. 541 (1949).

(3) the issue is effectively unreviewable on appeal from a final judgment.[156]

(3) Appealability of Immunity Decisions Under the Collateral Order Doctrine. Adverse decisions on claims of official immunity provide ideal vehicles for appeal under the collateral order doctrine. First, a denial of immunity conclusively determines that particular question, and since immunity is principally a question of law,[157] the determination is unlikely to be changed after a trial. Second, the question of immunity does not go to the merits of a plaintiff's claim; it does not resolve the issue of whether the defendant committed the putatively unlawful conduct that is the basis of the lawsuit or the question of the appropriate damages to be awarded in the case. Finally, the immunity issue is effectively unreviewable on appeal from a final judgment. "The entitlement is an immunity from suit rather than a mere defense to liability; . . . it is effectively lost if a case is erroneously permitted to go to trial."[158] The Supreme Court has held that the collateral order doctrine is applicable to district court denials of summary judgment based on official immunity. In Nixon v. Fitzgerald,[159] the Court held the doctrine applied to denials of claims of

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[156]Id. at 546-47. See also Flanagan v. United States, 465 U.S. 259 (1984); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981); Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978).

[157]Bates v. Jean, 745 F.2d 1146, 1151 (7th Cir. 1984).

[158]Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (emphasis in the original).

[159]457 U.S. 731, 742-43 (1982).

absolute immunity.[160] The question of whether adverse decisions on claims of qualified immunity are appealable under the collateral order doctrine remained open and subject to considerable dispute for another three years.[161] Finally, in Mitchell v. Forsyth,[162] the Supreme Court resolved the issue, holding that an issue of qualified immunity, to the extent that it turns on an issue of law, is immediately appealable under the collateral order doctrine. Denial of a defendant's summary judgment motion in a qualified immunity case that raises a genuine issue of fact is not a "final decision" within meaning of appellate jurisdiction statute [28 U.S.C. § 1291] and is not immediately appealable.[163]

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[160]See also Heathcoat v. Potts, 790 F.2d 1540 (11th Cir. 1986).

[161]Compare Tubbesing v. Arnold, 742 F.2d 401 (8th Cir. 1984); Krohn v. United States, 742 F.2d 24 (1st Cir. 1984); Metlin v. Palastra, 729 F.2d 353 (5th Cir. 1984); McSurley v. McClellan, 697 F.2d 309 (D.C. Cir. 1982), with Forsyth v. Kleindienst, 729 F.2d 267 (3d Cir. 1984), rev'd sub nom. Mitchell v. Forsyth, 472 U.S. 511 (1985); Bever v. Gilbertson, 724 F.2d 1083 (4th Cir.), cert. denied, 469 U.S. 948 (1984).

[162]472 U.S. 511 (1985). A district court's order denying a defendant's summary judgment motion for qualified immunity was an immediately appealable "collateral order" (i.e., a "final decision") under Cohen, where (1) the defendant was a public official asserting a qualified immunity defense and (2) the issue appealed concerned, not which facts the parties might be able to prove, but, rather, whether or not certain given facts show a violation of "clearly established" law. See also Behrens v. Pelletier, 116 S. Ct. 834 (1996).

[163]Johnson v. Jones, 115 S. Ct. 2151 (1995) (defendants, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a "genuine" issue of fact for trial.
(continued...)

f. Sources of Immunity. There are three sources of official immunity: the Constitution, federal statutes, and judicially-made case law. We will discuss these sources in the context of the specific immunities available to public officials.

## 9.4 Immunities: Constitutional.

a. General. Article I, section 6, clause 1 of the Constitution provides that "for any Speech or Debate in either House [Members of Congress], shall not be questioned in any other place." This "speech or debate" clause had its origins in the English Bill of Rights of 1688, which was an effort by the British Parliament to protect the right of its members to criticize the Crown without threat of prosecution.[164] The speech or debate clause of the Constitution is intended "to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary."[165]

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[163](...continued)
See also Behrens v. Pelletier, 116 S. Ct. 834 (1996) (Johnson's limitation on appellate review applies only when "what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred").

[164]Kilbourne v. Thompson, 103 U.S. 168, 201-02 (1881). See also Engdahl, Immunity and Accountability for Positive Governmental Wrongs, 44 U. Colo. L. Rev. 1, 42-43 (1972); Gray, Private Wrongs of Public Servants, 47 Calif. L. Rev. 303, 319 (1959).

[165]Gravel v. United States, 408 U.S. 606, 617 (1972). See also Eastland v. United States Servicemen's Fund, 421 U.S. 491, 502 (1975). "It also prevents disruption of Congressional operations by preventing distractions or interference with ongoing activity." In re Grand Jury, 821 F.2d 946, 952 (3d Cir. 1987).

b. Application of the "Speech or Debate" Clause. The Supreme Court first interpreted the "speech or debate" clause in Kilbourne v. Thompson.[166] In Kilbourne, the Court held that the clause barred a suit for false imprisonment against members of the House of Representatives who had obtained a resolution imprisoning the plaintiff for contempt of the House. The Court, finding the immunity to attach even though the congressmen had acted in excess of their authority, took a very broad view of the scope of the legislative immunity:

> It would be a very narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, which though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers. In short, to things generally done in session of the House by one of its members in relation to the business before it.[167]

Since Kilbourne, the Supreme Court has given the clause "a practical rather than a strictly literal reading which would limit the provision to utterances made within the four walls of either Chamber."[168] Thus, the Court has construed the provision to protect both members of Congress and their staffs (including the

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[166]103 U.S. 168 (1881).

[167]Id. at 201-02.

[168]Hutchinson v. Proxmire, 443 U.S. 111, 124 (1979).

GAO),[169] and to encompass all "things generally done in a session of the House by one of its members in relation to the business before it."[170] Included are committee hearings, committee reports, resolutions offered, and voting of members.[171] The courts have not extended the clause, however, to actions taken beyond the legislative sphere.

> Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative processes by which members participate in Committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. . . . [T]he courts have extended the privilege to matters beyond pure speech or debate in either House, but "only when necessary to prevent indirect impairment of such deliberations."[172]

For example, the clause does not protect members of Congress or their staffs for their efforts to influence the Executive Branch or for their republication outside

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[169]Gravel v. United States, 408 U.S. 606, 616 (1972); Chapman v. Space Qualified Sys. Corp., 647 F. Supp. 551 (N.D. Fla. 1986).

[170]Kilbourne v. Thompson, 103 U.S. 168, 204 (1881).

[171]Id.; Doe v. McMillan, 412 U.S. 306, 311-12 (1973).

[172]Gravel v. United States, 408 U.S. 606, 625 (1972) (citation omitted).

of Congress of defamatory documents or statements made in legislative proceedings.[173]

9.5 Immunities: Statutory.

a. General. Three forms of statutory immunity are available to protect members and employees of the armed services: the Federal Employees Liability Reform and Tort Compensation Act,[174] which immunizes federal officials from liability for state law torts committed within the scope of duty; the Gonzales Act,[175] which protects military health care personnel from medical malpractice claims; and the legal malpractice statute, which immunizes Department of Defense legal staffs from legal malpractice claims.[176] When applicable, these statutes afford an absolute immunity from personal liability. The exclusive remedy in such cases is against the United States under the Federal Tort Claims Act [FTCA].[177]

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[173]Hutchinson v. Proxmire, 443 U.S. 111, 130 (1979); Doe v. McMillan, 412 U.S. 306, 313-14 (1973); Gravel v. United States, 408 U.S. 606 (1972); United States v. Johnson, 383 U.S. 169, 172 (1966); Chastain v. Sundquist, 833 F.2d 311 (D.C. Cir. 1987).

[174]Pub. L. No. 100-694, 102 Stat. 4563 (1988) (codified at and amending 28 U.S.C. §§ 2671, 2674, 2679).

[175]10 U.S.C. § 1089 (1995).

[176]10 U.S.C. § 1054 (1995).

[177]28 U.S.C. § 1346(b), 2671-2680 (1995).

b. Federal Employees Liability Reform and Tort Compensation Act.

(1) The Statute. 28 U.S.C. § 2679(b)(1) provides:

> The remedy against the United States provided by sections 1346(b) and 2672 of this title [the Federal Tort Claims Act] for injury or loss of property or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Scope of Immunity. By its terms, the Federal Employees Liability Reform and Tort Compensation Act establishes that an action against the United States, under the FTCA, is the exclusive remedy against a federal employee for money damages caused by a negligent act or omission committed within the scope of employment. The individual government employee is absolutely immune from any liability. Furthermore, suits against the employee are precluded even when the

United States has a defense that prevents actual recovery.[178]

(3) Operation of the Statute. Under the statute, if a plaintiff sues a government official for personal injury or property damage resulting from a negligent act or omission committed within the scope of the official's employment, upon certification by the Attorney General that the official was acting within the scope of his federal employment, the United States is substituted as the exclusive defendant in the case.[179] Until recently, there was a division among the Circuit Courts of Appeal as to the reviewability of the Attorney General's certification. The Supreme Court, in De Martinez, et al. v. Lamagno, has now firmly decided that Attorney General scope of employment certification is subject to judicial review.[180] Following certification,

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[178]H.R. Rep. No. 100-700, 100th Cong., 2d Sess., at 6-7 (1988); United States v. Smith, 499 U.S. 160 (1991); Schneider v. United States, 27 F.3d 1327 (8th Cir.), cert. denied, 115 S. Ct. 723 (1995); Mitchell v. United States, 896 F.2d 128 (5th Cir. 1990).

[179]28 U.S.C. § 2679(d)(1).

[180]Katia Gutierrez De Martinez, et al. v. Lamagno, 115 S. Ct. 2227 (1995). The Attorney General's scope of employment certification is reviewable in court. Prior to this decision, there was a split among the circuits on reviewability. The Attorney General's certification was conclusive and not reviewable. See Johnson v. Carter, 983 F.2d 1316 (4th Cir. 1993); Mitchell v. Carlson, 896 F.2d 128 (5th Cir. 1990); Aviles v. Lutz, 887 F.2d 1046 (10th Cir. 1989). The Attorney General's certification was not given conclusive effect. See Kimbro v. Velten, 30 F.3d 1501 (D.C. Cir. 1994); Brown v. Armstrong, 949 F.2d 1007 (8th Cir. 1991); Meridian Int'l Logistics, Inc. v. United States, 939 F.2d 740 (9th Cir. 1991); Hamrick v. Franklin, 931 F.2d 1209 (7th Cir. 1991), cert. denied, 502 U.S. 869 (1991); S.J. & W. Ranch, Inc. v. Lehtinen, 913 F.2d 1538 (11th Cir. 1990), (continued...)

if the suit was originally filed in the state court, it is removed to federal district court for disposition.[181] To maintain the lawsuit against the United States, the plaintiff must have complied with the conditions of the FTCA, including its statute of limitations and administrative claim requirement.[182] Furthermore, the statute specifically allows the United States to assert any judicial or legislative immunity defenses that would have been available to the employee.[183]

(4) Application of the Statute. Congress wrote the Federal Employees Liability Reform and Tort Compensation Act, which covers federal employees generally, with one purpose in mind . . . to "protect Federal employees from personal liability for common law torts committed within the scope of their employment."[184] In actual application, 28 U.S.C. § 2679(d), as amended, duplicates the statutory immunity provided under 10 U.S.C. § 1089 and 10 U.S.C. § 1054 described below.

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[180](...continued)
modified, 924 F.2d 1555 (11th Cir.), cert. denied, 502 U.S. 813 (1991); Melo v. Hafer, 912 F.2d 628 (3d Cir. 1990); aff'd on other grounds, 502 U.S. 21 (1991); Nasuti v. Scannell, 906 F.2d 802 (1st Cir. 1990); Arbour v. Jenkins, 903 F.2d 416 (6th Cir. 1990).

[181]Id.

[182]28 U.S.C. §§ 2401(b), 2675(a) (1995).

[183]28 U.S.C. § 2674; H.R. Rep. No. 100-700, 100th Cong., 2d Sess., at 8 (1988).

[184]Katia Gutierrez De Martinez et al. v. Lamagno, 115 S. Ct. at 2232 (1995).

c. The Gonzales Bill.

(1) The Statute. 10 U.S.C. § 1089 provides in relevant part:

> (a) The remedy against the United States provided by sections 1346(b) and 2672 of title 28 [the Federal Tort Claims Act] for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (including medical and dental technicians, nursing assistants, and therapists) of the armed forces, the Department of Defense, or the Central Intelligence Agency in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of his duties or employment therein or therefor shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or the estate of such person) whose act or omission gave rise to such action or proceeding.
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> (f) The head of the agency concerned or his designee may, to the extent that he deems appropriate, hold harmless or provide liability insurance for any person described in subsection (a) for damages, for personal injury, including death, caused by such person's negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of such person's duties if such person is assigned to a foreign country or detailed for service with other than a Federal department, agency, or instrumentality or if the circumstances are such as are likely to preclude the remedies of third persons against the United States

described in [the FTCA], for such damage or injury.

(2) Purpose. The Gonzales Bill "meets the serious and urgent needs of defense medical personnel by protecting them fully from any personal liability arising out of the performance of their official medical duties."[185] Congress intended to eliminate the need for military medical personnel to purchase their own malpractice insurance.[186] Moreover, absent immunity, Congress was concerned that military medical personnel would be unduly cautious in their administration of care to patients, that the threat of litigation would undermine morale, and that recruitment and retention of medical personnel in an all-volunteer military would become difficult.[187] Military health care providers were not the first to receive protection from malpractice liability; Congress had earlier afforded similar protection to medical personnel of the Veterans' Administration (1965), the Public Health Service (1970), and the State Department (1976).[188]

(3) Scope of Immunity. 10 U.S.C. § 1089 protects all military medical personnel, including physicians, dentists, nurses, pharmacists, and paramedics, from tort liability arising out of the performance of medical, dental, or related health care

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[185]S. Rep. No. 1264, 94th Cong., 2d Sess. 2, reprinted in 1976 U.S. Code Cong. & Ad. News 4443.

[186]Id. at 5.

[187]Id.

[188]Id. at 3.

functions. Like the Federal Employees Liability Reform and Tort Compensation Act, the exclusive remedy in such cases is against the United States under the FTCA.[189] The statute does not immunize military medical personnel from tort liability arising from the performance of non-health related (e.g., command) functions.[190] Nor does the statute protect contract physicians who are not government employees.[191] Moreover, where the FTCA does not apply, the Gonzales Bill does not afford immunity. Thus, the statute does not immunize medical personnel stationed outside the United States.[192] The courts disagree as to whether the statute applies to military physicians performing residencies in civilian hospitals.[193] In cases in which medical personnel are not

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[189]See, e.g., Vilanova v. United States, 625 F. Supp. 651, 655-56 (D.P.R. 1985), aff'd in part, vacated in part, 802 F.2d 440 (1st Cir. 1986); Bass v. Parsons, 577 F. Supp. 944, 948 (S.D.W. Va. 1984); Hall v. United States, 528 F. Supp. 963 (D.N.J. 1981), aff'd, 688 F.2d 821 (3d Cir. 1982); Howell v. United States, 489 F. Supp. 147 (W.D. Tenn. 1980).

[190]Mendez v. Belton, 739 F.2d 15 (1st Cir. 1984) (Public Health Service doctor not protected by malpractice immunity statute for alleged racial and gender discrimination in discipline of a subordinate).

[191]Lurch v. United States, 719 F.2d 333 (10th Cir. 1983) (VA), cert. denied, 466 U.S. 927 (1984); Bernie v. United States, 712 F.2d 1271 (8th Cir. 1983) (Indian Health Service); Wood v. Standard Products Co., 671 F.2d 825 (4th Cir. 1982) (PHS); Walker v. United States, 549 F. Supp. 973 (W.D. Okla. 1982).

[192]Pelphrey v. United States, 674 F.2d 243 (4th Cir. 1982); Heller v. United States, 605 F. Supp. 144 (E.D. Pa.), aff'd, 776 F.2d 92 (3d Cir. 1985), cert. denied, 476 U.S. 1105 (1986).

[193]Compare Green v. United States, 709 F.2d 1158 (7th Cir. (1983), aff'g 530 F. Supp. 633 (E.D. Wis. 1982), with Afonso v. City of Boston, 587 F. Supp. 1342 (D. Mass. 1984).

protected from liability because of the inapplicability of the FTCA, the statute permits the service secretaries to provide liability insurance or indemnification for damages.[194] Finally, the Gonzales Bill affords military medical and dental personnel protection from suits by plaintiffs who, because of their status, are not permitted to bring suit under the FTCA. These include military personnel who are barred from suit by the Feres doctrine,[195] federal employees receiving Federal Employee Compensation Act benefits, and nonappropriated fund employees covered by the Longshoremen and Harbor Workers Compensation Act.[196]

(4) Operation of the Statute. Like the Federal Employees Liability Reform and Tort Compensation Act, if a plaintiff sues a person protected by section 1089, upon certification by the Attorney General that the individual defendant was acting within the scope of his duties, the United States is substituted as the exclusive defendant in the case.[197] And if the suit is brought in state court, it is removed under the statute to federal district court.[198] Finally, a plaintiff must

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[194]10 U.S.C. § 1089(f).

[195]Feres v. United States, 340 U.S. 135 (1950).

[196]Baker v. Barber, 673 F.2d 147 (6th Cir. 1982); Vilanova v. United States, 625 F. Supp. 651 (D.P.R. 1985); Bass v. Parsons, 577 F. Supp. 944 (S.D.W. Va. 1984); Hall v. United States, 528 F. Supp. 963 (D.N.J. 1981), aff'd, 688 F.2d 821 (3d Cir. 1982); Howell v. United States, 489 F. Supp. 147 (W.D. Tenn. 1980).

[197]10 U.S.C. § 1089(c).

[198]Id.

have complied with the requirements of the FTCA to maintain the lawsuit against the United States.[199]

d. Immunity From Legal Malpractice.

(1) The statute. As part of the Defense Authorization Act of 1987, Congress afforded immunity from malpractice to attorneys, paralegals, and other members of legal staffs within the Department of Defense.[200] The statute, which is codified at 10 U.S.C. § 1054, provides in relevant part:

> (a) The remedy against the United States provided by [the FTCA] for damages for injury or loss of property caused by the negligent or wrongful act or omission of any person who is an attorney, paralegal, or other member of a legal staff within the Department of Defense (including the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32), in connection with providing legal services while acting within the scope of the person's duties or employment, is exclusive of any other civil action or proceeding by reason of the same subject matter against the person (or the estate of the person) whose act or omission gave rise to such action or proceedings.
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> (f) The head of the agency concerned may hold harmless or provide liability insurance for any person described in subsection (a) for damages for injury or loss of property caused by such person's negligent or wrongful act or omission in the provision of authorized legal assistance while acting within the scope of such person's duties if such person is assigned to a foreign country or detailed for

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[199] Id.

[200] National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 1356, 100 Stat. 3996.

> service with an entity other than a Federal department, agency, or instrumentality or if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 1346(b) of title 28, for such damage or injury.

(2) Scope of Immunity. 10 U.S.C. § 1054 affords the same type of protection for military legal personnel that the Gonzales Bill provides for members of the military medical departments. The statute affords absolute immunity for all Defense Department lawyers (both military and civilian) and their staffs for any claim of legal malpractice.[201] The statute should protect, for example, military attorneys serving as legal assistance officers or defense counsel. While the immunity exists only when the FTCA is applicable (such as in the United States), the statute permits the service secretaries to provide liability insurance or indemnification where the FTCA is unavailable.[202] Thus, for example, while judge advocates will not be immune under the statute for malpractice committed overseas, they may receive protection either in the form of liability insurance or indemnification should their service secretary so provide.

(3) Operation of the Statute. Like the other statutory immunities, if a plaintiff sues a person protected by section 1054, upon certification by the Attorney General that the individual defendant was acting with the scope of his duties, the United States

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[201] 10 U.S.C. § 1054(a).

[202] Id. § 1054(f).

is substituted as the exclusive defendant in the case.[203] And if the suit is brought in state court, it is removed under the statute to federal district court.[204]

## 9.6 Immunities: Judicially-Created.

a. General. Judicially created immunities are those established by case law.[205] For purposes of analysis, we will discuss these immunities in the context of two categories of public officials: (1) officials performing judicially-related functions, such as judges, prosecutors, and public defenders; and (2) executive branch officials (not including prosecutors). While it is convenient to examine immunity issues by looking at judicial officers and executive branch officials as separate categories, except for the President of the United States, the title an official holds does not determine the existence or scope of official immunity.[206] Rather, the courts will examine the function that gave rise to the claim to see if protecting the function is more important than compensating an injured plaintiff. In Forrester v. White[207] the Supreme Court held that a state court judge

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[203] Id. § 1054(c).

