No. 10-778C
(Judge Christine O.C. Miller)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

RICHARD COLLINS, individually
and on behalf of a class of all those
similarly situated,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS

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July 18, 2011

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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

RICHARD COLLINS, individually and on behalf of a class of all those similarly situated,	)	
Plaintiff,	)	No. 10-778C
	)	(Judge Christine O.C. Miller)
v.	)	
THE UNITED STATES,	)	
Defendant.	)	

DEFENDANT'S REPLY TO PLAINTIFF'S
RESPONSE TO DEFENDANT'S MOTION TO DISMISS

Defendant, the United States, respectfully submits this reply in support of its motion to dismiss the complaint of plaintiff, Richard Collins, for lack of subject matter jurisdiction or, in the alternative, for failure to state a claim. In our motion, we demonstrated that the Court should dismiss the complaint because: (1) the complaint is founded upon a statute and regulation that are not money-mandating; (2) Mr. Collins' claim is nonjusticiable because the decision to award separation pay is committed to the discretion of the Secretary of Defense; and (3) even under the theory set forth in the complaint – that is, that the Court should strike allegedly unconstitutional portions of the separation pay instruction – Mr. Collins' claim still fails because he cannot meet the conditions required for full separation pay.

In his opposition, Mr. Collins contends that, based upon this Court's caselaw, as well as caselaw from the United States Court of Appeals for the Federal Circuit, the separation pay statute and implementing regulations are money-mandating. Mr. Collins also asserts that the denial of separation pay is a justiciable controversy because the Executive Branch cannot

promulgate a regulation that violates the Constitution. Finally, Mr. Collins asserts that "under traditional severability analysis" the regulations may be severed in their entirety or, in the alternative, portions of the regulation may be severed and Mr. Collins would then be entitled to full separation pay.

The Court should reject Mr. Collins' arguments. The broad language in both the statute and regulation provides discretion to the Secretary to deny full separation pay. Therefore, the statute and regulations are not money-mandating. Indeed, that language provides no standard against which the Court may judge the Secretary's decision to award pay. Further, Mr. Collins asks the Court to strike down and rewrite the regulations so that he would then be entitled to full separation pay. This Court may not serve the function of the Legislature and write statutes or regulations so that Mr. Collins would be entitled to full separation pay. Mr. Collins' complaint should be dismissed.

ARGUMENT

I. The Separation Pay Statute And Implementing Instructions Are Not Money-Mandating

As demonstrated in our motion to dismiss, the Court does not possess jurisdiction to entertain Mr. Collins' case because he has not identified a money-mandating statute or regulation. We explained that 10 U.S.C. § 1174 bestows broad authority upon the Secretary of Defense to determine the circumstances under which separation pay should be granted and the amount of any payment. Specifically, the statute provides that, for regular enlisted members who otherwise are eligible for separation pay, the service member is entitled to full separation pay "unless the Secretary concerned determines that the conditions under which the member is discharged do not warrant payment of such pay." 10 U.S.C. § 1174(b)(1). The statute further

provides that the service member shall be entitled to full separation pay, except "in the case of a member who is discharged under criteria prescribed by the Secretary of Defense." *Id.* § 1174(b)(2). Finally, the statute provides that "the amount of separation pay which *may* be paid" is either full separation pay or half separation pay. *Id.* § 1174(d) (emphasis added). Thus, by its express terms, the statute is not money-mandating.

In response, Mr. Collins asserts that "[t]wo separate decisions of this Court have already explicitly recognized that 10 U.S.C. § 1174 is a money-mandating statute. . . ." Opposition, at 12 (citing *Siemietkowski v. United States*, 86 Fed. Cl. 193, 197 (2009), and *Toon v. United States*, 96 Fed. Cl. 288, 300 (2010)). We cited those cases in our brief and, after expressing our disagreement with the decisions, then explained that the decisions, as non-binding precedent, are only as persuasive as their reasoning. Neither *Siemietkowski* or *Toon* provided analysis of whether the statute is money-mandating. Further, these cases did not involve a situation where the service member alleged that he or she received half separation pay, but should have received full separation pay.

Mr. Collins also asserts that "[i]n numerous other cases, this Court has implicitly assumed that 10 U.S.C. § 1174 is money mandating." Opposition, at 12-13. As the Supreme Court has made clear, however, "[w]hen a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed." *Ariz. Christian Sch. Tuition Org. v. Winn*, __ U.S. __, 131 S. Ct. 1436, 1448 (2011).

Mr. Collins then asserts that "a plaintiff does not have to show that the statute or regulation mandates damages for his or her claim in particular" – instead, "the question is whether the statute as a general matter provides successful plaintiffs with a right to money

damages." Opposition. at 13. We agree. The statute and regulations are drafted such that they provide discretion to the Secretary to determine if a service member may receive full separation pay. They do not mandate such pay.

Mr. Collins also contends that the use of the word "entitled" in the statute makes it money-mandating. Opposition, at 14. Mr. Collins, however, neglects to give sufficient credence to the remainder of the statute, which makes clear that a service member is "entitled to [full] separation pay . . . *unless the Secretary concerned determines that the conditions under which the member is discharged do not warrant payment of such pay*." 10 U.S.C. § 1174 (emphasis added).