[204] Id. § 1054(c)(1).

[205] While the Federal Employees Liability Reform and Tort Compensation Act, Pub. L. No. 100-694, 102 Stat. 4563 (1988), statutorily immunizes government employees from liability for state law torts committed in the course of employment, the United States gets the benefit of any immunity the employee would have been entitled to. Thus, judicially created immunities remain an important defense to government liability.

[206] Nixon v. Fitzgerald, 457 U.S. 731 (1982)

[207] 484 U.S. 219 (1988).

did not enjoy immunity from a suit by a probation officer who alleged that the judge fired her from her position because she was a woman. In finding that the administrative act of discharging an employee was not the sort of function that justifies absolute immunity from suit, the Court reviewed the development and purposes of immunity:

> Suits for monetary damages are meant to compensate the victims of wrongful actions and to discourage conduct that may result in liability. Special problems arise, however, when government officials are exposed to liability for damages. To the extent that the threat of liability encourages these officials to carry out their duties in a lawful and appropriate manner, and to pay their victims when they do not, it accomplishes exactly what it should. By its nature, however, the threat of liability can create perverse incentives that operate to inhibit officials in the proper performance of their duties. In many contexts, government officials are expected to make decisions that are impartial or imaginative, and that above all are informed by considerations other than the personal interests of the decisionmaker. Because government officials are engaged by definition in governing, their decisions will often have adverse effects on other persons. When officials are threatened with personal liability for acts taken pursuant to their official duties, they may well be induced to act with an excess of caution or otherwise to skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct. In this way, exposing government officials to the same legal hazards faced by other citizens may detract from the rule of law instead of contributing to it.
>
> Such considerations have led to the creation of various forms of immunity from suit for certain government officials. Aware of the salutary effects that the threat of liability can have, however, as well as the undeniable tension between official immunities

> and the ideal of the rule of law, this Court has been cautious in recognizing claims that government officials should be free of the obligation to answer for their acts in court. Running through our cases, with fair consistency, is a "functional" approach to immunity questions other than those that have been decided by express constitutional or statutory enactment. Under that approach, we examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and we seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions.[208]

b. Judicial Officers.

(1) Judges.

(a) Historical Origins. After the King, who could "do no wrong,"[209] judges were the first public officials to receive an immunity from suit.[210] The immunity extended to all acts done in their judicial capacities.[211] Initially, this immunity was predicated on an extension of the Crown's immunity: if the King could do no wrong, then neither could his personal delegates--the judges.[212] When the American courts adopted the immunity, its underlying justification changed; judicial immunity from suit became premised on

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[208]Id. at 542.

[209]1 W. Blackstone, Commentaries of the Laws of England 239 (1765), quoted in Engdahl, supra note 162, at 4.

[210]See Gray, supra note 162, at 309.

[211]Id.

[212]Floyd v. Barker, 77 Eng. Rep. 1305, 1307 (Star Chamber 1607) (Coke, J.).

the need to "secure a free, vigorous and independent administration of justice."[213]

(b) Scope of Judicial Immunity. Judicial immunity is absolute. It bars suits for both common law and constitutional wrongs.[214] The immunity attaches regardless of corruption, or maliciousness, or the commission of grave procedural errors.[215] The purpose of immunity is to protect the independence of judges by ensuring that their judgments are based on their convictions rather than apprehensions of personal liability.[216]

> It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would

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[213]Yates v. Lansing, 5 Johns. 282, 293 (N.Y. 1810) (Kent, C.J.). See also Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872); Miller v. Hope, 2 Shaw H.L. 125, 134 (1824) (without immunity for his mistakes, "no man but a beggar, or a fool, would be a Judge").

[214]Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872); Pierson v. Ray, 386 U.S. 547 (1967); Stump v. Sparkman, 435 U.S. 349 (1978).

[215]Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872); Stump v. Sparkman, 435 U.S. 349 (1978); Crooks v. Maynard, 820 F.2d 329, 333 n.4 (9th Cir. 1987); Lowe v. Letsinger, 772 F.2d 308 (7th Cir. 1985); Martinez v. Winner, 771 F.2d 424 (10th Cir.), modified, 778 F.2d 553 (10th Cir. 1985); Holloway v. Walker, 765 F.2d 517 (5th Cir.), cert. denied, 474 U.S. 1037 (1985); Adams v. McIlhany, 764 F.2d 294 (5th Cir. 1985), cert. denied, 474 U.S. 1101 (1986).

[216]Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347.

> contribute not to principled and fearless decision-making but to intimidation.[217]

(c) Test for Judicial Immunity. In Stump v. Sparkman,[218] the Supreme Court established a two-part test for determining whether a judge enjoys absolute immunity for his conduct. First, was the judge, in performing the acts at issue, dealing with the plaintiff in his judicial capacity and were his acts the type that are normally performed by a judge? If the answer is no, judicial immunity does not lie.[219] If the answer to the question is yes, then the official claiming judicial immunity must meet the second part of the Stump test: did the judge act in the clear absence of all jurisdiction.[220] If the judge acted outside his jurisdiction, then he may be held to respond in money damages.[221]

(i) Acts of Judicial Nature. To be entitled to absolute immunity from suit, a judge must first establish that his challenged conduct was judicial

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[217]Pierson v. Ray, 386 U.S. 547, 554 (1967). See also Harris v. Deveaux, 780 F.2d 911, 915-16 (11th Cir. 1986); Holloway v. Walker, 765 F.2d 517, 522 (5th Cir.), cert. denied, 474 U.S. 1037 (1985); Thomas v. Sams, 734 F.2d 185, 189 (5th Cir. 1984), cert. denied, 472 U.S. 1017 (1985); Powell v. Nigro, 601 F. Supp. 144, 147 (D.D.C. 1985); Campana v. Muir, 585 F. Supp. 33, 36 (M.D. Pa.), aff'd, 738 F.2d 420 (3d Cir. 1984).

[218]435 U.S. 349 (1978).

[219]Crooks v. Maynard, 820 F.2d 329, 332 (9th Cir. 1987); Emory v. Peeler, 756 F.2d 1547, 1553 (11th Cir. 1985).

[220]Stump v. Sparkman, 435 U.S. 349, 362; Crooks v. Maynard, 820 F.2d 329, 332 (9th Cir. 1987); Emory v. Peeler, 756 F.2d 1547, 1553 (11th Cir. 1985).

[221]Id.

in character.[222] That is, the judge must show that he dealt with the plaintiff in a judicial capacity and that the acts at issue are normally performed by a judge.[223] The Court of Appeals, Fifth Circuit, has set out four factors relevant to the determination of whether an act is judicial:

> (1) whether the precise act complained of was a normal judicial function; (2) whether the events involved occurred in the courtroom or adjunct spaces, such as the judge's chambers; (3) whether the controversy centered around a case then pending before the judge; and (4) whether the act arose directly and immediately out of a visit to the judge in his official capacity.[224]

To these factors, the Seventh Circuit has added the condition that the act must involve the exercise of discretion or judgment; it cannot be a merely

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[222]Forrester v. White, 484 U.S. 219 (1988); see supra § 9.6b.

[223]See, e.g., Harris v. Deveaux, 780 F.2d 911, 914 (11th Cir. 1986); Lowe v. Letsinger, 772 F.2d 308, 312 (7th Cir. 1985); Martinez v. Winner, 771 F.2d 424, 434 (10th Cir.), modified, 778 F.2d 553 (10th Cir. 1985); Holloway v. Walker, 765 F.2d 517, 522-23 (5th Cir.), cert. denied, 474 U.S. 1037 (1985); Staples v. Edwards, 592 F. Supp. 763, 764 (E.D. Mo. 1984); Wickstrom v. Ebert, 585 F. Supp. 924, 928 (E.D. Wis. 1984).

[224]Holloway v. Walker, 765 F.2d 517, 524 (5th Cir.), cert. denied, 474 U.S. 834 (1985), citing McAlester v. Brown, 469 F.2d 1280, 1282 (5th Cir. 1972). See also Crooks v. Maynard, 820 F.2d 329, 332 (9th Cir. 1987); Sparks v. Character & Fitness Comm. of Ky., 818 F.2d 541, 542 (6th Cir. 1987); Eades v. Sterlinske, 810 F.2d 723, 725-26 (7th Cir. 1987); Forrester v. White, 792 F.2d 647, 654 (7th Cir. 1986), cert. granted, 479 U.S. 1083 (1987); Ashelman v. Pope, 793 F.2d 1072, 1075-76 (9th Cir. 1986) (en banc); Harris v. Deveaux, 780 F.2d 911, 915 (11th Cir. 1986); Adams v. McIlhany, 764 F.2d 294, 297 (5th Cir. 1985), cert. denied, 474 U.S. 1101 (1986).

ministerial act that "might as well have been committed to a private person as to a judge."[225] If the judge cannot show that his acts were judicial in nature, he does not receive absolute judicial immunity from suit.[226] If the acts are judicial in character, then the official claiming judicial immunity must show that the acts taken were not clearly outside his jurisdiction.

(ii) Acts Within Jurisdiction. Once an official has established that his challenged acts were of a judicial nature, he must then meet the second part of the Stump v. Sparkman test: did the conduct

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[225]Lowe v. Letsinger, 772 F.2d 308, 312 (7th Cir. 1985).

[226]See, e.g., Thomas v. Sams, 734 F.2d 185 (5th Cir. 1984), cert. denied, 477 U.S. 1017 (1985) (official acting in dual capacity of magistrate and mayor not entitled to judicial immunity for mayoral acts). The lower federal courts have sharply disagreed about whether judges are performing a judicial function when they make decisions regarding the hiring and firing of court personnel. Compare Crooks v. Maynard, 820 F.2d 329 (9th Cir. 1987) (judge absolutely immune for imposition of contempt to enforce administrative personnel officer); Forrester v. White, 792 F.2d 647 (7th Cir. 1986), cert. granted, 479 U.S. 1083 (1987) (judge absolutely immune for dismissal of probation officer), with McMillan v. Svetanoff, 793 F.2d 149 (7th Cir), cert. denied, 479 U.S. 985 (1986) (judge not absolutely immune for firing of court reporter). At least one court has suggested that the differing results turn on the status of the employee in question. If the employee provides advice and recommendations to the judge, he deals with the judge in the judge's judicial capacity. A judge is absolutely immune for personnel decisions regarding such employees. On the other hand, if the employee merely performs administrative tasks, he deals with the judge in the judge's administrative capacity. "And because the judicial decision making process is not involved," the judge's decisions regarding the employee are not insulated by judicial immunity. McDonald v. Krajewski, 649 F. Supp. 370, 374 (N.D. Ind. 1986).

fall clearly outside of his jurisdiction.[227] If the judge acted outside his jurisdiction, he may be held liable for money damages.[228] The Supreme Court, however, has construed the scope of a judge's jurisdiction broadly. A judge will not be deprived of immunity simply because his action was in excess of his authority; rather, to be subject to liability he must have acted in the "clear absence of all jurisdiction."[229] The Supreme Court illustrated the distinction between actions in "excess of authority" and actions "in the clear absence of all jurisdiction" in Bradley. Illustrative of a clear lack of jurisdiction is a probate judge, with jurisdiction only over wills and estates, trying a criminal offense. The probate judge would not be immune from suit. On the other hand, if a criminal court judge, with general criminal jurisdiction over offenses committed in a certain district, convicted a defendant of a nonexistent offense or sentenced him to a greater punishment than allowed by law, he would merely be acting in excess of his authority and would be immune.[230] Finally, a judge will not be deprived of immunity if all the court lacks

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[227]435 U.S. 349, 359-64 (1978).

[228]See Emory v. Peeler, 756 F.2d 1547, 1553 (11th Cir. 1985).

[229]Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351-52 (1872). See also Stump v. Sparkman, 435 U.S. 349 (1978); Crooks v. Maynard, 820 F.2d 329, 333 (9th Cir. 1987); Van Sickle v. Holloway, 791 F.2d 1431, 1435 (10th Cir. 1986); Harris v. Deveaux, 780 F.2d 911, 916 (11th Cir. 1986); Chu v. Griffith, 771 F.2d 79, 81 (4th Cir. 1985); Holloway v. Walker, 765 F.2d 517, 523-24 (5th Cir.), cert. denied, 106 S. Ct. 605 (1985); Adams v. McIlhany, 764 F.2d 294, 298-99 (5th Cir. 1985), cert. denied, 474 U.S. 1101 (1986).

[230]Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 353 (1872).

is personal, as opposed to subject-matter, jurisdiction.[231]

(d) Nonmonetary Relief. While judges are immune from liability for money damages for their judicial acts, they are not immune from prospective relief, such as injunction or declaratory judgment.[232] And if a plaintiff secures an injunction or a declaratory judgment against unlawful conduct of a judge, the judge is not immune from an award of attorney's fees in the proceedings.[233]

(e) Extension of Judicial Immunity to Nonjudicial Officers.

(i) General. Although judges have absolute immunity for judicial acts taken within their jurisdiction, other public officials who execute the judges' orders do not. In other words, the cloak of judicial immunity does not necessarily cover a nonjudicial officer who happens to commit tortious conduct at the behest of the judge. Thus, police officers, sheriffs, marshals, and court clerks may have to rely on some other form of immunity even if sued for acts done at the direction of a judge; the judge will be absolutely immune, but not always the official who carries out his order.

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[231]Ashelman v. Pope, 793 F.2d 1072, 1076 (9th Cir. 1986) (en banc); Dykes v. Hosemann, 776 F.2d 942 (11th Cir. 1985) (en banc).

[232]Pulliam v. Allen, 466 U.S. 522 (1984).

[233]Id. See also Wahl v. McIver, 773 F.2d 1169, 1172 (11th Cir. 1985).

(ii) Examples. The Supreme Court decision in Malley v. Briggs,[234] illustrates the dichotomy. In Malley, police officers obtained arrest warrants for members of a prominent Rhode Island family based on information received from wiretaps that the family members were using marijuana. The state grand jury refused to issue an indictment, and those arrested sued the police officers. Refusing to hold that the officers were absolutely immune from suit, the Supreme Court held police officers conducting searches or making arrests pursuant to a judge's warrant are not entitled to an absolute immunity from suit for an unlawful search or arrest simply because a judicial officer authorized the search or arrest. In other words, a police officer is not entitled to rely on the judgment of the judicial officer that probable cause for the search or arrest exists. Instead, the reasonableness of the police officer's conduct is evaluated independently.[235] To similar effect is Lowe v. Letsinger,[236] in which the court refused to find a court clerk absolutely immune for tortious conduct committed at the request of a judge even though the court held the judge absolutely immune for making the request.[237]

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[234]475 U.S. 335 (1986).

[235]See also United States v. Burzynski Cancer Research Inst., 819 F.2d 1301, 1309 (5th Cir. 1987), cert. denied, 484 U.S. 1065 (1988); Bergquist v. County of Conchise, 806 F.2d 1364, 1367-68 (9th Cir. 1986).

[236]772 F.2d 308 (7th Cir. 1985).

[237]Compare Eades v. Sterlinske, 810 F.2d 723, 726 (7th Cir. 1987) (clerk and court reporter absolutely immune for discretionary acts that were integral part of judicial process); Sharma v. Stevas, 790 F.2d 1486 (9th Cir. 1986) (clerk of court absolutely immune for acts that are integral part of the judicial process).

(f) Quasi-Judicial Immunity. The concept of judicial immunity protects not only judges, but also executive officials who engage in quasi-judicial acts, such as parole board members, administrative law judges, and probation officers.[238] We will discuss below the immunity of executive branch officials for quasi-judicial acts.

(2) Prosecutors.

(a) General. Along with judges, most other participants in the judicial process have enjoyed an absolute immunity from personal liability for acts done in the course of their judicial duties.[239] This immunity encompasses prosecutors.[240] A prosecutor is absolutely immune from civil liability for any actions associated with the initiation or prosecution of criminal proceedings.[241] This immunity attaches

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[238]See generally Butz v. Economou, 438 U.S. 478, 508-17 (1978); Dorman v. Higgins, 821 F.2d 133 (2d Cir. 1987); Harper v. Jeffries, 808 F.2d 281 (3d Cir. 1986); Ryan v. Bilbey, 764 F.2d 1325, 1328 n.4 (9th Cir. 1985).

[239]Engdahl, supra note 162, at 46-47.

[240]Id.

[241]Imbler v. Pachtman, 424 U.S. 409 (1976); Morris v. County of Tehama, 795 F.2d 791, 793 (9th Cir. 1986); Ashelman v. Pope, 793 F.2d 1072, 1076 (9th Cir. 1986) (en banc); Tripati v. I.N.S., 784 F.2d 345, 346-47 (10th Cir. 1986); Ryan v. Bilby, 764 F.2d 1325, 1328 (9th Cir. 1985); Rex v. Teeples, 753 F.2d 840 (10th Cir.), cert. denied, 474 U.S. 967 (1985); Maglione v. Briggs, 748 F.2d 116 (2d Cir. 1984); Demery v. Kupperman, 735 F.2d 1139, 1143 (9th Cir. 1984), cert. denied, 469 U.S. 1127 (1985); Flynn v. Dyzwilewski, 644 F. Supp. 769, 773 (N.D. Ill. 1986); Miner v. Baker, 638 F. Supp. 239, 241 (E.D. Mo. 1986); Hayes v. Hall, 604 F. Supp. 1063, 1067 (W.D. Mich.
(continued...)

regardless of whether the prosecutor acts with malice or dishonesty.[242] The purpose of the immunity is to protect prosecutors from the harassment of unfounded litigation that could deflect their energies from their public duties and compromise the independence of their judgment.[243]

> A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate. . . . Further, if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law.[244]

(b) Scope of Immunity. The prosecutorial immunity is limited to "prosecutorial acts constituting an integral part of the judicial process such as

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[241](...continued)
1985); Condos v. Conforte, 596 F. Supp. 197, 200 (D. Nev. 1984); Wickstrom v. Ebert, 585 F. Supp. 924, 929 (E.D. Wis. 1984); Brown v. Reno, 584 F. Supp. 504 (S.D. Fla. 1984).

[242]Imbler v. Pachtman, 424 U.S. 409, 427 (1976); Wahl v. McIver, 773 F.2d 1169, 173 (11th Cir. 1985); Martinez v. Winner, 771 F.2d 424, 437 (10th Cir.), modified, 778 F.2d 553 (10th Cir. 1985); Hayes v. Hall, 604 F. Supp. 1063, 1067 (W.D. Mich, 1985); Condos v. Conforte, 596 F. Supp. 197, 200 (D. Nev. 1984).

[243]Imbler v. Pachtman, 424 U.S. 409, 423 (1976).

[244]Id. at 424-25.

initiating a prosecution and presenting the state's case."[245] The immunity does not protect prosecutors from acts that are administrative or investigative in nature.[246] Thus, a prosecutor is immune from suit for such activities as presenting a case to a grand jury, conferring with witnesses, using perjured testimony, and arguing the state's case.[247] Moreover, some courts have extended the immunity to protect prosecutors giving legal advice, such as district attorneys advising police officers.[248] On the other hand, prosecutorial immunity does not apply to acts such as approving or conducting

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[245]Wickstrom v. Ebert, 585 F. Supp. 924, 930 (E.D. Wis. 1984).

[246]Imbler v. Pachtman, 424 U.S. 409, 430 (1976); Haynesworth v. Miller, 820 F.2d 1245, 1267 (D.C. Cir. 1987); Schloss v. Bouse, 876 F.2d 287, 290-91 (2d Cir. 1989); Barr v. Abrams, 810 F.2d 358, 362 (2d Cir. 1987); Joseph v. Patterson, 795 F.2d 549, 554 (7th Cir. 1986); Rex v. Teeples, 753 F.2d 840, 843 (10th Cir.), cert. denied, 474 U.S. 967 (1985); Demery v. Kupperman, 735 F.2d 1139, 1143 (9th Cir. 1984), cert. denied, 469 U.S. 1127 (1985); Hayes v. Hall, 604 F. Supp. 1063, 1067 (W.D. Mich. 1985); Wickstrom v. Ebert, 585 F. Supp. 924, 930 (E.D. Wis. 1984); Cribb v. Pelham, 552 F. Supp. 1217, 1222 (D.S.C. 1982).

[247]See, e.g., Dory V. Ryan, 25 F.3d 81, 83 (2d Cir. 1994); Haynesworth v. Miller, 820 F.2d 1245, 1267 (D.C. Cir. 1987); Maglione v. Briggs, 748 F.2d 116, 118 (2d Cir. 1984); Fullman v. Graddick, 739 F.2d 553, 558-59 (11th Cir. 1984); Demery v. Kupperman, 735 F.2d 1139, 1143-44 (9th Cir. 1984), cert. denied, 469 U.S. 1127 (1985); Lerwill v. Joslin, 712 F.2d 435, 437 (10th Cir. 1983); Hayes v. Hall, 604 F. Supp. 1063, 1067 (W.D. Mich. 1985); Hawk v. Brosha, 590 F. Supp. 337, 345 (E.D. Pa. 1984); Wickstrom v. Ebert, 585 F. Supp. 924, 930-931 (E.D. Wis. 1984); Cribb v. Pelham, 552 F. Supp. 1217, 1222 (D.S.C. 1982).

[248]Henderson v. Lopez, 790 F.2d 44 (7th Cir. 1986). See also Mother Goose Nursery Schools, Inc. v. Sendak, 770 F.2d 668 (7th Cir. 1985), cert. denied, 474 U.S. 1102 (1986). But see Benavidez v. Gunnell, 722 F.2d 615 (10th Cir. 1983).

a search, or participating with the police in acquiring evidence before criminal charges are brought.[249] Nor does the immunity bar injunctive or declaratory relief against prosecutors.[250] And if a plaintiff secures an injunction or declaratory judgment, the prosecutor is not immune from an award of attorneys fees.[251]

(c) Immunity of Government Attorneys in Civil Litigation. Attorneys representing the government in civil litigation are also absolutely immune from personal liability for their judicial actions, such as presenting the government's case in court.[252] This immunity encompasses both government counsel who initiate civil actions as well as those who defend them.[253] However, it does not protect government attorneys who advise agencies that are not parties to

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[249]See, e.g., Mitchell v. Forsyth, 472 U.S. 511 (1985); Joseph v. Patterson, 795 F.2d 549, 555-56 (6th Cir. 1986); Rex v. Teeples, 753 F.2d 840, 844 (10th Cir.), cert. denied, 474 U.S. 967 (1985); Klitzman, Klitzman & Gallagher v. Krut, 591 F. Supp. 258, 264-65 (D.N.J.), aff'd, 744 F.2d 955 (3d Cir. 1984). See also Buckley v. Fitzsimmons, 509 U.S. 259 (1993); Doe v. Phillips, 81 F.3d 1204 (2d Cir. 1996); Pinaud v. County of Suffolk, 52 F.3d 1139 (2d Cir. 1995).

[250]Martinez v. Winner, 771 F.2d 424, 438 (10th Cir.), modified, 778 F.2d 553 (10th Cir. 1985).

[251]Cf. Pulliam v. Allen, 466 U.S. 522 (1984).

[252]Butz v. Economou, 438 U.S. 478, 512-17 (1978).

[253]Barrett v. United States, 798 F.2d 565 (2d Cir. 1986). Cf. Rudow v. City of New York, 642 F. Supp. 1456 (S.D.N.Y. 1986) (government attorney representing city and private individual in sex discrimination suit absolutely immune).

litigation, even if their advice is given in anticipation of litigation.[254]

(d) Quasi-Judicial Immunity. As we will discuss later, prosecutorial immunity extends not only to state advocates in criminal proceedings, but also officials who act in a quasi-prosecutorial capacities in administrative proceedings.[255]

(3) Public Defenders. Unlike judges and prosecutors, public defenders are not immune from either common law or constitutional tort claims.[256] The rationale for the absence of immunity is that public defenders are more akin to privately-retained attorneys than public officials. Where judges and prosecutors represent the interest of society as a whole, public defenders represent individual clients.[257]

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[254]Barrett v. United States, 798 F.2d 565 (2d Cir. 1986). But cf. Mother Goose Nursery Schools, Inc. v. Sendak, 770 F.2d 668 (7th Cir. 1985) (Attorney General absolutely immune for advising state to reject a proposed contract with the plaintiff), cert. denied, 474 U.S. 1102 (1986).

[255]Butz v. Economou, 438 U.S. 478, 511-12 (1978); Coverdell v. Department of Social and Health Services, 834 F.2d 758 (9th Cir. 1987); Horwitz v. State Bd. of Medical Examiners, 822 F.2d 1508 (10th Cir. 1987); Demery v. Kupperman, 735 F.2d 1139, 1143 (9th Cir. 1984), cert. denied, 469 U.S. 1127 (1985).

[256]Tower v. Glover, 467 U.S. 914 (1984); Ferri v. Ackerman, 444 U.S. 193 (1979).

[257]Tower v. Glover, 467 U.S. 914, 921-22; Ferri v. Ackerman, 444 U.S. 193, 202-04. Compare Rudow v. City of New York, 642 F. Supp. 1456 (S.D.N.Y. 1986) (government attorney representing both city and private party in discrimination suit furthered law enforcement scheme to combat discrimination).

> In contrast [to judges and prosecutors], the primary office performed by appointed counsel parallels the office of privately retained counsel. Although it is true that appointed counsel serves pursuant to statutory authorization and in furtherance of the federal interest in insuring effective representation of criminal defendants, his duty is not to the public at large, except in that general way. His principal responsibility is to serve the individual interests of his client. Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation. The fear that an unsuccessful defense of a criminal charge will lead to a malpractice claim does not conflict with performance of that function. If anything, it provides the same incentive for appointed and retained counsel to perform that function competently. The primary rationale for granting immunity to judges, prosecutors, and other public officers does not apply to defense counsel sued for malpractice by his own client.[258]

(4) Other Participants in Judicial Proceedings. For the same reason as judges, jurors are absolutely immune from liability for suits arising out of the performance of their duties.[259] In addition, witnesses are absolutely immune from liability for their testimony.[260] The reason witnesses are protected is the

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[258]Ferri v. Ackerman, 444 U.S. 193, 204 (footnote omitted).

[259]Sunn v. Dean, 597 F. Supp. 79, 81-83 (N.D. Ga. 1984).

[260]Briscoe v. LaHue, 460 U.S. 325 (1983); Macko v. Byron, 760 F.2d 95, 97 (6th Cir. 1985); Myers v. Bull, 599 F.2d 863, 865 (8th Cir. 1979), cert. denied, 444 U.S. 901 (1980); Burke v. Miller, 580 F.2d 108, 110 (4th Cir. 1978), cert. denied, 440 U.S. 930 (1979); Fiore v. Thornburgh, 658 F. Supp. 161, 165 (W.D. Pa. 1987). Cf. Miner v. Baker, 638 F. Supp. 239, 241 (E.D. Mo. 1986) (court-appointed psychiatrist absolutely immune).

fear they might be reluctant to testify or might color their testimony to avoid a lawsuit if immunity was denied.[261]

c. Executive Branch Officials.

(1) General. The character of the immunity to which executive branch officials are entitled--absolute or qualified--is dependent in large part upon the nature of the claim asserted against them. As a general rule, executive branch officials have an absolute immunity from common law torts,[262] while they only enjoy a qualified immunity from constitutional torts and statutory actions under the Civil Rights Acts.[263] This section considers the immunity of executive branch officials under both types of claims.

(2) Common Law Torts.

(a) General Immunity of Federal Officials.

(i) Courts in England and in the United States have traditionally subjected public officials to common law tort liability for injuries caused in the course of performing governmental

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[261]Briscoe v. LaHue, 460 U.S. 325, 333 (1983).

[262]Federal Employees Liability Reform and Tort Compensation Act, Pub. L. No. 100-694, 102 Stat. 4563 (1988) (codified at and amending 28 U.S.C. §§ 2671, 2674, 2679); Barr v. Matteo, 360 U.S. 564 (1959).

[263]Butz v. Economou, 438 U.S. 478 (1978); Sheuer v. Rhodes, 416 U.S. 232 (1974).

functions.[264] Curiously, this is one area of the law in which the remedy has become more restricted over the years; the exposure of public officials for common law torts is much more circumscribed today than it was a century ago.

(ii) Tort redress against individual government officers was in part reflective of the courts' efforts to mitigate the effects of sovereign immunity. If the government could not be sued for the wrongs of its officers, at least the officers could be held personally accountable on the fiction that their illegal actions could not be attributed to the sovereign.[265] These lawsuits became more than just a means of redressing strictly personal rights; they became "an instrument for enforcing certain legal rights and particularly constitutional limitations against the state."[266]

(iii) During the 18th and early 19th centuries, public official accountability for

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[264]See, e.g., In the Case of the Marshalsea, 77 Eng. Rep. 1027 (K.B. 1613); Barwis v. Keppel, 95 Eng. Rep. 831 (K.B. 1766); Mostyn v. Fabrigas, 98 Eng. Rep. 1021 (K.B. 1774); Rafael v. Verelst, 96 Eng. Rep. 621 (K.B. 1776); Warden v. Bailey, 128 Eng. Rep. 253 (C.P. 1811); Mann v. Owen, 109 Eng. Rep. 22 (K.B. 1829); Wise v. Withers, 7 U.S. (3 Cranch.) 331 (1806); Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820); Martin v. Mott 25 U.S. (12 Wheat.) 19 (1827); Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857).

[265]Engdahl, supra note 162, at 14; Hill, supra note 7, at 1122-23.

[266]Engdahl, supra note 162, at 19. See also Rosen, Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial, 108 Mil. L. Rev. 5, 16, 20-25 (1985).

common law torts was very strict. Government officers were not only potentially liable for actions not authorized by the state, but even those that were authorized but subsequently deemed unlawful:

> The rule was extremely harsh to the public official. He was required to judge at his peril whether his contemplated act was actually authorized by the law under which his superior officer purported to have authority to authorize the subordinate to act, and that question might turn on difficult questions of statutory interpretation. He must judge at his peril whether the contemplated act, even if actually authorized, would constitute a trespass or other positive wrong, and that question might turn on uncertain chains of title, ambiguous assertions of right, or other uncertainties. Finally, he must judge at his peril whether the state's authorization-in-fact, if actually given, was constitutional, and that question would often be difficult even for judges to answer.[267]

(iv) An illustrative case of this harsh rule of liability is Little v. Barreme.[268] In 1799, Congress enacted a statute giving the President authority to order the Navy to seize all ships, in which Americans had an interest, going to French ports. The purpose of the legislation was to enforce the suspension of trade with France during the nation's period of near hostilities with that country. The President, through the Secretary of the Navy, ordered U.S. naval vessels to seize all American ships going to or from French ports. Captain George Little, the commander of the United States frigate Boston, seized such a ship going from a French port. The ship's owner sued Captain

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[267]Engdahl, supra note 162, at 18.

[268]6 U.S. (2 Cranch) 170 (1804).

Little in part because Little had seized the ship when it was coming from, rather than going to, a French port as authorized by the statute. The circuit court, finding that Captain Little had exceeded the statutory authority, awarded more than $8,500 in damages against him. The Supreme Court affirmed the damages award. Chief Justice Marshall, writing for the Court, noted the harshness of the rule under which Captain Little could be exposed to such liability:

> I confess the first bias of my mind was very strong in favor of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages. I was much inclined to think that a distinction ought to be taken between acts of civil and those of military officers; and between proceedings within the body of the country and those on the high seas. The implicit obedience which military men usually pay to the orders of their superiors, which indeed is indispensably necessary to every military system, appeared to me strongly to imply the principle that those orders, if not to perform a prohibited act, ought to justify the person whose general duty it is to obey them, and who is placed by the laws of his country in a situation which in general requires that he should obey them. I was strongly inclined to think that where, in consequence of orders from the legitimate authority, a vessel is seized with pure intentions, the claim of the injured party for damages would be against that government from which the orders proceeded, and would be a proper subject for negotiation. But I have been convinced that I was mistaken, and I have receded from my first opinion. I acquiesce in that of my brethren, which is, that the instructions cannot change the nature of the transaction, or legalize an act which, without

those instructions, would have been plain trespass.[269]

(v) By the second half of the 19th century, courts began to recognize the need to protect government officials from damages claims arising from the performance of their public duties.[270] The modern executive immunity doctrine was born in Spalding v. Vilas,[271] In Spalding, the Postmaster General of the United States was sued for defamation arising from a letter published in the course of his duties. Comparing the need to protect federal executive officials from civil tort liability with the policies underpinning judicial immunity, the Court held that the Postmaster General and other senior federal officials were entitled to absolute immunity from such lawsuits.[272] The Court further held that the motives that impel federal officials to take actions inimical to the interests of others are "wholly immaterial" in applying the immunity.[273]

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[269]Id. at 179. See also Wise v. Withers, 7 U.S. (3 Cranch) 331 (1806); Milligan v. Hovey, 17 F. Cas. 380 (C.C.D. Ind. 1871) (No. 9,605); Smith v. Shaw, 12 Johns. 257 (N.Y. 1815); Warden v. Bailey, 128 Eng. Rep. 253 (K.B. 1811); Rafael v. Verelst, 96 Eng. Rep. 621 (K.B. 1776); Mostyn v. Fabrigas, 98 Eng. Rep. 1021 (K.B. 1774); The Case of the Marshalsea, 77 Eng. Rep. 1027 (K.B. 1613).

[270]E.g., Kendall v. Stokes, 44 U.S. (3 How.) 87 (1845); Pullan v. Kissinger, 20 F. Cas. 44 (S.D. Ohio 1870) (No. 11,463).

[271]161 U.S. 483 (1896).

[272]Id. at 498.

[273]Id.

(vi) Sixty-three years after its decision in Spalding, the Supreme Court, in Barr v. Matteo,[274] reaffirmed the absolute immunity of federal officials from common law torts. Although the Barr decision set the standard for the next twenty years, it contained an essential uncertainty concerning the precise test for availability of the immunity defense. Literally read, Barr stated that government officials who act within the "outer perimeters" of their duties are absolutely immune from state-law tort suits.[275] At issue was whether government defendants must also prove that the particular function giving rise to the alleged tort was discretionary. That question was finally settled in Westfall v. Erwin,[276] where the Court held that there is a discretionary-function element for official immunity:

WESTFALL v. ERWIN
484 U.S. 292 (1988)

> JUSTICE MARSHALL delivered the opinion of the Court.
>
> Respondent William Erwin brought a state-law tort suit against petitioners, federal employees in the Executive Branch, alleging that he had suffered injuries as a result of petitioners' negligence in performing official acts. The issue presented is whether these federal officials are absolutely immune from liability under state tort law for conduct within the scope of their employment without regard to whether the challenged conduct was discretionary in nature.
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> . . . .

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[274] 360 U.S. 564 (1959).

[275] 360 U.S. at 575.

[276] 484 U.S. 292 (1988).

I

We granted certiorari, 480 U.S. (1987), to resolve the dispute among the Courts of Appeals as to whether conduct by federal officials must be discretionary in nature, as well as being within the scope of their employment, before the conduct is absolutely immune from state-law tort liability. We affirm.

II

In Barr v. Matteo, 360 U.S. 564 (1959) and Howard v. Lyons, 360 U.S. 593 (1959), this Court held that the scope of absolute official immunity afforded federal employees is a matter of federal law, "to be formulated by the courts in the absence of legislative action by Congress." Id., at 597. The purpose of such official immunity is not to protect an erring official, but to insulate the decisionmaking process from the harassment of prospective litigation. The provision of immunity rests on the view that the threat of liability will make federal officials unduly timid in carrying out their official duties, and that effective Government will be promoted if officials are freed of the costs of vexatious and often frivolous damage suits. See Barr v. Matteo, supra, 360 U.S. 571; Doe v. McMillan, 412 U.S. 306, 319 (1973). This Court always has recognized, however, that official immunity comes at a great cost. An injured party with an otherwise meritorious tort claim is denied compensation simply because he had the misfortune to be injured by a federal official. Moreover, absolute immunity contravenes the basic tenet that individuals be held accountable for their wrongful conduct. We therefore have held that absolute immunity for federal officials is justified only when "the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens." Doe v. McMillan, supra, at 320.

Petitioners initially ask that we endorse the approach followed by the Fourth and Eighth Circuits, see General Electric Co. v. United States, 813 F.2d 1273, 1276-1277 (CA4 1987);

Poolman v. Nelson, 802 F.2d 304, 307 (CA8 1986), and by the District Court in the present action, that all federal employees are absolutely immune from suits for damages under state tort law "whenever their conduct falls within the scope of their official duties." Brief for Petitioners 12. Petitioners argue that such a rule would have the benefit of eliminating uncertainty as to the scope of absolute immunity for state-law tort actions, and would most effectively ensure that federal officials act free of inhibition. Neither the purposes of the doctrine of official immunity nor our cases support such a broad view of the scope of absolute immunity, however, and we refuse to adopt this position.

The central purpose of official immunity, promoting effective Government, would not be furthered by shielding an official from state-law tort liability without regard to whether the alleged tortious conduct is discretionary in nature. When an official's conduct is not the product of independent judgment, the threat of liability cannot detrimentally inhibit that conduct. It is only when officials exercise decisionmaking discretion that potential liability may shackle "the fearless, vigorous, and effective administration of policies of government." Barr v. Matteo, supra, at 571. Because it would not further effective governance, absolute immunity for nondiscretionary functions finds no support in the traditional justification for official immunity.

Moreover, in Doe v. McMillan, supra, we explicitly rejected the suggestion that official immunity attaches solely because conduct is within the outer perimeter of an official's duties. Doe involved a damages action for both constitutional violations and common-law torts against the Public Printer and the Superintendent of Documents arising out of the public distribution of a congressional committee's report. After recognizing that the distribution of documents was "'within the outer perimeter' of the statutory duties of the Public Printer and the Superintendent of Documents," the Court stated "[I]f official immunity automatically attaches to any conduct expressly or impliedly

authorized by law, the Court of Appeals correctly dismissed the complaint against these officials. This, however, is not the governing rule." 412 U.S., at 322. The Court went on to evaluate the level of discretion exercised by these officials, finding that they "exercise discretion only with respect to estimating the demand for particular documents and adjusting the supply accordingly." Id., 323. The Court rejected the claim that these officials enjoyed absolute immunity for all their official acts, and held instead that the officials were immune from suit only to the extent that the Government officials ordering the printing would be immune for the same conduct. See id., at 323-324. The key importance of Doe lies in its analysis of discretion as a critical factor in evaluating the legitimacy of official immunity. As Doe's analysis makes clear, absolute immunity from state-law tort actions should be available only when the conduct of federal officials is within the scope of their official duties and the conduct is discretionary in nature.

As an alternative position, petitioners contend that even if discretion is required before absolute immunity attaches, the requirement is satisfied as long as the official exercise "minimal discretion." Brief for Petitioners 15. If the precise conduct is not mandated by law, petitioners argue, then the act is "discretionary" and the official is entitled to absolute immunity from state-law tort liability. We reject such a wooden interpretation of the discretionary function requirement. Because virtually all official acts involve some modicum of choice, petitioners' reading of the requirement would render it essentially meaningless. Furthermore, by focusing entirely on the question whether a federal official's precise conduct is controlled by law or regulation, petitioners' approach ignores the balance of potential benefits and costs of absolute immunity under the circumstances and thus loses sight of the underlying purpose of official immunity doctrine. See Doe v. McMillan, 412 U.S., at 320. Conduct by federal official will often involve the exercise of a modicum of choice and yet be largely unaffected by the prospect of tort

liability, making the provision of absolute immunity unnecessary and unwise.

. . . .

Because this case comes to us on summary judgment and the relevant factual background is undeveloped, we are not called on to define the precise boundaries of official immunity or to determine the level of discretion required before immunity may attach. In deciding whether particular governmental functions properly fall within the scope of absolute official immunity, however, courts should be careful to heed the Court's admonition in Doe to consider whether the contribution to effective Government in particular contexts outweighs the potential harm to individual citizens. Courts must not lose sight of the purposes of the official immunity doctrine when resolving individual claims of immunity or formulating general guidelines. We are also of the view, however, that Congress is in the best position to provide guidance for the complex and often highly empirical inquiry into whether absolute immunity is warranted in a particular context. Legislated standards governing the immunity of federal employees involved in state-law tort actions would be useful. . . .

. . . .

The judgement of the court of appeals is affirmed.

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(vi) The Westfall Court clearly held that discretion was a key element in the official immunity doctrine and federal officials were entitled to absolute immunity only if both scope of employment and discretion were present. Unfortunately, the Court did not provide comprehensive guidance on what sort of action or conduct satisfied the discretion criteria.

While a decision is generally deemed to be discretionary if it is "the result of a judgment or decision which it is necessary that the Government official be free to make without fear or threat of vexatious or fictitious suits and alleged personal liability,"[277] such definitions are of little help in guiding the day-to-day actions of federal officials.[278] The ambiguities left by Westfall, the uncertain nature of the discretion required for official immunity, and the resulting prospect of increased liability and litigation costs for federal officials prompted Congress to statutorily immunize federal employees for state law torts.[279]

(b) Intra-Service Immunity.

(i) Apart from immunity under Barr v. Matteo, military officials benefit from the doctrine of "intra-service" or "intra-military " immunity, which precludes one soldier from suing another soldier for injuries arising incident to military service. Intra-service immunity is distinctly different from the immunity under Barr and is bottomed on the Supreme Court's decision in Feres v. United States.[280] While official immunity under Barr permits public officials to make governmental decisions without fear of

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[277]Norton v. McShane, 332 F.2d 855, 859 (5th Cir. 1964).

[278]See generally, Rabago, Absolute Immunity for State-Law Torts under Westfall v. Erwin: How Much Discretion is Enough? The Army Lawyer, November 1988 at 5.

[279]Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (1988) (codified at and amending 28 U.S.C. §§ 2671, 2674, 2679). See H.R. Rep. No. 100-700, 100th Cong., 2d Sess., at 2-3.

[280]340 U.S. 135 (1950).

retribution, intra-service immunity is intended to preserve military discipline by proscribing divisive internal lawsuits.[281]

(ii) Feres-based intra-service immunity embraces tortious conduct by servicemembers whether they stand in a superior or subordinate relationship vis-a-vis a plaintiff and whether the tortious acts committed are directly incident to duty.[282] Moreover, intra-service immunity applies whether the action is in negligence or for intentional conduct.[283]

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[281]See Bois v. Marsh, 801 F.2d 462, 470-71 (D.C. Cir. 1986); Hass v. United States, 518 F.2d 1138, 1143 (4th Cir. 1975).

[282]Id.; Martinez v. Schrock, 537 F.2d 765 (3d Cir. 1976), cert. denied, 430 U.S. 920 (1977); Tirrill v. McNamara, 451 F.2d 579 (9th Cir. 1971); Cross v. Fiscus, 661 F. Supp. 36 (N.D. Ill. 1987). Compare Taber v. Maine, 45 F.3d 598 (2d Cir. 1995) (Government liable under doctrine of respondent superior for sailors drunken condition that resulted in motor vehicle accident injuring another sailor).

[283]Bois v. Marsh, 801 F.2d 462, 470-71 (D.C. Cir. 1986); Trerice v. Pedersen, 769 F.2d 1398 (9th Cir. 1985); Trerice v. Summons, 755 F.2d 1081 (4th Cir. 1985); Citizens Nat'l Bank v. United States, 594 F.2d 1154 (7th Cir. 1979); Cross v. Fiscus, 661 F. Supp. 36 (N.D. Ill. 1987); Howard v. Sikula, 627 F. Supp. 497 (S.D. Ohio 1986); Benvenuti v. Department of Defense, 587 F. Supp. 348 (D.D.C. 1984), aff'd, 802 F.2d 469 (Fed. Cir. 1986); Bass v. Parsons, 577 F. Supp. 944 (S.D.W. Va. 1984); Thompson v. United States ex rel. Brown, 493 F. Supp. 28 (W.D. Okl. 1980); Everett v. United States, 492 F. Supp. 318 (S.D. Ohio 1980); Schmid v. Rumsfeld, 481 F. Supp. 19 (N.D. Cal. 1979); Calhoun v. United States, 475 F. Supp. 1 (S.D. Cal. 1977), aff'd, 604 F.2d 647 (9th Cir. 1979), cert. denied, 444 U.S. 1078 (1980); Jaffee v. United States, 468 F. Supp. 632 (D.N.J. 1979), aff'd, 663 F.2d 1226 (3d Cir. 1981) (en banc), cert. denied, 456 U.S. 972 (1982); Levin v. United States, 403 F. Supp. 99 (D. Mass. 1975); Birdwell v. Schlesinger, 403 F. Supp. 710 (D. Colo. 1975); Rotko v. Abrams, 338 F. Supp. 46 (D. Conn. 1971), aff'd, 455 F.2d 992 (2d Cir. 1972).

(3) Constitutional Torts and Statutory Actions.

(a) General Rule: Qualified Immunity.

(i) The Supreme Court has refused to extend to federal officials a blanket absolute immunity from constitutionally-based damages claims. Instead, as a general rule, federal officials get only a qualified immunity from such suits. The landmark case is Butz v. Economou:

BUTZ v. ECONOMOU
438 U.S. 478 (1978)

> [After an unsuccessful Department of Agriculture proceeding to revoke or suspend the registration of plaintiff's commodity futures commission company, plaintiff filed an action for damages in District Court against defendant officials (including the Secretary and Assistant Secretary of Agriculture, the Judicial Officer, the Chief Hearing Examiner who had recommended sustaining the administrative complaint, and the Department attorney who had prosecuted the enforcement proceedings), alleging inter alia, that by instituting unauthorized proceedings against him they had violated various of his constitutional rights. The District Court dismissed the action on the ground that the individual defendants, as federal officials, were entitled to absolute immunity for all discretionary acts within the scope of their authority. The Court of Appeals reversed, holding that the defendants were entitled only to the qualified immunity available to their counterparts in state government.]
>
> The single submission by the United States on behalf of petitioners is that all of the federal officials sued in this case are absolutely immune from any liability for damages even if in the course of enforcing the relevant statutes they infringed respondent's constitutional rights and even if the

violation was knowing and deliberate. Although the position is earnestly and ably presented by the United States, we are quite sure that it is unsound and consequently reject it.

In Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), the victim of an arrest and search claimed to be violative of the Fourth Amendment brought suit for damages against the responsible federal agents. Repeating the declaration in Marbury v. Madison, 1 Cranch 137, 163 (1803), that "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws," 403 U.S., at 397, and stating that "Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty," id., at 395, we rejected the claim that the plaintiff's remedy lay only in the state court under state law, with the Fourth Amendment operating merely to nullify a defense of federal authorization. We held that a violation of the Fourth Amendment by federal agents gives rise to a cause of action for damages consequent upon the constitutional conduct. Ibid.

Bivens established that compensable injury to a constitutionally protected interest could be vindicated by a suit for damages invoking the general federal question jurisdiction of the federal courts, but we reserved the question whether the agents involved were "immune from liability by virtue of their official position," and remanded the case for that determination. On remand, the Court of Appeals for the Second Circuit, as has every other court of appeals that has faced the question, held that the agents were not absolutely immune and that the public interest would be sufficiently protected by according the agents and their superiors a qualified immunity.

In our view, the courts of appeals have reached sound results. We cannot agree with the United States that our prior cases are to the contrary and support the rule it now urges us to embrace.

The Government places principal reliance on Barr v. Matteo, 360 U.S. 654 (1959). . . .

. . . Barr does not control this case. It did not address the liability of the acting director had his conduct not been within the outer limits of his duties, but from the care with which the Court inquired into the scope of his authority, it may be inferred that had the release been unauthorized, and surely if the issuance of press releases had been expressly forbidden by statute, the claim of absolute immunity would not have been upheld. The inference is supported by the fact that Mr. Justice Stewart, although agreeing with the principles announced by Mr. Justice Harlan, dissented and would have rejected the immunity claim because the press release, in his view, was not action in the line of duty. 360 U.S., at 592. It is apparent also that a quite different question would have been presented had the officer ignored an express statutory or constitutional limitation on his authority.

. . . .

. . . We are confident that Barr did not purport to protect an official who has not only committed a wrong under local law, but also violated those fundamental principles of fairness embodied in the Constitution.[2] Whatever level of protection from state interference is appropriate for federal officials executing their duties under federal law, it cannot be doubted that these officials, even when acting pursuant to congressional authorization, are subject to the restraints imposed by the Federal Constitution.

The liability of officials who have exceeded constitutional limits was not confronted in either Barr or Spalding. Neither of those cases supports the Government's position. Beyond that, however, neither case purported to abolish the liability of federal officers for actions manifestly beyond their line of duty; and if they are accountable when they stray beyond the plain limits of their statutory authority, it would be incongruous to hold that they may nevertheless willfully or knowingly violate constitutional rights without fear of liability.

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[2]We view this case, in its present posture, as concerned only with constitutional issues.

The District Court memorandum focused exclusively on respondent's constitutional claims. It appears from the language and reasoning of its opinion that the Court of Appeals was also essentially concerned with respondent's constitutional claims. See, e.g., 535 F.2d, at 695 n. 7. The Second Circuit has subsequently read Economou as limited to that context. See Huntington Towers, Ltd. v. Franklin Nat. Bank, 559 F.2d 863, 870, and n. 2 (1977), cert. denied sub nom. Huntington Towers, Ltd. v. Federal Reserve Bank of N.Y., 434 U.S. 1012 (1978). The argument before us as well has focused on respondent's constitutional claims, and our holding is so limited.

Although it is true that the Court has not dealt with this issue with respect to federal officers, we have several times addressed the immunity of state officers when sued under 42 U.S.C. § 1983 for alleged violations of constitutional rights. . . .

. . . [I]n the absence of congressional direction to the contrary, there is no basis for according to federal officials a higher degree of immunity from liability when sued for a constitutional infringement as authorized by Bivens than is accorded state officials when sued for the identical violation under § 1983. The constitutional injuries made actionable by § 1983 are of no greater magnitude than those for which federal officials may be responsible. The pressures and uncertainties facing decisionmakers in state government are little if at all different from those affecting federal officials. We see no sense in holding a state governor liable but immunizing the head of a federal department; in holding the administrator of a federal hospital immune where the superintendent of a state hospital would be liable; in protecting the warden of a federal prison where the warden of a state prison would be vulnerable; or in distinguishing between state and federal police participating in the same investigation. Surely, federal officials should enjoy no greater zone of protection when they violate federal constitutional rules than do state officers.

. . . .

> . . . We therefore hold that, in a suit for damages arising from unconstitutional action, federal executive officials exercising discretion are entitled only to the qualified immunity specified in Scheuer, subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business. . . . .[284]

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(ii) Until 1982, the test for qualified immunity had two parts: one subjective and one objective.[285] The courts required that defendants seeking immunity act with both "permissible intentions" and without "ignorance or disregard of settled, indisputable law."[286] Immunity was not available if a defendant took action with the malicious intention to deprive the plaintiff of constitutional rights or to cause some other injury.[287] On the other hand, under the objective part of the test the inquiry was the state of the applicable law at the time of the defendant's actions. A defendant official would be immune from suit only if he did not know, nor should have known, that the

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[284]See also Mitchell v. Forsyth, 472 U.S. 511 (1985); Harlow v. Fitzgerald, 457 U.S. 800 (1982); Nixon v. Fitzgerald, 457 U.S. 731 (1982); Scheuer v. Rhodes, 416 U.S. 232 (1974).

[285]Wood v. Strickland, 420 U.S. 308 (1975). See also O'Connor v. Donaldson, 422 U.S. 563, 577 (1975).

[286]Wood v. Strickland, 420 U.S. 308, 321-22, cited in Comment, Harlow v. Fitzgerald, supra note 12, at 910. See also Bogard v. Cook, 586 F.2d 399, 411 (5th Cir.), cert. denied, 444 U.S. 883 (1979).

[287]Wood v. Strickland, 420 U.S. 308, 322 (1975).

action he took would violate the constitutional rights of the plaintiff.[288]

(iii) The subjective part of the qualified immunity test proved incompatible with the policy that insubstantial lawsuits against public officials should be dismissed early in the proceedings, preferably at summary judgment.[289]

The subjective element focused on the questions of motive and intent, which are invariably factual issues not amenable to resolution by summary judgment.[290] Instead, resolution of the subjective part of the test often required wide-ranging discovery into the defendant's motivation, and a trial on the merits of the issue.[291] To effect the goal of protecting public officials and the public service from the agonies of litigation in insubstantial cases, the Supreme Court, in

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[288]Id.

[289]See supra notes 147-151 and accompanying text.

[290]See Wade v. Hegner, 804 F.2d 67, 69 (7th Cir. 1986); People of Three Mile Island v. NRC, 747 F.2d 139, 143-44 (3d Cir. 1984); Hobson v. Wilson, 737 F.2d 1, 25 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985); Ortega v. City of Kansas City, 659 F. Supp. 1201, 1207 (D. Kan. 1987); Conset Corp. v. Community Serv. Admin., 624 F. Supp. 601, 604 (D.D.C. 1985); Potter v. Murray City, 585 F. Supp. 1126, 1134 (D. Utah 1984), aff'd, 760 F.2d 1065 (10th Cir.), cert denied, 474 U.S. 849 (1985); Skevofilax v. Quigley, 586 F. Supp. 532, 536-37 (D.N.J. 1984).

[291]Id.

Harlow v. Fitzgerald,[292] eliminated the subjective prong of the qualified immunity defense:

HARLOW v. FITZGERALD
457 U.S. 800 (1982)

JUSTICE POWELL delivered the opinion of the Court.

The issue in this case is the scope of the immunity available to the senior aides and advisers of the President of the United States in a suit for damages based upon their official acts.

I

In this suit for civil damages petitioners Bryce Harlow and Alexander Butterfield are alleged to have participated in a conspiracy to violate the constitutional and statutory rights of the respondent A. Ernest Fitzgerald. Respondent avers that petitioners entered the conspiracy in their capacities as senior White House aides to former President Richard M. Nixon. . . .

. . . .

[The Court first held that Harlow and Butterfield were not entitled to absolute immunity as Presidential aides.]

IV

Even if they cannot establish that their official functions require absolute immunity, petitioners assert that public policy at least mandates an application of the qualified immunity standard that would permit the defeat of insubstantial claims without resort to trial. We agree.

A

The resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative.

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[292]457 U.S. 800 (1982). See also Behrens v. Pelletier, 116 S. Ct. 834 (1996); Anderson v. Creighton, 483 U.S. 635 (1987); Malley v. Briggs, 475 U.S. 335 (1986).

In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees. Butz v. Economou, supra, at 506; see Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S., at 410 ("For people in Bivens' shoes, it is damages or nothing"). It is this recognition that has required the denial of absolute immunity to most public officers. At the same time, however, it cannot be disputed seriously that claims frequently run against the innocent as well as the guilty--at a cost not only to the defendant officials, but to the society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties." Gregoire v. Biddle, 177 F.2d 579, 581 (CA2 1949), cert. denied, 339 U.S. 949 (1950).

In identifying qualified immunity as the best attainable accommodation of competing values, in Butz, supra, at 507-508, as in Scheuer, 416 U.S., at 245-248, we relied on the assumption that this standard would permit "[i]nsubstantial lawsuits [to] be quickly terminated." 438 U.S., at 507-598; see Hanrahan v. Hampton, 446 U.S. 754, 765 (1980) (Powell, J., concurring in part and dissenting in part). Yet petitioners advance persuasive arguments that the dismissal of insubstantial lawsuits without trial--a factor presupposed in the balance of competing interests struck by our prior cases--requires an adjustment of the "good faith" standard established by our decisions.

B

Qualified or "good faith" immunity is an affirmative defense that must be pleaded by a defendant official. Gomez v. Toledo, 446 U.S. 635 (1980). Decisions of this Court have established that the "good faith" defense has both an "objective" and "subjective" aspect. The objective element involves a presumptive

knowledge of and respect for "basic, unquestioned constitutional rights." Wood v. Strickland, 420 U.S. 308, 322 (1975). The subjective component refers to "permissible intentions." Ibid. Characteristically the Court has defined these elements by identifying the circumstances in which qualified immunity would not be available. Referring both to the objective and subjective elements, we have held that qualified immunity would be defeated if an official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury. . . ." Ibid. (emphasis added).

The subjective element of the good-faith defense frequently has proved incompatible with our admonition in Butz that insubstantial claims should not proceed to trial. Rule 56 of the Federal Rules of Civil Procedure provides that disputed questions of fact ordinarily may not be decided on motions for summary judgment. And an official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury.

In the context of Butz's attempted balancing of competing values, it now is clear that substantial costs attend the litigation of the subjective good faith of government officials. Not only are there the general costs of subjecting officials to the risks of trial--distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service. There are special costs to "subjective" inquiries of this kind. Immunity generally is available only to officials performing discretionary functions. In contrast with the thought processes accompanying "ministerial" tasks, the judgments surrounding discretionary action almost inevitably are influenced by the decisionmaker's experiences, values, and emotions. These variables explain in part why questions of subjective intent so rarely can be decided by summary judgment. Yet they also

frame a background in which there often is no clear end to the relevant evidence. Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government.

Consistent with the balance at which we aimed in Butz, we conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery. We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. See Procunier v. Navarette, 434 U.S. 555, 565 (1978); Wood v. Strickland, 420 U.S., at 322.

Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.

By defining the limits of qualified immunity essentially in objective terms, we

> provide no license to lawless conduct. The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. But where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken "with independence and without fear of consequences." Pierson v. Ray, 386 U.S. 547, 554 (1967). . . .

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(iv) Under Harlow, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established [federal] statutory or constitutional rights of which a reasonable person would have known."[293] Courts often state the rule as a two-fold inquiry:

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[293]Harlow v. Fitzgerald, 457 U.S. 800, 818 (emphasis added); see also Numez v. Izquierdo-Mora, 834 F.2d 19 (1st Cir. 1987) (the official responsible for the discharge of a political appointee is afforded qualified immunity from any retaliatory suit where it is not clearly established that the dismissed individual's position was protected from discharge for political reasons).

Of course, as the Supreme Court recently noted, "[a] necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is `clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." Siegert v. Gilley, 111 S. Ct. 1789, 1793 (1991).

> (1) Was the law clearly established at the time [of the alleged violation]? If the answer to this threshold question is no, the official is immune.
>
> (2) If the answer is yes, the immunity defense ordinarily should fail unless the official claims extraordinary circumstances and can prove that he neither knew nor should have known that his acts invaded settled rights.[294]

No inquiry other than the objective one is now relevant in testing the qualified immunity of public officials.[295] And the inquiry is one of law, which can usually be resolved by the district judge on a motion for summary judgment.[296]

This is not to suggest that factual questions no longer have any bearing on the existence of qualified immunity. Factual issues arise most frequently under two circumstances: First, the availability of qualified

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[294]Batiste v. Burke, 746 F.2d 257, 260 n.3 (5th Cir. 1984); Skevofilax v. Quigley, 586 F. Supp. 532, 538 (D.N.J. 1984). See also Hobson v. Wilson, 737 F.2d 1, 25 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985). Accord Creamer v. Porter, 754 F.2d 1311, 1317 (5th Cir. 1985); Deary v. Three Un-Named Police Officers, 746 F.2d 185, 192 (3d Cir. 1984).

[295]Hewitt v. Grabicki, 794 F.2d 1373, 1381 (9th Cir. 1986); Freeman v. Blair, 793 F.2d 166, 173 (8th Cir. 1986); Flinn v. Gordon, 775 F.2d 1551, 1553 (11th Cir. 1985), cert. denied, 476 U.S. 1116 (1986); People of Three Mile Island v. NRC, 747 F.2d 139, 144 (3d Cir. 1984); Bates v. Jean, 745 F.2d 1146, 1151 (7th Cir. 1984).

[296]Mitchell v. Forsyth, 472 U.S. 511, 528 (1985); Creamer v. Porter, 754 F.2d 1311,1317 (5th Cir. 1985); Bates v. Jean, 745 F.2d 1146, 1151 (7th Cir. 1984); Fullman v. Graddick, 739 F.2d 553, 560 (11th Cir. 1984); Losch v. Borough of Parkesburg, 736 F.2d 903, 909 (3d Cir. 1984); Skevofilax v. Quigley, 586 F. Supp. 532, 541 (D.N.J. 1984); Woulard v. Redman, 584 F. Supp. 247, 249 (D. Del. 1984).

immunity may turn on a particular construction of the facts. For example, immunity from an allegedly unlawful search may depend upon whether the defendant had probable cause, a fact-specific determination that turns on the particular facts of the case. Second, and more problematic, the defendant's motive or state of mind--necessarily a factual question--may be an element of the plaintiff's substantive claim. For example, a plaintiff fired from public employment may assert that the termination was in retaliation for the exercise of some constitutional right. The defendant, on the other hand, may claim some legitimate basis for the action. The defendant's state of mind--a subjective inquiry--is an essential element of the plaintiff's constitutional claim. These issues are dealt with below.[297]

(v) The Supreme Court has provided only limited guidance in defining what is meant by a "clearly established" statutory or constitutional right. For example, it has held that a mere violation of a state statute or regulation does not vitiate an official's qualified immunity from suit.[298] Moreover, the state of the law measured is the law that existed at the time of the defendant's actions.[299] The decisive issue is

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[297]See infra notes 314-318 and accompanying text.

[298]Davis v. Scherer, 468 U.S. 183, 194-96 (1984). See also McIntosh v. Weinberger, 810 F.2d 1411, 1432 (8th Cir. 1987); Culbreath v. Block, 799 F.2d 1248, 1250 (8th Cir. 1986); Pollnow v. Glennon, 757 F.2d 496, 501 (2d Cir. 1985). Cf. Kompare v. Stein, 801 F.2d 883, 888 n.6 (7th Cir. 1986) (state law).

[299]Mitchell v. Forsyth, 472 U.S. 511, 530-34 (1985). See also Mendez-Palou v. Rohena-Betancourt, 813 F.2d 1255, 1258-59 (1st Cir. 1987); Williams v. Smith, 781 F.2d 319, 322 (2d Cir. 1986); Hall v. Medical College of Ohio, 742 (continued...)

not whether the public official's conduct turned out to be unlawful because of subsequent case law, but whether the question of the legality of the action was open at the time he acted.[300] Stated simply, government officials are not "charged with predicting the future course of constitutional law."[301] The "clearly established" requirement, however, continues to pose at several ambiguities:

(A) First, the type of judicial pronouncement necessary to clearly establish a constitutional right is unclear.[302] Obviously, Supreme Court precedent is sufficient.[303] But if the Supreme Court has not decided an issue, what should courts use

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[299](...continued)
F.2d 299, 308-09 (6th Cir. 1984), cert. denied, 469 U.S. 1113 (1985); Richards v. Mileski, 567 F. Supp. 1391, 1398 (D.D.C. 1983).

[300]Mitchell v. Forsyth, 472 U.S. 511, 530-35 (1985); Edwards v. Baer, 863 F.2d 606, 607 (8th Cir. 1989); Fields v. City of Omaha, 810 F.2d 830, 834 (8th Cir. 1987).

[301]Pierson v. Ray, 386 U.S. 547, 557 (1967). See also Rodriguez v. Munoz, 808 F.2d 138, 142 (1st Cir. 1986); DeAbadia v. Mora, 792 F.2d 1187, 1191 (1st Cir. 1986); Conset Corp. v. Community Serv. Admin., 624 F. Supp. 601, 605 (D.D.C. 1985).

[302]People of Three Mile Island v. NRC, 747 F.2d 139, 144 (3d Cir. 1984). See also Hawkins v. Steingut, 829 F.2d 317, 321 (2nd Cir. 1987) (a district court decision does not clearly establish the law even in its own circuit. . .); Ortega v. City of Kansas City, 659 F. Supp. 1201, 1207-08 (D. Kan. 1987) (for a description of the approaches the courts of appeals have taken on this question).

[303]Hobson v. Wilson, 737 F.2d 1, 26 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985). See also Wade v. Hegner, 804 F.2d 67, 71 (7th Cir. 1986); McDonald v. Krajewski, 649 F. Supp. 370, 375 (N.D. Ind. 1986).

as the reference points? Do they consider the law as pronounced by the courts of appeals, or the local district courts, or the state courts?[304] Most courts refer to the decisions of the governing court of appeals, or lacking such decisions, the clear weight of authority as measured by the opinions of the other federal courts.[305]

(B) Second, and more problematic, is "the extent to which courts should require a correspondence between the facts of 'establishing' cases and the facts of the case under consideration."[306] Supreme Court decisions suggest that "the factual contexts of the relevant case law should

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[304]Hobson v. Wilson, 737 F.2d 1, 25-26 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985).

[305]Mitchell v. Forsyth, 472 U.S. 511, 530-33 (1985); Davis v. Scherer, 468 U.S. 183, 192 (1984); Page v. DeLaune, 837 F.2d 233, 239(5th Cir. 1988); Bozucki v. Ryan, 827 F.2d 836, 844 (1st Cir. 1987); Colaizzi v. Walker, 812 F.2d 304, 308 (7th Cir. 1987); Kirkpatrick v. City of Los Angeles, 803 F.2d 485, 490 (9th Cir. 1986); Darryl H. v. Coler, 801 F.2d 893, 908 (7th Cir. 1986); Culbreath v. Block, 799 F.2d 1248, 1250 (8th Cir. 1986); Flinn v. Gordon, 775 F.2d 1551, 1553 (11th Cir. 1985), cert. denied, 476 U.S. 1116 (1986); Augustine v. McDonald, 770 F.2d 1442, 1445-46 (9th Cir. 1985); Capoeman v. Reed, 754 F.2d 1512, 1514 (9th Cir. 1985); Pembaur v. City of Cincinnati, 746 F.2d 337, 339-40 (6th Cir. 1984), rev'd on other grounds, 475 U.S. 469 (1986); Hall v. Medical College of Ohio, 742 F.2d 299, 309 (6th Cir. 1984), cert. denied, 469 U.S. 1113 (1985); Bilbrey v. Brown, 738 F.2d 1462, 1466-67 (9th Cir. 1984); People of Three Mile Island v. NRC, 747 F.2d 139, 145-47 (3d Cir. 1984); Hobson v. Wilson, 737 F.2d 1, 26 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985); Cox v. Thompson, 635 F. Supp. 594, 598 (S.D. Ill. 1986). Cf. Thorne v. City of El Segundo, 802 F.2d 1131, 1138 (9th Cir. 1986); Barrett v. United States, 798 F.2d 565 (2d Cir. 1986) (reliance in part on state courts).

[306]Comment, Harlow v. Fitzgerald, supra note 13, at 923.

bear sufficient similarity to the instant factual context to inform the official that her conduct was unlawful."[307] While some courts have required a relatively strict factual relationship,[308] most insist that officials know and apply general legal principles in appropriate factual settings. In other words, public officials "are required to relate established law to analogous factual settings."[309]

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[307]Id. at 919. See Mitchell v. Forsyth, 472 U.S. 511, 533-35 (1985); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Procunier v. Navarette, 434 U.S. 555, 562-64 (1978).

[308]E.g., Danenberger v. Johnson, 821 F.2d 361, 363 (7th Cir. 1987), quoting Benson v. Allphin, 786 F.2d 268, 278 (7th Cir. 1986) ("'the facts of the existing case law must closely correspond to the contested action before the defendant official is subject to liability'"); Powers v. Lightner, 820 F.2d 818, 822 (7th Cir. 1987) (Pell, J.); Greenberg, v. Kmetko, 811 F.2d 1057, 1063 (7th Cir. 1987); DeAbadia v. Mora, 792 F.2d 1187 (1st Cir. 1986); Sullivan v. United States, 788 F.2d 813 (1st Cir. 1986); Brockell v. Norton, 732 F.2d 664 (8th Cir. 1984); Calloway v. Fauver, 544 F. Supp. 584 (D.N.J. 1982).

[309]People of Three Mile Island v. NRC, 747 F.2d 139, 144 (3d Cir. 1984). See, e.g., Hall v. Ochs, 817 F.2d 920, 924-25 (1st Cir. 1987); Garcia v. Miera, 817 F.2d 650, 654-56 (10th Cir. 1987); Jefferson v. Ysleta Indep. School Dist., 817 F.2d 303, 305 (5th Cir. 1987); Vasquez-Rios v. Hernandez-Colon, 815 F.2d 830, 837 (1st Cir. 1987); McIntosh v. Weinberger, 810 F.2d 1411, 1432-34 (8th Cir. 1987); Daniel v. Taylor, 808 F.2d 1401, 1403 (11th Cir. 1986); Thorne v. County of El Segundo, 802 F.2d 1131, 1138-40 (9th Cir. 1986); Ward v. City of San Diego, 791 F.2d 1329, 1332 (9th Cir. 1986); Barrett v. United States, 798 F.2d 565 (2d Cir. 1986); Kraus v. County of Pierce, 793 F.2d 1105 (9th Cir. 1986); Freeman v. Blair, 793 F.2d 166 (8th Cir. 1986); Fernandez v. Leonard, 784 F.2d 1209 (1st Cir. 1986); Briggs v. Malley, 748 F.2d 715, 719-21 (1st Cir. 1984), aff'd, 475 U.S. 335 (1986); Bates v. Jean, 745 F.2d 1146, 1152 (7th Cir. 1984); Llaguno v. Mingey, 739 F.2d 1186, 1194-95 (7th Cir. 1984); Hobson v. Wilson, 737 F.2d 1, (continued...)

(C) A third (and related) problem is the level of generality at which the plaintiff is permitted to describe the defendant's putative constitutional transgression. The more generally the court identifies the constitutional question at issue, the less likely the defendant will be able to establish that the law was not clearly established. Consequently, "[t]he right must be sufficiently particularized to put potential defendants on notice that their conduct is probably unlawful."[310]

> The operation of [the Harlow] standard . . . depends substantially on the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of Harlow. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. Harlow would be transformed from a guarantee of immunity into a rule of

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[309](...continued)
29 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985); Losch v. Borough of Parkesburg, 736 F.2d 903, 910 (3d Cir. 1984); Ortega v. City of Kansas City, 659 F. Supp. 1201, 1209 (D. Kan. 1987).

[310]Colaizzi v. Walker, 812 F.2d 304, 308 (7th Cir. 1987), quoting Azeez v. Fairman, 795 F.2d 1296, 1301 (7th Cir. 1986).

> pleading. . . . It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official is protected by qualified immunity unless the very action in question has previously been held unlawful, . . . but it is to say that in the light of preexisting law that unlawfulness must be apparent.[311]

Lastly, the factual issue of the defendant's state of mind or motive may be an element of the plaintiff's claim.[312] For example, a plaintiff may allege a denial of equal protection under the fifth or fourteenth amendment, which requires proof of a purposeful discriminatory intent. Or the plaintiff may assert that a government official took some adverse action because of the manner in which the plaintiff exercised rights under the first amendment, which necessarily draws into question the defendant's motive.[313] The availability of qualified immunity in these and other constitutional tort cases will turn on two issues: (1) does the alleged conduct set out a constitutional violation, and

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[311]Anderson v. Creighton, 483 U.S. 635, 639-40 (1987).

[312]See Note, Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation, 95 Yale L.J. 126 (1985) [hereinafter Note, Unconstitutional Purpose]; Musso v. Hourigan, 836 F.2d 736, 743 (2nd Cir. 1988); Bothke v. Fluor Engineers & Constructors, Inc., 834 F.2d 804, 810-11 (9th Cir. 1987) (although clearly established constitutional right was violated, because the officials state of mind was objectively reasonable, she was afforded qualified immunity).

[313]Id. at 135-36.

if so, (2) were the constitutional standards clearly established at the time in question. In Harlow, the Supreme Court eliminated the relevancy of the defendant's intent or motive with respect to the second issue, but not the first.[314] The courts have had to strike a balance to permit plaintiffs to establish unconstitutional motives when state of mind is an element of a plaintiff's claim, while at the same time realizing the policy considerations underlying a defendant official's immunity from suit. Most courts require plaintiffs to allege specific facts of unconstitutional motive; to avert dismissal short of trial, the plaintiff must produce direct (not inferential or circumstantial) evidence of improper motivation.[315] Conclusory assertions of improper state of mind, malice, bad faith, or retaliatory motive are insufficient.[316]

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[314]Martin v. D.C. Metropolitan Police Dep't, 812 F.2d 1425, 1433 (D.C. Cir. 1987); Wade v. Hegner, 804 F.2d 67, 70 (7th Cir. 1986); Hobson v. Wilson, 737 F.2d 1, 29-31 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985); Harris v. Eichbaum, 642 F. Supp. 1056, 1065 (D. Md. 1986); Note, Unconstitutional Purpose, supra note 314, at 127.

[315]Martin v. D.C. Metropolitan Police Dep't, 812 F.2d 1425, 1435 (D.C. Cir. 1987); Hobson v. Wilson, 737 F.2d 1, 30 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985); Harris v. Eichbaum, 642 F. Supp. 1056, 1065 (D. Md. 1986). Cf. Elliott v. Perez, 751 F.2d 1472 (5th Cir. 1985) (need to plead all alleged constitutional violations with specificity).

[316]Siegert v. Gilley, 895 F.2d 797, 800-801 (D.C. Cir. 1990), aff'd on other grounds, 111 S. Ct. 1789 (1991); Trapnell v. Ralston, 819 F.2d 182, 185 (8th Cir. 1987); Wright v. South Arkansas Regional Health Centers, Inc., 800 F.2d 199, 204 (8th Cir. 1986). Some courts have allowed limited discovery of unconstitutional motive. E.g., Harris v. Eichbaum, 642 F. Supp. 1056, 1065 (D. Md. 1986).

(vi) The defense of qualified immunity in a military context is illustrated in Metlin v. Palastra:

METLIN v. PALASTRA
729 F.2d 353 (5th Cir. 1984)

Before WISDOM, REAVLEY and HIGGINBOTHAM, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

An Army officer appeals from the denial of summary judgment in a suit by the owners of two businesses declared off-limits to Army personnel by an Armed Forces Disciplinary Control Board of which the officer was president. After finding appellate jurisdiction over the denial of the officer's claim of absolute immunity, we exercise pendent jurisdiction over his qualified immunity claim and conclude that the Army officer is entitled to qualified immunity as a matter of law.

I

According to the summary judgment evidence, on January 13, 1981, some Leesville teenagers burglarized the home of Lieutenant Colonel Brown, Assistant Provost Marshall at Fort Polk. Some of the stolen property turned up at Metlin's pawnshop. Metlin was arrested for receiving stolen property and other charges, but the charges were later dropped. Brown's superior at Fort Polk was the defendant, Colonel Charles Herrera. Herrera was Provost Marshall and the president of the Local Board of the Armed Forces Disciplinary Control Board. Among other duties, the Local Board is empowered by Army regulations to recommend establishments and areas to be placed on or removed from off-limits restrictions; off-limits decisions, however, are made by the local commander as a "function of command".

After learning of Metlin's arrest, Herrera talked to the commanding officer,

General Palastra, who indicated that "emergency" action would be appropriate but did not take any immediate action to place the pawnshop off-limits. About two weeks later, on February 12, the Board met and voted to put the pawnshop off-limits. Palastra approved this recommendation. On March 4, Metlin received notice of this action. It was the first notice he had received that the Army was considering such action, although the regulations arguably provide that notice should be given before action is taken in "routine" cases. In response to letters from Metlin's attorney, Herrera indicated that he would investigate the situation and invited Metlin to appear at the next Local Board meeting. According to the plaintiffs, Herrera later indicated that an appearance was unnecessary, and Metlin did not appear. Although Herrera was informed that all charges against Metlin had been dropped, the Local Board voted to continue the off-limits designation at its May 14 meeting, and Palastra approved the recommendation.

At the May 14 meeting the Local Board, in response to a Defense Department directive discouraging military contact with drug paraphernalia, also voted to place Carson's record store off-limits because he was selling paraphernalia. Carson received no notice until June 11, although another record store, owned by a brother of one of Herrera's employees, did receive advance notice that the Local Board was considering such action.

Metlin and Carson filed separate lawsuits on July 16 against Palastra, Herrera, the United States, the Secretary of the Army, and the Local Board, seeking injunctive relief and damages for violations of their due process rights and armed forces regulations. On August 6, they were represented by an attorney at the Local Board meeting; the Board voted to recommend removal of the restrictions from the pawnshop, but not the record store. The new commanding officer, General Peter, approved this recommendation. Some months later the restrictions were lifted from the record store as well, after the sale of paraphernalia was discontinued.

The district court consolidated the cases, denied the request for injunctive relief as moot, and dismissed the actions

against the United States, the Local Board, and the Secretary of the Army; the court later stayed proceedings against General Palastra under the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C.App. §§ 521 and 524, because Palastra had been stationed out of the country. The court denied motions to dismiss the actions against Palastra and Herrera. After substantial discovery, Herrera filed a new motion to dismiss or for summary judgment on the ground of absolute or qualified immunity. The court denied the motion without opinion on March 14, 1983, and Herrera appealed.

II

[The court held the district court's denial of immunity was appealable.]

III

Colonel Herrera argues that he is entitled to absolute immunity or, in the alternative, qualified immunity from constitutional and common law damages. Finally, he denies that plaintiffs have been deprived of any constitutional right. We are uncertain whether plaintiffs seek to recover for any common law tort. Our uncertainty need not detain us because Colonel Herrera indisputably is immune from common law tort liability. He was at all times acting at least within the "outer perimeter" of his line of duty. Barr v. Matteo, 360 U.S. 564, 79 S. Ct. 1335, 3 L.Ed.2d 1434 (1959).

Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L.Ed.2d 396 (1982) permits liability for damages stemming from an asserted constitutional deprivation only when the "law was clearly established at the time an action occurred." Id., 102 S. Ct. at 2739. As we have made plain, "[t]he focus is on the objective legal reasonableness of an official's acts. Unless the . . . plaintiff can establish that the defendant officials have violated clearly established law, the claim for damages must be dismissed." Sampson v. King, 693 F.2d 566, 570 (5th Cir. 1982).

It is by no means certain that plaintiffs' expectation of patronage from

servicemen stationed nearby is a protectable property interest.

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Board of Regents v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). Plaintiffs suggest that the provisions of the applicable Army regulations providing the procedures for an off-limits declaration create the requisite property interest. By the terms of the regulations, however, the final off-limits decision belongs to the commander. It is at least uncertain whether the regulations place "substantive limitations on official discretion." Olim v. Wakinekona, _____ U.S. ____, _____, 103 S. Ct. 1741, 1747, 75 L.Ed.2d 813 (1983). As recently noted by the Supreme Court, "[t]he [government] may choose to require procedures for reasons other than protection against deprivation of substantive rights, . . . [and] in making that choice the [government] does not create an independent substantive right." Id.

Nor can we say with any certainty that plaintiffs have identified a protected liberty interest. "[R]eputation alone, apart from some more tangible interests such as employment, is [not] 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." Paul v. Davis, 424 U.S. 693, 701, 96 S. Ct. 1155, 1160, 47 L.Ed.2d 405 (1976).

Moreover, even if we were to identify with certainty some property or liberty interest, whether the process then due was not accorded is far from certain. Plaintiffs received notice and an opportunity to appear at a hearing after the initial decision to place their businesses off-limits. It is at least unclear whether such post-deprivation procedures were here adequate. See Parratt v. Taylor, 451 U.S. 527, 538-39, 101 S. Ct. 1908, 1914-15, 68 L.Ed.2d 420 (1981).

Colonel Herrera was entitled to qualified immunity as a matter of law. The district court erred in denying his motion for summary

judgment. The case is remanded with instructions to enter judgment in favor of Colonel Herrera on plaintiffs' claims against him.

REVERSED AND REMANDED.

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(b) Exception to the General Rule: Executive Branch Officials Performing Special Functions.

(i) General. As indicated above, "[f]or executive officers in general, . . . qualified immunity represents the norm."[317] Under some exceptional circumstances, however, the federal courts will afford executive branch officials an absolute immunity from suit. Executive officials may receive an absolute immunity from suit when they are performing "special functions that require a full exemption from liability,"[318] or when they have a unique constitutional status that mandates complete protection from suit.[319] In determining whether a public official should have an absolute immunity from suit, courts consider three factors: "(1) whether a historical or common law basis exists for immunity from suit arising out of the performance of the function; (2) whether performance of the function poses obvious risks of harassing or vexatious litigation against the official; and (3) whether there exist alternatives to damage suits against the official as a means of redressing wrongful

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[317]Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982).

[318]Butz v. Economou, 438 U.S. 478, 508 (1978).

[319]Nixon v. Fitzgerald, 457 U.S. 731 (1982).

conduct."[320] As a general rule, the courts will focus on the particular role or duty the defendant was performing that gave rise to the suit and determine whether that role or duty is comparable to a governmental function that has traditionally received absolute protection from suit.[321] Public officials asserting an absolute immunity from suit for constitutional torts "bear the burden of showing that public policy requires an exemption of that scope."[322]

(ii) Examples.

(A) The President and Other High Executive Branch Officials. In Nixon v. Fitzgerald,[323] the Supreme Court held that the President of the United States occupies such a unique position in the constitutional scheme as to require an absolute immunity from damages liability predicated on official acts. The Court has refused, however, to extend absolute immunity to close presidential aides,[324] or to cabinet level officers,[325] even when they are performing duties closely linked to national security.[326]

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[320]Barrett v. United States, 798 F.2d 565, 571 (2d Cir. 1986), citing Mitchell v. Forsyth, 472 U.S. 511, 521-23 (1985).

[321]Butz v. Economou, 438 U.S. 478, 513-17 (1978); Manion v. Michigan Bd. of Medicine, 765 F.2d 590, 593 (6th Cir. 1985).

[322]Butz v. Economou, 438 U.S. 478, 506 (1978).

[323]457 U.S. 731 (1982).

[324]Harlow v. Fitzgerald, 457 U.S. 800 (1982).

[325]Butz v. Economou, 438 U.S. 478 (1978).

[326]Mitchell v. Forsyth, 471 U.S. 511 (1985).

(B) Quasi-Judicial and Quasi-Prosecutorial Acts. Courts most commonly afford absolute immunity to executive branch officials who are performing duties analogous to those of judges and prosecutors--i.e., for quasi-judicial and quasi-prosecutorial acts.[327] The Supreme Court has reasoned that the policies supporting the absolute immunity of judges and prosecutors apply with equal force to officials performing similar roles in the executive branch.[328] The Supreme Court has listed six factors characteristic of the judicial process that are to be considered in determining whether a function is sufficiently judicial in character to be afforded absolute immunity:

> (a) the need to assure that the individual can perform his function without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal.[329]

Applying these factors, the federal courts have given absolute immunity from suit to administrative law judges,[330] government counsel who initiate or pursue

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[327]See Butz v. Economou, 438 U.S. 478, 511-17 (1978).

[328]Id.

[329]Cleavinger v. Saxner, 474 U.S. 193, 198 (1985).

[330]Butz v. Economou, 438 U.S. 478, 514 (1978); Chocallo v. Bureau of Hearings & Appeals, 548 F. Supp. 1349, 1365-
(continued...)

administrative proceedings,[331] members of parole boards who deny or revoke parole,[332] probation officers preparing presentencing reports,[333] court clerks who perform judicial functions,[334] state officials who adjudicate extradition requests,[335] and members of state boards of bar examiners who make decisions on admissions.[336] On the other hand, the courts have denied absolute immunity to

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[330](...continued)
66 (E.D. Pa. 1982), aff'd, 716 F.2d 889 (3d Cir.), cert. denied, 464 U.S. 983 (1983).

[331]Butz v. Economou, 438 U.S. 478, 515 (1978); Demery v. Kupperman, 735 F.2d 1139 (9th Cir. 1984), cert. denied, 469 U.S. 1127 (1985); accord Walden v. Wishengrad, 745 F.2d 149 (2d Cir. 1984) (attorney who initiates and prosecutes child protection cases).

[332]Harper v. Jeffries, 808 F.2d 281, 284 (3d Cir. 1986); Hilliard v. Board of Pardons & Paroles, 759 F.2d 1190 (5th Cir. 1985); Trotter v. Klincar, 748 F.2d 1177 (7th Cir. 1984); Sellars v. Procunier, 641 F.2d 1295 (9th Cir.), cert. denied, 454 U.S. 1102 (1981).

[333]Dorman v. Higgins, 821 F.2d 133, 137 (2d Cir. 1987); Demoran v. Witt, 781 F.2d 155 (9th Cir. 1986); Crosby-Bey v. Jansson, 586 F. Supp. 96 (D.D.C. 1984); but cf. Ray v. Pickett, 734 F.2d 370 (9th Cir. 1984) (probation officer only gets qualified immunity for report to secure arrest warrant for a parole violator).

[334]Eades v. Sterlinske, 810 F.2d 723, 726 (7th Cir. 1987); cert. denied, 484 U.S. 847 (1987); Sharma v. Stevas, 790 F.2d 1486 (9th Cir. 1986); McCaw v. Winter, 745 F.2d 533 (8th Cir. 1984); but cf. Lowe v. Letsinger, 772 F.2d 308, 313 (7th Cir. 1985) (court clerk gets only qualified immunity for ministerial functions).

[335]Arebaugh v. Dalton, 600 F. Supp. 1345 (E.D. Va. 1985).

[336]Sparks v. Character & Fitness Comm. of Ky., 818 F.2d 541 (6th Cir. 1987); Rosenfield v. Clark, 586 F. Supp. 1332 (D. Vt. 1984), aff'd, 760 F.2d 253 (1st Cir. 1985); but see Manion v. Michigan Bd. of Medicine, 765 F.2d 590 (6th Cir. 1985) (medical licensing board); Powell v. Nigro, 601 F. Supp. 144 (D.D.C. 1985) (bar examiners).

members of prison disciplinary committees,[337] and to police officers seeking search and arrest warrants from judges.[338] Attorneys defending military officials should assert absolute immunity for quasi-judicial and quasi-prosecutorial acts when suits arise from such adjudicative activities as administrative discharge proceedings, nonjudicial punishment, and armed forces disciplinary control board determinations.

(C) Other Executive Branch Officials. The lower federal courts have held that public officials rendering employee performance evaluations and officials making medical fitness determinations for the Human Reliability Program--which controls access to nuclear weapons--are performing special functions requiring an absolute immunity from suit.[339]

(c) Feres-Based Immunity in Constitutional Tort Litigation. Until June 1983, government attorneys argued that Feres-based intra-service immunity should absolutely protect military officials from suit by servicemembers for constitutional wrongs suffered incident to military service. Most federal courts agreed and held that military officials were absolutely immune from constitutional tort claims brought by servicemembers based on the doctrine of

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[337]Cleavinger v. Saxner, 474 U.S. 193 (1985).

[338]Malley v. Briggs, 475 U.S. 335 (1986).

[339]Lawrence v. Acree, 665 F.2d 1319 (D.C. Cir. 1981); Tigue v. Swaim, 585 F.2d 909 (8th Cir. 1978).

intra-service immunity.[340] In 1983, however, in Chappell v. Wallace,[341] the Supreme Court did not decide the question of whether Feres-based intra-service immunity barred such suits. Instead, the Court held that because such suits would impair military discipline, there were special factors counseling hesitation against permitting constitutional tort suits by military personnel against their superior officers.[342] In other words, the Court found that concerns for military discipline militated against the judicial creation of a cause of action under the Constitution for injuries arising incident to military service.

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[340]See, e.g., Calhoun v. United, 604 F.2d 647 (9th Cir. 1979), aff'g 475 F. Supp. 1 (S.D. Cal. 1977), cert. denied, 440 U.S. 1078 (1980); Rotko v. Abrams, 455 F.2d 992 (2d Cir. 1972), aff'g 338 F. Supp. 46 (D. Conn. 1971); Sigler v. LeVan, 485 F. Supp. 185 (D. Md. 1980); Thornwell v. United States, 471 F. Supp. 344 (D.D.C. 1979); Nagy v. United States, 471 F. Supp. 383 (D.D.C. 1979); Birdwell v. Schlesinger, 403 F. Supp. 710 (D. Colo. 1975). But see Wallace v. Chappell, 661 F.2d 729 (9th Cir. 1981), rev'd, 462 U.S. 269 (1983); Tigue v. Swaim, 585 F.2d 909 (8th Cir. 1978); Alvarez v. Wilson, 431 F. Supp. 136 (N.D. Ill. 1977).

[341]462 U.S. 296 (1983).

[342]See supra notes 120-131 and accompanying text.

# CHAPTER 10

# JUDGMENTS, COSTS, AND FEES

## 10.1 Introduction.

The maxim "you can't win 'em all" applies with equal force to defending the United States in litigation as it does to the rest of life's endeavors. Some cases are lost in either the trial or appellate courtroom and the resulting judgment must be satisfied. Others are settled prior to trial or final judgment and the settlement agreement calls for the United States to pay the plaintiff a sum of money. Win or lose, the issue of what litigation costs and expenses are payable or recoverable is also an important one for the Federal litigator. This chapter highlights the procedures for satisfying money judgments or settlements on behalf of the United States and reviews the law governing the award of costs and attorneys fees.[1]

## 10.2 Judgments and Settlements.

### a. Judgments Against the United States.

Absent some specific statutory provision to the contrary, agency salary and operations appropriations are

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[1]The General Accounting Office (GAO) is ultimately responsible for approving payments of civil judgments against the United States. For a detailed treatment of Federal appropriations in general and the payment of judgments entered against the United States in particular, see Principles of Federal Appropriations Law, 1st ed. (June 1982), published by the Office of the General Counsel, United States General Accounting Office.

generally not available to satisfy judgments. In fact, prior to 1956, judgments entered against the United States were paid only after Congress passed a specific appropriation. Thus, a litigant could find himself with a valid judgment against the United States but no source of funds to legally satisfy the judgment. Congress changed the rule in 1956 and established a permanent appropriation, commonly know as the "judgment fund," to pay judgments and settlements rendered against the United States.[2] The permanent appropriation statute provides, in part, as follows:

> (a) Necessary amounts are appropriated to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law when-
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> (1) payment is not otherwise provided for;
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> (2) payment is certified by the Comptroller General; and
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> (3) the judgment, award, or settlement is payable-
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> (A) under section 2414, 2517, 2672, or 2677 of title 28;
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> (B) under section 3723 of this title;
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> (C) under a decision of a board of contract appeals; or
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> (D) in excess of an amount payable from the appropriations of an agency for a meritorious claim under section 2733 or 2734 of title 10, section 715 of title 32, or section 203 of the National

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[2]31 U.S.C. § 1304 (1995). See, e.g., 15 Comp. Gen. 933 (1936); 5 Comp. Gen. 203 (1925); 1 Comp. Gen. 540 (1922). See also 60 Comp. Gen. 375 (1981) (agency salary appropriations are used where the agency is required to promote an employee and pay him or her at a higher grade). For a discussion of the history of the judgment fund, see Principles of Federal Appropriations Law, supra note 1, at 12-3 - 12-6.

Aeronautics and Space Act of 1958 (42 U.S.C. § 2473).[3]

The statute sets several criteria for payment of judgments, awards, or settlements. First, the permanent appropriation is only used when "payment is not otherwise provided for."[4] Two examples that arise frequently in the military departments where the judgment fund is not available are administrative settlements under the Federal Tort Claims Act (FTCA) for $2,500 or less[5] and settlements under the Military Claims Act for $100,000 or less.[6] In both of these instances the statutes specifically require the use of appropriations available to the agency. If an FTCA claim is settled administratively for more than $2,500, the entire amount is payable from the judgment fund.[7] Under the Military Claims Act, on the other hand, the judgment fund pays only the amount that exceeds $100,000; agency appropriations must satisfy the initial $100,000.[8] The Equal Access to Justice Act[9] also requires agency appropriations to be used for certain fee awards.[10]

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[3]31 U.S.C. § 1304(a) (1995). The judgment fund is the source of money for the payment of compromise settlements as well as judgments entered by court decisions.

[4]Id. § 1304(a)(1).

[5]28 U.S.C. § 2672 (1995).

[6]10 U.S.C. § 2733(d) (1995).

[7]28 U.S.C. § 2672 (1995).

[8]10 U.S.C. § 2733(d) (1995); 31 U.S.C. § 1304(a)(3)(D) (1995).

[9]5 U.S.C. § 504 (1995); 28 U.S.C. § 2412 (1995).

[10]See infra § 10.4(b).

The second criteria for payment from the judgment fund is "certification" by the General Accounting Office (GAO). This is essentially a ministerial task and does not involve review of the case on the merits.[11] The procedures differ slightly, depending on the court that entered the judgment. For judgments entered by the district courts, the Justice Department sends GAO a certified copy of the judgment and any related orders along with a transmittal letter that identifies the type of case and agency involved and states that the judgment is final and no further appellate review will be sought. The transmittal letter also specifies the payee of the check and directs return of the check through the appropriate Department of Justice attorney for delivery to the plaintiff. The GAO then determines if there is any setoff, indebtedness, or other deduction due the United States, and sends a "Certificate of Settlement" to the Treasury Department. The Treasury Department prepares the check and mails it back to the Department of Justice attorney who then delivers the check to the plaintiff and obtains any appropriate releases.

For judgments of the Court of Federal Claims, both the Department of Justice and the plaintiff are involved in requesting payment. The Department of Justice merely notifies GAO that the judgment is final and no further review will be sought. The plaintiff must send GAO a copy of the judgment and request payment. The GAO then certifies the judgment for payment and the Treasury Department issues the check and mails it according to

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[11]See Principles of Federal Appropriations Law, supra note 1, at 12-29 - 12-33.

the instructions in the plaintiff's letter requesting payment.

The last criteria is that the judgment, award, or compromise settlement must be "final." A "final decision" for appealing an adverse ruling under 28 U.S.C. § 1291 and a "final judgment" for purposes of paying a judgment are not the same. For purposes of appellate jurisdiction "[a] 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[12] With certain exceptions, only final judgments are appealable.[13] The fact that the "final decision" is subject to appeal means that it could change, and an order imposing liability could be reversed. Obviously, payment of a "final judgment" in that context is not what is meant by a "final judgment" for purposes of 31 U.S.C. § 1304. Judgments against the United States are not paid until the litigation is over. This may mean after review by the Supreme Court, after a decision by an appellate court, or even after the initial decision by the trial court. The idea behind the finality requirement is to prevent the premature payment of funds from the public fisc. Thus, a "final judgment" for payment purposes is a judgment that is "conclusive by reason of loss of the right of appeal -- by expiration of time or otherwise -- or by determination of the appeal by the court of last

[12]Catlin v. United States, 324 U.S. 229, 233 (1945).

[13]See supra § 9.3e for a discussion of the collateral order doctrine and its applicability to interlocutory orders denying claims of official immunity.

resort."[14] Once the Attorney General determines that the United States will not appeal an adverse decision or will seek no further review, the judgment is "final" and payable even though the time for filing a notice of appeal has not expired.[15]

Examples of judgments paid from the judgment fund include court-ordered back pay awards resulting from federal discriminatory job practices,[16] front pay awards in the form of damage awards,[17] and civil damage penalties or fines entered against agencies by court orders or settlement agreements.[18]

b. Judgments Against Individual Defendants.

Federal employees sued in their individual capacities are generally personally responsible for judgments entered against them. However, a few exceptions to the rule exist. Where the individual is merely a nominal defendant, the judgment fund is the proper source of funds for payment.[19] Agency salary

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[14]Principles of Federal Appropriations Law, supra note 1, at 12-25 (quoting Comp. Gen. Dec. B-129227 (22 Dec. 1980)).

[15]Id. at 12-25.

[16]60 Comp. Gen 375 (1981); 58 Comp. Gen. 311 (1979).

[17]60 Comp. Gen. 375 (1981).

[18]58 Comp. Gen. 667 (1979).

[19]58 Comp. Gen. 311 (1979)(judgment fund is the source for judgments against nominal official defendant, e.g. Employment discrimination actions). See Richerson v. Jones, 551 F.2d 918, 925 (3d Cir. 1977) (U.S. is real party defendant in Equal Employment Opportunity Act suit even though Act requires that the supervisor be used as the named defendant).

appropriations are another source from which the individual could satisfy personal judgments in some circumstances. They may be used, for example, to satisfy contempt fines incurred without negligence and in compliance with departmental regulations[20] or to reimburse an employee, if authorized by Congress, when a suit against an employee is based upon his official acts performed in the discharge of an official duty.[21]

c. Interest on Judgments.[22]

Payment is normally due when the court enters its final judgment and interest begins to accrue at that point based on Treasury Bill rates.[23] Judgments against the United States, however, are an exception. Interest on a judgment against the United States is recoverable only if the United States appeals and the district

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[20]44 Comp. Gen. 312 (1964).

[21]56 Comp. Gen. 615, 618 (1971); see Dec. Comp. Gen. B-176229 (Oct. 5, 1972), aff'd, B-176229 (May 1, 1973) (stating the rule but precluding reimbursement for Bureau of Indian Affairs employee); Dec. Comp. Gen. B-182219 (Oct. 3, 1974) (denying reimbursement to state Adjutant General sued by technician).

[22]This section applies to post-judgment interest. With respect to pre-judgment interest, the traditional "no interest rule" (i.e., the United States is not liable for prejudgment interest absent a clear and specific waiver of sovereign immunity) applies. See Library of Congress v. Shaw, 478 U.S. 310, 314 (1986). Congress has, in certain instances, waived the sovereign immunity of the United States for the payment of prejudgment interest. See, e.g., 5 U.S.C. § 5596(b)(2) (back pay to civilian employees subjected to unjustified or unwarranted personnel actions is payable with interest).

[23]28 U.S.C. § 1961 (1995).

court's judgment is affirmed.[24] In that situation, interest is payable from the date of filing of the judgment with GAO to the day before the court of appeals issues its mandate of affirmance.[25] The party seeking to recover the interest must file the judgment with the GAO.[26] Interest will not begin to accrue before the judgment is filed.

Interest on judgments entered by the United States Court of Federal Claims has an additional wrinkle. Under 28 U.S.C. § 2516(a), interest on Court of Federal Claims judgments is only payable if the contract that was sued on or an act of Congress specifically provides for interest. Assuming a contractual or statutory entitlement to interest, the unsuccessful appeal rule applies.[27] As with district court judgments, the plaintiff must file a copy of the judgment with GAO and interest accrues only from the date of filing through the day before the mandate of affirmance.[28]

## 10.3 Costs

a. General.

In addition to the money necessary to satisfy a judgment on the merits, the United States may also be responsible for the "taxable" costs incurred by the

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[24]31 U.S.C. § 1304(b) (1995).

[25]Id. § 1304(b)(1)(A) (1995).

[26]Rooney v. United States, 694 F.2d 582 (9th Cir. 1982).

[27]31 U.S.C. § 1304(b)(1)(B) (1995).

[28]Id.

prevailing party in the litigation.[29] The party seeking costs must "prevail;" no authority exist to award costs to a nonprevailing party.[30]

Recoverable costs include: (1) clerk and marshall fees, (2) court reporter fees for transcripts, (3) printing and witness fees, (4) fees for exemplification and necessary copies, (5) docket fees under 28 U.S.C. § 1923, and (6) compensation for court appointed interpreters.[31] Although the sovereign immunity of the United States would normally protect it from taxable costs, 28 U.S.C. § 2412(a) waives such immunity by stating:

> Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title...may be awarded to the prevailing party in any civil action brought by or against the United States or any agency and any official of the United States acting in his or her official capacity in any court having jurisdiction of such action.

Although the federal rules create a heavy presumption in favor of the prevailing party recovering

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[29]Fed. R. Civ. P. 54(d). For a thorough discussion of the recovery of costs and expenses in federal litigation, see Bartell, Taxation of Costs and Awards of Expenses in Federal Court, 101 F.R.D. 553 (1984). See also Delta Airlines, Inc. v. August, 450 U.S. 346 (1981) (prevailing parties presumptively entitled to costs under Fed. R. Civ. P. 54(d)).

[30]Worsham v. United States, 828 F.2d 1525, 1527 (11th Cir. 1987).

[31]28 U.S.C. § 1920 (1995). See also 28 U.S.C. § 1911 (1995) (clerk fees for Supreme Court); 28 U.S.C. § 1913 (1995) (clerk fees for Court of Appeals); 28 U.S.C. § 1931 (1995) (clerk fees for district courts); 28 U.S.C. § 1921 (1995) (marshall fees).

costs,[32] the court, in its discretion, can deny costs to the prevailing party. The court must, however, explain the reason for the denial of costs to the prevailing party.[33] Indigence and good faith of the losing party,[34] misconduct or bad faith by the prevailing party,[35] and absence of a clear victor[36] are all reasons for denying costs to the prevailing party. Appellate courts review a trial court's cost award decision under an abuse of discretion standard.[37]

b. Allowable Costs.

The costs listed in 28 U.S.C. § 1920 are, for the most part, unambiguous. Allowing a party costs for clerk fees, docket fees, and interpreter compensation is uncontroversial. The recovery of fees for transcripts prepared by court reporters, printing and witness fees,

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[32]Sun Ship, Inc. v. Lehman, 655 F.2d 1311, 1314 (D.C. Cir. 1981).

[33]See e.g., Connell v. Sears, Roebuck & Co., 722 F.2d 1542, 1553 (Fed. Cir. 1983).

[34]See e.g., United States v. Bexar County, 89 F.R.D. 391 (W.D. Tex. 1981) (costs not taxed to indigent plaintiffs when suit was neither frivolous nor brought in bad faith); Schaulis V. CTB/McGraw-Hill, Inc., 496 F. Supp. 666 (N.D. Cal. 1980) (costs of $1,400 denied when plaintiff was indigent and brought suit in good faith).

[35]Wilkerson v. Johnson, 669 F.2d 325, 330 (6th Cir. 1983) (costs denied when counsel for prevailing party failed to file brief or appear at oral argument).

[36]Johnson v. Nordstrom-Larpenteur Agency, Inc., 623 F.2d 1279 (8th Cir.), cert. denied, 449 U.S. 1042 (1980) (each party prevailed on one or more issues).

[37]United States Marshals Service v. Means, 724 F.2d 624, 648 (8th Cir. 1983).

and fees for exemplification and copies, however, have been the subject of litigation.

Trial and deposition transcript costs are recoverable only when the transcripts are "necessarily obtained for use in the case."[38] This is a factual determination made by the court.[39] Because courts have broad discretion in taxing costs, the appellate courts are reluctant to second guess the determination of whether a particular deposition or trial transcript was "necessary" for use in the case.[40] While some courts deny costs of discovery depositions taken purely for investigation or preparation purposes and not used as evidence,[41] the real inquiry is whether the deposition was "necessary" for proper handling of the case at the time it was taken. The trend seems to be that some amount of pure discovery is "necessary" and recovery of those costs should be determined on a case-by-case basis.[42] An extra step is required to recover the cost of daily transcripts. Parties may recoup them only with

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[38]28 U.S.C. § 1920(2) (1995).

[39]Allen v. United States Steel Corp., 665 F.2d 689, 697 (5th Cir. 1982).

[40]See 6 James W. Moore, et al., Moore's Federal Practice ¶ 54.77[4] (2d ed. 1985).

[41]See, e.g., Hudson v. Nabisco Brands, Inc., 758 F.2d 1237 (7th Cir. 1985). Compare Hill v. BASF Wyandotte Corp., 547 F. Supp. 348, 351 (E.D. Mich. 1982) (discovery deposition costs not taxable) with Independence Tube Corp. v. Copperweld Corp., 543 F. Supp. 706, 717 (N.D. Ill. 1982) (discovery deposition costs taxable).

[42]Moore et al., supra note 40, ¶ 54.77[4].

prior court approval where the copies are necessary for the court as well as the requesting counsel.[43]

Copying costs are treated like transcript costs; they must be obtained for use in a case before the costs can be recovered.[44] The production of demonstrative evidence is considered necessary only in complex or unusual cases. Prior approval of the court to incur costs for production of demonstrative evidence may be necessary to guarantee reimbursement.[45]

Finally, the court may require the losing party to pay witness fees. Daily witness fees are usually $40/day and witness travel expenses are equivalent to those allowed federal employees on TDY.[46] Expert fees above these limits are not recoverable under 28 U.S.C. § 1920.[47] Although a party is not normally considered a

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[43]In re Air Crash at John F. Kennedy Int'l Airport on June 24, 1975, 687 F.2d 626 (2d Cir. 1982).

[44]28 U.S.C. § 1920(4) (1995). See also Fogelman v. ARAMCO, 920 F.2d 278 (5th Cir. 1991).

[45]See, e.g., Rogal v. American Broadcasting Cos., No. 89-5235, 1994 WL 268250 (E.D. Pa. June 15, 1994) (courts allow taxation of copying costs for discovery materials, pleadings, deposition transcripts, trial transcripts, and exhibits); Studiengesellschaft Kohle v. Eastman Kodak, 713 F.2d 128, 132-133 (5th Cir. 1983) (cost of preparation of models, charts, and photographs disallowed without prior approval of court).

[46]28 U.S.C. § 1821 (1995).

[47]Crawford Fitting Co. v. J.T. Gibbons, 482 U.S. 437 (1987); Henkel v. Chicago, St. Paul, Minneapolis & Omaha Railway, 284 U.S. 444 (1932). Though precluded by 28 U.S.C. § 1920, a party may recover expert witness fees and other expenses under the Equal Access to Justice Act or other fee shifting statute. See infra § 10.3.

witness,[48] employees of a corporate party that testify are considered witnesses and their fees are therefore recoverable.[49]

c. Procedure for Obtaining Costs.

To recover costs, the prevailing party must file a bill of costs with the clerk of court within the time allotted by local rules.[50] The clerk can award costs with only one day's notice[51] if the bill of costs is verified by an affidavit from the successful party.[52] Objections to a clerk's award of costs must be made to the court within 5 days.[53]

## 10.4 Attorney Fees and Other Expenses.

a. General.

Traditionally, each party pays his own expenditures incurred during litigation beyond "taxable costs." The traditional "American Rule" precludes awarding attorney fees to a prevailing party absent

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[48]Heverly v. Lewis, 99 F.R.D. 135, 136 (D. Nev. 1983).

[49]Ingersoll Milling Machine Co. v. Otis Elevator Co., 89 F.R.D. 433 (N.D. Ill. 1981).

[50]File form AO 133 or an itemized list of allowable items.

[51]Fed. R. Civ. P. 54(d).

[52]28 U.S.C. § 1924 (1995); Wahl v. Carrier Manufacturing Co., 511 F.2d 209 (7th Cir. 1975).

[53]Fed. R. Civ. P. 54(d).

statutory authority.[54] Although it is common practice in England, our courts have held that such awards would effectively discourage the underprivileged from ever going to court.[55]

Exceptions to this rule have developed to accommodate instances where overriding considerations of justice call for such awards. Prior to the Supreme Court's decision in Alyeska Pipeline Service Company v. Wilderness Society,[56] litigants enforcing rights important to society could recover attorney fees from their opponents under a private attorney general theory.[57] In Alyeska, however, the Court held that environmentalists who had successfully barred the construction of an oil pipeline because it violated the Mineral Leasing Act were not entitled to attorney fees because the court lacked the statutory, contractual, or equitable power to grant such relief.[58] The Court's rejection of this method--through which less powerful litigants could challenge the activities of the powerful--acted as a catalyst for the enactment of the Equal Access to Justice Act (EAJA).[59]

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[54]Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967).

[55]Id. at 718.

[56]421 U.S. 240 (1975).

[57]Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939); Mills v. Electric Auto-Lite Co., 396 U.S. 375, (1970); Hall v. Cole, 412 U.S. 1 (1973).

[58]Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975).

[59]See infra § 10.3b.

Two common law exceptions to the "American Rule" exist. First, litigants who recover or maintain a common fund for a non-litigating class may have their attorney fees paid by the fund.[60] In Kargman v. Sullivan,[61] after determining that a landlord's rent increases were in violation of Boston rent control laws, the First Circuit awarded a tenant his attorney fees from an escrow account into which the court had ordered the landlord to pay the increased rent during the pendency of the litigation. The court reasoned that to have held the tenant personally liable would have been unfair because he was, in essence, representing all of the tenants. The court stated as follows:

> These cases make it clear that the federal court may award fees where the legal efforts of the parties seeking the award ultimately benefit everyone with an interest in a fund under court control. The rationale is to prevent the entire cost of legal representation from falling on the few who press the claims of many. These principles apply here, where there is a substantial court-controlled fund that will soon be returned to certain tenants. Although [the litigants] were individual tenants formally acting on behalf of themselves and not as class representatives, their interests were identical to those of most, if not all, of the tenants in the Kargmans' federally-subsidized housing. Thus the district court, in making the award, found that [the attorneys] work has

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[60]Trustee v. Greennough, 105 U.S. 527 (1882); Central R.R. & Banking Co. v. Pettus, 113 U.S. 116 (1885); United States v. Equitable Trust Co., 283 U.S. 738 (1931); Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939); Mills v. Electric Auto Lite Co., 396 U.S. 375 (1970); Hall v. Cole, 412 U.S. 1 (1973). See generally Dawson, Lawyers and Involuntary Clients: Attorney Fees From Funds, 87 Harv. L. Rev. 1597 (1974).

[61]589 F.2d 63 (1st Cir. 1978)

> largely resulted in the ultimate triumph to the defendant-intervenors . . . ." Having reviewed this case on several occasions, we too accept the importance of the work of [the attorneys] in securing a result that will benefit all of the Kargman tenants, not just those that they formally represented.[62]

Another common law exception to the "American Rule" exists where the unsuccessful party is found to have engaged in bad-faith litigation.[63] In Masalosola v. Stonewall Insurance Company,[64] the plaintiff's attorney was liable for the defendant's legal fees because the insurance company's settlement practice challenged by the plaintiff was clearly not a violation of the law. Here again, principles of fairness support the court's award of fees to the prevailing party. Fee shifting based on such equitable principles is also often codified.[65]

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[62]Id.

[63]Roadway Express Inc. v. Piper, 447 U.S. 752, 765-66 (1980).

[64]718 F.2d 955 (1983).

[65]Civil Rights Attorneys Fee Act, 42 U.S.C. § 1988 (1995). Freedom of Information Act 5 U.S.C. § 552(a)(4)(E) (1995); Privacy Act, 5 U.S.C. § 552(a)(g)(2)(B) (1995). See also Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968) ("Congress enacted [within that portion of Title II of the Civil Rights Act dealing with civil actions for preventative relief] the provisions for counsel fees not simply to penalize litigants who advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief"); Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980).

b. Equal Access to Justice Act (EAJA).

The "American Rule" and the Supreme Court's rejection of a major exception to it in Alyeska Pipeline Service Company v. Wilderness Society created conditions that Congress believed effectively barred legitimate suits due to prohibitive litigation costs. Congress was especially concerned that questionable governmental activities might go unchallenged. Prior to October 1, 1981, a party prevailing against the United States could collect only "taxable costs." This hardly dented the mammoth litigation costs usually incurred when suing the government. Congress passed the EAJA[66] to ease the expense burden on litigants of relatively limited means when engaged in litigation with the United States.

The EAJA allows prevailing parties to recover fees and expenses above "taxable costs" under three circumstances. First, the Act requires the United States to pay the reasonable attorney fees of its successful opponent where common law or a statute would require similar payments from a private party.[67] Second, courts can award a prevailing party its fees and other expenses in excess of taxable costs, including expert witness fees, cost of studies, and attorney's fees where the United States' position was not "substantially justified" and no special circumstances make the award unjust.[68] Finally, when a party prevails in an administrative adversary adjudication, the EAJA requires

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[66]Pub. L. No. 96-481, §§ 201-208, 94 Stat. 2321, 2325-2330, codified at 28 U.S.C. § 2412 (1980)).

[67]28 U.S.C. § 2412(b) (1996).

[68]Id. § 2412(d) (1996).

the agency to award fees and expenses where the United States' position was not "substantially justified" and no special circumstances make the award unjust.[69] All three opportunities to recover expenditures are available on filing an application for fees within thirty days of the final judgment.

(1) 28 U.S.C. § 2412(b).

Title 28 U.S.C. § 2412(b) does not create a new entitlement or cause of action; it merely waives the United States sovereign immunity and subjects it to the existing exceptions to the "American Rule" found in the common law and in statutes.[70] The Eleventh Circuit has recognized an additional requirement before a fee shifting statute can apply to the United States. The court held in Joe v. United States[71] that any statutory exception must be a federal statute because the House Report accompanying the EAJA stated that the United States would only pay attorney fees in accordance with "federal statutory exceptions" to the "American Rule."

Fees awarded under § 2412(b) are paid from the judgment fund unless the court finds that the United States acted in bad faith. If bad faith is the basis of the fee award, payment comes from the agency's appropriations.[72]

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[69]5 U.S.C. § 504 (1996).

[70]See supra § 10.3a.

[71]772 F.2d 1535, 1537 (11th Cir. 1985) (interpreting H. Rep. No. 1418, 96th Cong., 2d Sess. 17, reprinted in 1980 U.S.C.C.A.N. 4953, 4984, 4996); Mark v. Hanawha Banking & Trust Co., 575 F. Supp. 844 (D. Ore. 1983).

[72]28 U.S.C. § 2414(d)(2) (1996).

(2) 28 U.S.C. § 2412(d).

Unlike 28 U.S.C. § 2412(b), which only waives sovereign immunity, 28 U.S.C. § 2412(d) creates an entirely new entitlement to "fees and expenses" when a party prevails in non-tort civil litigation against the United States.[73] The fees and expenses listed in § 2412(d)(2)(A) are paid from agency appropriations.[74] Fees and expenses recoverable include reasonable expenses of expert witnesses, cost of any study,[75] analysis, engineering reports, tests, or projects which the court finds necessary for the case, and reasonable attorney fees, including compensation for paralegals and law clerks at cost, as well as partner review and editing of associates' work.[76]

Attorney fees are calculated using a "lodestar" figure--that is, reasonable hours expended at a

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[73]A 1996 amendment created a new basis of recovery for eligible parties against the government, even when the party does not qualify as a "prevailing party." In civil actions brought by the United States, or a proceeding for judicial review of an adversary adjudication under 5 U.S.C. § 504(a)(4), an eligible party may recover fees related to defending against excessive and unreasonable demands by the government. 28 U.S.C. § 2412(d)(1)(D).

[74]28 U.S.C. § 2412(d)(4) (1996).

[75]NAACP v. Donovan, 554 F. Supp. 715 (D.D.C. 1982).

[76]28 U.S.C. § 2412(d) (Supp. III 1985). See S.E.C. v. Waterhouse, 41 F.3d 805 (2d Cir. 1994) (attorney fees not recoverable by pro se litigant). See also Merrell v. Block, 809 F.2d 639 (9th Cir. 1987).

reasonable hourly rate[77] which takes into account travel time,[78] but not travel expenses.[79] Unlike the attorney fees of § 2412(b), fees awarded under § 2412(d) are subject to a $125 per hour cap.[80]

The $125 cap applies unless the court determines that an "increase in the cost of living or a special factor, such as the limited availability of qualified attorneys, justifies a higher fee."[81] The Supreme Court explained in Pierce v. Underwood[82] that the 'limited availability of qualified attorneys' referred to attorneys with specialized skills in such areas as foreign law or language and not of attorneys with extraordinary levels of lawyerly knowledge and ability:

> If "the limited availability of qualified attorneys for the proceedings involved" meant merely that lawyers skilled and experienced enough to try the case are in short supply, it would effectively eliminate the $75 cap--since the "prevailing

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[77]Blum v. Stenson, 465 U.S. 886, 898-900 (1984); Action on Smoking and Health v. C.A.B., 724 F.2d 211, 218 (D.C. Cir. 1984). See Missouri v. Jenkins, 491 U.S. 274 (1989); Pierce v. Underwood, 487 U.S. 552 (1988).

[78]Crank v. Minnesota State Univ. Bd., 738 F.2d 348, 350 (8th Cir. 1984). See Henry v. Webermeir, 738 F.2d 188, 194 (7th Cir. 1984) (when a lawyer travels he incurs opportunity costs based on clients with whom he could have been speaking).

[79]Action on Smoking and Health, 724 F.2d at 224.

[80]28 U.S.C. § 2412(d)(2)(A)(ii) (1996). A 1996 amendment increased this amount from $75.00 to $125.00 per hour. Although attorney fees under § 2412(b) may exceed $125, they must still be reasonable. See Action on Smoking and Health, 724 F.2d at 211.

[81]28 U.S.C. § 2412(d)(2)(A)(ii) (1996).

[82]487 U.S. 552 (1988).

> market rates for the kind and quality of the services furnished" are obviously determined by the relative supply of that kind and quality of services. "Limited availability" so interpreted would not be a "special factor," but a factor virtually always present when services with a market rate of more than $75 have been provided. We do not think Congress meant that if the rates for all the lawyers in the relevant city--or even in the entire country--come to exceed $75 per hour (adjusted for inflation), then that market-minimum rate will govern instead of the statutory cap. To the contrary, the "special factor" formulation suggests Congress thought that $75 an hour was generally quite enough public reimbursement for lawyers' fees, whatever the local or national market might be. If that is to be so, the exception for "limited availability of qualified attorneys for the proceedings involved" must refer to attorneys "qualified for the proceedings" in some specialized sense, rather than just in their general legal competence. We think it refers to attorneys having some distinctive knowledge or specialized skill needful for the litigation in question--as opposed to an extraordinary level of the general lawyerly knowledge and ability useful in all litigation. Examples of the former would be an identifiable practice specialty such as patent law, or knowledge of foreign law or language. Where such qualifications are necessary and can be obtained only at rates in excess of the $75 cap, reimbursement above that limit is allowed.[83]

To recover the fees and expenses listed in § 2412(d)(1)(H), the person requesting them: (1) must be a "party" as defined by § 2412(d)(2)(B); (2) who "prevails" against the United States in a non-tort civil action; (3) when the United States position is not "substantially justified"; and (4) no special

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[83] Id. at 571-72.

Thus, once the party attains any of the desired benefits, it theoretically prevails and is eligible for fees and expenses.[88] Courts calculate the amounts according to the lodestar figure and considers the degree of success or the extent to which a party prevailed.[89]

In keeping with the Hensley standard, a party need not succeed on all the issues to "prevail." The Ninth Circuit explained in Southern Oregon Citizens Against Toxic Sprays (SOCATS) v. Clark[90] that comparing the number of a party's successfully argued issues with the number of unsuccessful ones is irrelevant because a win on only one issue may achieve the common remedy sought through each issue. In SOCATS, the plaintiffs, who

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[87](...continued)
benefits he sought upon filing suit because the defendant was immune from damages and the plaintiff failed to request injunctive or declaratory relief); National Coalition Against Misuse of Pesticides v. Thomas, 828 F.2d 42, 44 (D.C. Cir. 1987) (remand to review EPA interim order concerning pesticides was not the outright ban on the pesticide's use sought by the plaintiff).

[88]Fair Share v. Law Enforcement Assistance Admin., 776 F.2d 1066 (D.C. Cir. 1985); Southern Or. Citizens Against Toxic Sprays, Inc. v. Clark, 720 F.2d 1475, 1481 (9th Cir. 1983), cert. denied, 469 U.S. 1028 (1984). See Hensley, 461 U.S. at 433 n.7.

[89]Blum v. Stenson, 465 U.S. 886, 898-900 (1984) (also included are novelty and complexity of issues, expertise of counsel and quality of representation); see Riverside v. Rivera, 477 U.S. 561 (1986) (amount of damage award is only an element in the lodestar's reasonable attorneys fee); Pennsylvania v. Delaware Valley Citizens' Council, 478 U.S. 546 (1986) (superior quality of attorneys is reflected within the lodestar reasonable rate and should not increase the fee recovered).

[90]720 F.2d 1475, 1481 (9th Cir. 1983), cert. denied, 469 U.S. 1028 (1984).

lived near or used a forest being sprayed with pesticides, prevailed because they were successful in obtaining injunctive relief to halt the spraying of pesticides, not because they prevailed on three out of four legal issues.[91]

Even limited successes enable parties to prevail for purposes of recovering fees and expenses. In Van Sant v. United States Postal Service[92] the Fourth Circuit held that although the plaintiff's court awarded remedy for the elimination of his postal service job was a small fraction of the relief requested, he had still prevailed:

> This litigation has continued for fourteen years. It has been before us four times. While Van Sant made elaborate and extravagant claims of violation of his rights as a result of a reduction in force in the United States Postal Service during which his position as a planning architect was eliminated, in the last analysis he achieved only very limited success. He ultimately prevailed only on his claim that his notice of termination was premature and that he was entitled to compensation for the period October 12, 1971 (the effective date of his actual release) to December 7, 1971 (the earliest date on which we determined that his termination could be legally effective). He had sought recovery of $400,000-$500,000 and reinstatement. He was denied reinstatement, and his recovery was limited to approximately $5,600. Not only was his recovery small in the monetary sense, the litigation resulted in the establishment of no new significant principles of law that would be of aid to any other person except in the

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[91] Id.

[92] 805 F.2d 141, 142 (4th Cir. 1986), cert. denied, 480 U.S. 935 (1987).

> extraordinarily unlikely event that the facts surrounding Van Sant's claim would be duplicated.
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> At the same time, in a very limited sense, we think that Van Sant is a prevailing party within the meaning of the Act.[93]

This follows the principle in Hensley that awards fees where at least some of the desired benefit is achieved through litigation. Although his prevailing status made him eligible for fees, the court adjusted the recovery to reflect the reasonable amount of time required to accomplish the limited success at a reasonable hourly rate, not to exceed the $75/hour cap.[94]

Victory on an interim order or interlocutory matter may be sufficiently significant to qualify the litigant as a prevailing party.[95] The Tenth Circuit awarded attorney fees in Kopunec v. Nelson[96] where the plaintiff received only preliminary injunctive relief against deportation and reversal of the Immigration and Naturalization Services' (INS) automatic revocation of his visa, pending further agency proceeding. Because the relief obtained was the remedy sought, and the

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[93]Id. at 142.

[94]Id. at 142-43 (case decided under $75.00 cap on fees). See Texas State Teachers Ass'n v. Garland Independent School Dist., 489 U.S. 782 (1989).

[95]See H.R. Rep. No. 1418, 96th Cong., 2d Sess. 11 (1979), reprinted in 1980 U.S.C.C.A.N. 4990 (a fee award may be appropriate where the party has prevailed on an interim order, which was central to the case, or where an interlocutory appeal is "sufficiently significant and discrete to be treated as a separate unit").

[96]801 F.2d 1226 (10th Cir. 1986).

relief was significantly distinct from the INS's ultimate grant or denial of the plaintiff's work visa, the plaintiff "prevailed."[97]

The same principle applies to settlements. If the settlement produces substantially the same relief the plaintiff would have obtained if successful on the merits and bringing suit was the catalyst, then he has prevailed and is entitled to fees.[98]

Alternatively in Harahan v. Hampton,[99] the Supreme Court held that a purely procedural win with no substantive relief on the merits does not entitle the plaintiff to shift his attorney fees to the opposing party.

> The respondents have not prevailed on the merits of any of their claims. The Court of Appeals held only that the respondents were entitled to a trial of their cause. As a practical matter they are in a position no different from that they would have occupied if they had simply defeated the defendants' motion for a directed verdict in the trial court. The jury may or may not decide some or all of the issues in favor of the respondents. If the jury should not do so on remand in these cases, it could not seriously be contended that the respondents had prevailed. Nor may they fairly be said to have "prevailed" by reason of the Court of Appeals' other interlocutory dispositions, which affected

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[97] Id. at 1229.

[98] See Brauwders v. Bowen, 823 F.2d 273, 275 (8th Cir. 1987); McQuiston v. Marsh, 790 F.2d 798, 801 (9th Cir. 1986); Cervantez v. Whitfield, 776 F.2d 556, 562 (8th Cir. 1985); Premachandra v. Mites, 727 F.2d 717, 727 (8th Cir. 1984).

[99] 446 U.S. 754 (1980).

> only the extent of discovery. As is true of other procedural or evidentiary rulings, these determinations may affect the disposition on the merits, but were themselves not matters on which a party could "prevail" for purposes of shifting his counsel fees to the opposing party under § 1988.[100]

However, if a party ultimately prevails on the merits, the courts will normally reimburse fees and expenses incurred during the successful interim litigation.[101] Furthermore, courts may even compensate a plaintiff for time spent on unsuccessful interim issues if he ultimately prevails on the merits and the unsuccessful procedural issues are essentially the same as the issues that produced the win on the merits. For example, in Devine v. Sutermeister,[102] a party lost a motion to dismiss but yet prevailed overall by successfully arguing the same issue on the merits. The Court of Appeals found that the procedural motion to dismiss was

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[100]Id. at 758-59. See Brauwders, 823 F.2d at 275 (party must do more than win remand to administrative level for further proceedings to qualify as an EAJA prevailing party); Austin v. Department of Commerce, 742 F.2d 1417 (Fed. Cir. 1984) (remand for introduction of improperly withheld evidence is not a substantial remedy, therefore, the party does not prevail); Swietlawich v. County of Bucks, 620 F.2d 33 (3d. Cir. 1980) (vacation of judgement because of error in jury instructions and remand for new trial did not make plaintiff a prevailing party); Bly v. Mcleod, 605 F.2d 134 (4th Cir. 1979) (remand for clarification and impanelling of three-judge district court did not entitle party to prevail).

[101]Brewer v. American Battle Monuments Comm'n., 814 F.2d 1564, 1567 (Fed. Cir. 1987); Miller v. United States, 793 F.2d 270 (3d Cir. 1985); Escobar Ruiz v. Immigration and Naturalization Service, 787 F.2d 1294, 1298 (9th Cir. 1986); Massachusetts Fair Share v. Law Enforcement Assistance Admin., 776 F.2d 1066, 1068 (D.C. Cir. 1985).

[102]733 F.2d 892 (Fed. Cir. 1984), cert. denied, 484 U.S. 815 (1987).

subsumed by the identical issue on the merits. Although the plaintiff technically lost the interlocutory issue, he ultimately prevailed on the same issue at trial and the court awarded him fees for all of his efforts.[103]

The third element needed to recover fees and expenses from the United States concerns whether the government's "position" in the litigation and the underlying agency action[104] giving rise to the civil action was substantially justified.[105] This determination is made from the record without additional discovery or evidentiary hearing.[106] Prior to the 1985 revision of the EAJA, all but one of the circuits held that the governmental position was substantially justified if it had a reasonable basis in law and fact.[107] Although the

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[103]Id. at 898.

[104]28 U.S.C. § 2412(d)(2)(D) (1996).

[105]28 U.S.C. § 2412(d)(1) (1996). See Zapon v. U.S., 53 F.3d 283 (9th Cir. 1995) (prevailing party not entitled to award if court finds position of U.S. substantially justified or that special circumstances make award unjust); Wang v. Horio, 45 F.3d 1362 (9th Cir. 1995) (Attorney General refusal to certify informant as acting within scope of employment for 28 U.S.C. § 2679 immunity purposes was "substantially justified" and attorney fees under EAJA not recoverable); Gilbert v. Shalala, 45 F.3d 1391 (10th Cir. 1995) (government bears burden of showing its position was substantially justified).

[106]28 U.S.C. § 2412(d)(1)(B). See Friends of Boundry Waters Wilderness v. Thomas, 53 F.3d 881 (8th Cir. 1995) (determination of "substantially justified" is based on decision on the merits rationale that supports the decision).

[107]U.S. v. Yoffe, 775 F.2d 447 (1st Cir. 1985); Citizens Council of Del. County v. Brinegar, 741 F.2d 584, 593 (3rd Cir. 1984); Anderson v. Heckler, 756 F.2d 1011, 1013 (4th Cir. 1985); Hanover Building Materials, Inc. v. Gruffuda, 748 F.2d 1011, 1015 (5th Cir. 1984); Trident (continued...)

1985 revision left the "substantially justified" language unaltered, an accompanying House Report interpreted the standard to mean more than mere reasonableness because the 1980 Congress rejected a "reasonably justified" standard in favor of a "substantially justified" one.[108] Thereafter the circuits split over whether the standard was merely reasonable in law and fact[109] or more than reasonable.[110]

In Pierce v. Underwood,[111] the Supreme Court settled the issue, adopting the traditional interpretation. The

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[107](...continued)
Marine Construction, Inc. v. District Engineer, 766 F.2d 974, 980 (6th Cir. 1985); Ramos v. Haig, 716 F.2d 1109, 1112 (7th Cir. 1983); Foley Construction Co. v. U.S. Army Corps of Engineers, 716 F.2d 1202, 1204 (8th Cir. 1983); Foster v. Tourtellotte, 704 F.2d 1109, 1112 (9th Cir. 1983); United States v. 2,116 Boxes of Boned Beef, 726 F.2d 1481, 1486-87 (10th Cir. 1984); Ashburn v. United States, 740 F.2d 843 (11th Cir.1984); Broad Ave. Laundry and Tailoring v. United States, 693 F.2d 1387, 1391 (Fed. Cir. 1982). But see Spencer v. Nat'l Labor Rel. Bd., 712 F.2d 539 (D.C. Cir. 1983).

[108]H.R. Rep. No. 120, 99th Cong., 1st Sess. 8 (1985), reprinted in 1985 U.S.C.C.A.N. 132, 136.

[109]Sierra Club v. Sec'y of Army, 820 F.2d 523 (1st Cir. 1987); Garcia v. Schweiker, 829 F.2d 396 (3d Cir. 1987); Pullman v. Bowen, 820 F.2d 105 (4th Cir. 1987); Broussard v. Bowen, 828 F.2d 310 (5th Cir. 1987); Adams & Westlake, Ltd. v. Nat'l Labor Rel. Bd., 814 F.2d 1161 (7th Cir. 1987); Barry v. Bowen, 825 F.2d 1324 (9th Cir. 1987); Kemp v. Bowen, 822 F.2d 966 (10th Cir. 1987).

[110]Riddle v. Secretary of Health & Human Serv., 817 F.2d 1238 (6th Cir. 1987); United States v. 1,378.65 Acres of Land, 794 F.2d 1313 (8th Cir. 1986); Gavette v. OPM, 808 F.2d 1456 (Fed. Cir. 1986); Federal Election Comm'n v. Rose, 806 F.2d 1081 (D.C. Dir. 1986).

[111]487 U.S. 552 (1988). See Commissioner v. Jean, 496 U.S. 154 (1990); Flores v. Shalala, 1995 WL 329565 (9th Cir. June 5, 1995).

court held that the government's position was substantially justified when it was "justified to a degree that would satisfy a reasonable person."

> Before proceeding to consider whether the trial court abused its discretion in this case, we have one more abstract legal issue to resolve: the meaning of the phrase "substantially justified" in 28 U.S.C. § 2412(d)(1)(A). The Court of Appeals, following Ninth Circuit precedent, held that the Government's position was "substantially justified" if it "had a reasonable basis both in law and fact."
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> The source of that formulation is a Committee Report prepared at the time of the original enactment of the EAJA, which commented that "[t]he test of whether the Government position is substantially justified is essentially one of reasonableness in law and fact." H.R. Conf. Rep. No. 96-1434 p.22 (1980).
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> In addressing this issue, we make clear at the outset that we do not think it appropriate to substitute for the formula that Congress has adopted any judicially crafted revision of it--whether that be "reasonable basis in both law and fact" or anything else. "Substantially justified" is the test the statute prescribes, and the issue should be framed in those terms. That being said, there is nevertheless an obvious need to elaborate upon the meaning of the phrase. The broad range of interpretations described above is attributable to the fact that the word "substantial" can have two quite different--indeed, almost contrary--connotations. On the one hand, it can mean "[c]onsiderable in amount, value, or the like; large," Webster's New International Dictionary 2514 (2d ed. 1945)--as, for example, in the statement "he won the election by a substantial majority." On the other hand, it can mean "[t]hat is such in substance or in the main," ibid--as, for example, in the statement "what he said was substantially true." Depending upon which connotation one selects, 'substantially

justified' is susceptible of interpretations ranging from the Government's to the respondent's.

We are not, however, dealing with a field of law that provides no guidance in this matter. Judicial review of agency action, the field at issue here, regularly proceeds under the rubric of "substantial evidence" set forth in the Administrative Procedure Act, 5 U.S.C. § 706(2)(E). That phrase does not mean a large or considerable amount of evidence, but rather "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolidated Edison Co. v. NLRB. In an area related to the present case in another way, the test for avoiding the imposition of attorney's fees for resisting discovery in district court is whether the resistance was "substantially justified," To our knowledge, that has never been described as meaning "justified to a high degree," but rather has been said to be satisfied if there is a "genuine dispute," . . . or "if reasonable people could differ as to [the appropriateness of the contested action]," . . . . [citations omitted].

We are of the view, therefore, that as between the two commonly used connotations of the word "substantially," the one most naturally conveyed by the phrase before us here is not "justified to a high degree," but rather "justified in substance or in the main"--that is, justified to a degree that could satisfy a reasonable person. That is no different from the "reasonable basis both in law and fact" formulation adopted by the Ninth Circuit and the vast majority of other Courts of Appeals that have addressed this issue. . . . To be "substantially justified" means, of course, more than merely undeserving of sanctions for frivolousness; that is assuredly not the standard for Government litigation of which a reasonable person would approve.

Respondents press upon us an excerpt from the House Committee Report pertaining to the 1985 reenactment of the EAJA, which read as follows:

> "Several courts have held correctly that 'substantial justification' means more than merely reasonable. Because in 1980 Congress rejected a standard of 'reasonably justified' in favor of 'substantially justified,' the test must be more than mere reasonableness."

If this language is to be controlling upon us, it must be either (1) an authoritative interpretation of what the 1980 statute meant, or (2) an authoritative expression of what the 1985 Congress intended. It cannot of course, be the former since it is the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means. Nor can it reasonably be thought to be the latter--because it is not an explanation of any language that the 1985 Committee drafted, because on its face it accepts the 1980 meaning of the terms as subsisting, and because there is no indication whatever in the text or even the legislative history of the 1985 reenactment that Congress thought it was doing anything insofar as the present issue is concerned except reenacting and making permanent the 1980 legislation. (Quite obviously, reenacting precisely the same language would be a strange way to make a change.) This is not, it should be noted, a situation in which Congress reenacted a statute that had in fact been given a consistent judicial interpretation along the line that the quoted Committee Report suggested. Such a reenactment, of course, generally includes the settled judicial interpretation. Lorillard v. Pons. Here, to the contrary, the almost uniform appellate interpretation (12 Circuits out of 13) contradicted the interpretation endorsed in the committee report. . . . Only the District of Columbia Circuit had adopted the position that the Government had to show something "slightly more" than reasonableness. Spencer v. NLRB, cert. denied, 466 U.S. 936 (1984). We might add that in addition to being out of accord with

> the vast body of existing appellate precedent, the 1985 House Report also contradicted, without explanation, the 1980 House Report ("reasonableness in law and fact") from which, as we have noted, the Ninth Circuit drew its formulation in the present case.
>
> Even in the ordinary situation, the 1985 House Report would not suffice to fix the meaning of language which that reporting Committee did not even draft. Much less are we willing to accord it such force in the present case, since only the clearest indication of congressional command would persuade us to adopt a test so out of accord with prior usage, and so unadministerable, as "more than mere reasonableness." Between the test of reasonableness, and a test such as "clearly and convincingly justified"--which no one, not even respondents, suggests is applicable--there is simply no accepted stopping-place, no ledge that can hold the anchor for steady and consistent judicial behavior.[112]

* * * *

Some courts endorse proportional awards of fees and expenses where the government's position on one issue is substantially justified and not substantially justified on another.[113] Others have not broached the subject, perhaps because they focus on the overall position of the government, decreasing awards through the lodestar figure where the United States was

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[112]487 U.S. at 563.

[113]Baeder v. Heckler, 826 F.2d 1345 (3d Cir. 1987); Goldhaber v. Foley, 698 F.2d 193, 197 (3d Cir. 1983). Where issues are argued in the alternative, in pursuit of a single remedy, the focus is instead on the substantial justification of the government's overall position. See Southern Oregon Citizens Against Toxic Sprays, Inc. v. Clark, 720 F.2d 1475 (9th Cir. 1983), cert. denied, 469 U.S. 1028 (1984).

substantially justified during some issues but not on others.[114]

Finally, fees and expenses are recoverable under § 2412(d) only where no special circumstances would make an award of fees unjust.[115] The courts have held special circumstances to exist where the government advances good faith arguments for novel and creditable interpretations of the law[116] and where equitable considerations mitigate against allowing a prevailing party to recover fees.[117] The government has the burden of proof on both the "special circumstances" and the "substantially justified" issues.[118]

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[114]Cf. Trichila v. Secretary of Health and Human Services, 823 F.2d 702, 708 (2d Cir. 1987) (court refused to analyze the government's position during its opposition to an EAJA award separately from its position on the merits; once the government was not substantially justified on the merits it was deemed not substantially justified in resisting award of attorney fees).

[115]28 U.S.C. § 2412(d)(1)(B) (1996).

[116]Russell v. National Mediation Bd., 775 F.2d 1284, 1290 (5th Cir. 1985) (although the government's interpretation of the law was novel it was not credible).

[117]Taylor v. United States, 815 F.2d 249 (3d Cir. 1987) (a serviceman, unable to leave Spain after being placed on legal hold status by the Navy pending a Spanish trial for vehicular manslaughter but protected from the Spanish authorities by his service status, fled to the United States upon his conviction. He successfully enjoined the Navy from sending him back to Spain but because he had availed himself of the Navy's protection he was not entitled to fees and expenses for resisting his return to Spain).

[118]Id. at 253 (for special circumstances); Sierra Club v. Sec'y of Army, 820 F.2d 513 (1st Cir. 1987); Gilbert v. Shalala, 45 F.3d 1391 (10th Cir. 1995) (government bears burden of showing its position was substantially justified); Ellis v. Bowen, 811 F.2d 814 (3d Cir. 1987) (for substantial justification).

(3) 5 U.S.C. § 504.

The EAJA also allows recovery of fees and expenses incurred during an agency adjudication.[119] The fees and expenses, identical to those found in 28 U.S.C. § 2412(d),[120] are paid from agency appropriations[121] if (1) the government's position during the agency adjudication and underlying agency action[122] is not substantially justified, (2) a party[123] prevails over the United States, and (3) no special circumstances make the award of fees unjust, or, in certain circumstances where the government has made an excessive demand for fees.[124]

An agency adjudication includes an adjudication under 5 U.S.C. § 554 in which the government's position is represented by counsel[125] and any appeal to an agency board of contract appeals pursuant to the Contract Disputes Act of 1978.[126]

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[119]5 U.S.C. § 504(a)(1); § 504 (b)(1)(C) (1996); General Dynamics Corp. v. United States, 49 F.3d 1384 (9th Cir. 1995) (5 U.S.C. § 504 allows a prevailing party to recover attorney fees from U.S. in an adversary proceeding).

[120]5 U.S.C. § 504(b)(1)(A) (1996).

[121]Id. § 504(d) (1996).

[122]Id. § 504(b)(1)(E) (1996).

[123]Id. § 504(b)(1)(B) (1996).

[124]Id. § 504(a)(1) (1996).

[125]Id. § 504(b)(1)(C)(i) (1996).

[126]Id. § 504(b)(1)(C)(ii) (1996). Contractually related adjudications such as bid protests are not covered by the Contract Disputes Act and attorney fees may be recovered through statutory authority other than the EAJA.

Interpreting adjudication "under 5 U.S.C. § 554," the Ninth Circuit, in Escobar Ruiz v. Immigration and Naturalization Services,[127] held that fees were not limited to those adjudications governed by § 554, but extended to include those defined by § 554(c):

> The dispute centers around the meaning of the phrase "an adjudication under section 554." The government asserts that "under" is the same thing as "conducted under" or "governed by." The petitioner contends that "under" means "as defined by" or "under the meaning of." Both interpretations are plausible; because the statutory language is unclear, we are justified in looking to the legislative history and purpose of the EAJA in order to ascertain the correct reading.
>
> . . . .
>
> In short, we agree with the petitioner that "an adjudication under section 554" means "an adjudication as defined by section 554." This interpretation is supported by the legislative history of the EAJA, by the way other circuits have analyzed EAJA issues, and by the model rules for EAJA implementation. There is no question that deportation proceedings meet that definition. Deportation proceedings are mandated by the immigration statute, which provides that a "[d]etermination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present." 8 U.S.C. § 1252(b) (1982). Thus, deportation proceedings clearly meet the APA's definition of an adjudication "required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. § 554(a) (1982).[128]

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[127]838 F.2d 1020 (9th Cir. 1988) (en banc).

[128]Id. at 1023-24.

Although the petitioner's deportation hearing was not governed by the Administrative Procedure Act (APA), according to the Ninth Circuit, it was an adjudication as defined by the APA because the governing statute (the Immigration and Naturalization Act) allowed deportation only after a hearing on the record.[129] Thus, under the Ninth Circuit's reasoning, once an agency adjudication is established, the party seeking to recover fees need only show that he was a prevailing party[130] and rebut any governmental arguments that the government's position is substantially justified or that special circumstances make an award unjust.

The Ninth Circuit's position that fees under the EAJA were not limited to adjudications governed by § 554 was rejected by other circuits[131] and ultimately rejected by the Supreme Court.[132]

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[129]Id.

[130]The definition of a "party" and the criteria to determine whether the party "prevailed," as well as determining the justification of the government's position and whether the award of fees under the circumstances would be unjust, is the same under § 504 as under § 2412.

[131]See Ardestani v. Department of Justice, 904 F.2d 1505 (11th Cir. 1990); Clarke v. Immigration and Naturalization Service, 904 F.2d 172 (3d Cir. 1990); St. Louis Fuel and Supply Co. v. Federal Energy Regulatory Commission, 890 F.2d 446 (D.C. Cir. 1989); Owens v. Brock, 860 F.2d 1363 (6th Cir. 1988).

[132]Ardestani v. Immigration and Naturalization Service, 502 U.S. 129 (1991).