Mr. Collins cites the fact that the Military Pay Act, 37 U.S.C. § 204, is money-mandating because it provides that "[t]he following persons are entitled to the basic pay of the pay grade to which assigned or distributed." *Id.* Mr. Collins also cites the statute providing for remote-duty pay, which provides that, under certain circumstances, an employee "is entitled, in addition to pay otherwise due him, to allowance of not to exceed $10 a day." 5 U.S.C. § 5942(a). Yet these statutes both support that the separation pay statute is not money-mandating. Neither statute contains the discretionary language used in the separation pay statute.

Mr. Collins' argument that the use of the word "shall" in the statute demonstrates that it is money-mandating should also be rejected. Again, this language is conditioned upon the Secretary deciding to award separation pay in the first instance and, moreover, is subject to the limitation that full separation pay shall be awarded "unless the Secretary concerned determines that the conditions under which the member is discharged do not warrant payment of such pay." 10 U.S.C. § 1174(b)(2).

Mr. Collins then asserts that the "limited" discretion delegated to the Secretary "is hardly sufficient to negate the money-mandating nature of the statutory scheme" because it "is tightly confined by the rest of the statute and must be exercised within the guidelines set by Congress." Opposition, at 16. Mr. Collins is incorrect. With respect to the decision to award full or half separation pay, the statute does not confine the Secretary's discretion *at all*. Congress left it to the Secretary's complete discretion to determine whether "the conditions under which the member is discharged do not warrant payment of such pay." 10 U.S.C. § 1174(b)(1). And simply because Congress set minimum criteria that must be met before a service member is entitled to any separation pay, as well as other criteria concerning separation pay, *see* Opposition at 16, does not alter the fact that Congress left to the Secretary's absolute discretion the decision whether to award pay and, if so, whether such pay should be half or full separation pay.

Similarly, the cases cited by Mr. Collins do not support that the statute is money-mandating. In *Doe v. United States*, 100 F.3d 1576 (Fed. Cir. 1996), the Federal Circuit held that a moiety statute providing for the payment of an award for providing certain information to the Government was money-mandating, notwithstanding the use of the word "may." The court emphasized that a prior version of the statute, which also used the word "may," had been understood to mandate payment, and that "Congress provided no indication in either the statutory language or legislative history that it intended to reject or alter this construction and to render awards wholly discretionary." *Id.* at 1581. The court held that "[c]ontrary to the Government's position, Congress did not indicate any intention to give the Secretary absolute discretion to deny an award under the moiety statute when the conditions for award are met." *Id.*

Here, in contrast, Congress provided the Secretary absolute discretion to deny separation

pay even when the conditions set forth in the statute are met. *See* 10 U.S.C. §§ 1174(b)(1) (providing that, for regular enlisted members who otherwise are eligible for separation pay, the service member is entitled to separation pay "unless the Secretary concerned determines that the conditions under which the member is discharged do not warrant payment of such pay."), 1174(b)(2) (providing that the service member shall be entitled to full separation pay, except "in the case of a member who is discharged under criteria prescribed by the Secretary of Defense.").

Similarly, in *Bradley v. United States*, 870 F.2d 1578 (Fed. Cir. 1989), the Federal Circuit held that the prevailing pay rate statute, 5 U.S.C. § 5349, is money-mandating because of the significant limits on the Government's discretion set forth in the statute. Specifically, the statute does not allow the Government to decide the conditions under which pay would be made nor does it permit the Government to decide not to provide for any pay. Rather, the statute simply gives the Government the discretion to adjust pay rates (but it nonetheless mandates at least a minimum level of pay). In contrast, here, the separation pay statute places no limits on the Secretary's discretion to award pay.

Indeed, the jurisdictional issue presented in this case is strikingly similar to that presented in *Adair v. United States*, 648 F.2d 1318 (Ct. Cl. 1981). In *Adair*, the statute at issue provided that "[u]nder regulations prescribed by the Secretary of Defense or by the Secretary of Health, Education, and Welfare, as appropriate, and approved by the President," certain medical officers "may, upon acceptance of the written agreement by the Secretary concerned, or his designee, and in addition to any other pay or allowances to which he is entitled, be paid an amount not to exceed $13,500 for each year of the active duty agreement." *Id.* at 1320. The Court of Claims found that this statute is not money-mandating. The Court held that "[i]t is implicit in the

holding of *Testan* that a statute providing for solely discretionary payment of money does not give rise to a 'right to recover money damages from the United States.'" *Id.* at 1322 (quoting *United States v. Testan*, 424 U.S. 392 (1976)); *see also Peri v. United States*, 340 F.3d 1337, 1341 (Fed. Cir. 2003) (holding that statute that "created the Department of Justice Assets Forfeiture Fund, authorized the Attorney General to make payments from the Fund for specified purposes, and prescribed the terms and conditions for making such payments. It is a money-authorizing statute, not a money-mandating one."); *Huston v. United States*, 956 F.2d 259, 262 (Fed. Cir. 1992) (holding that statute and regulations were not money-mandating because statute did not require a pay increase and regulations simply established eligibility for pay increase).

Moreover, that the statute sets out certain minimum requirements that must be met before a service member can even be considered eligible for separation pay does not support that the statute is money-mandating. *See* Opposition, at 16. Congress simply set a baseline that must be met before a member can receive separation pay, but it explicitly left the decision whether to ultimately award such pay (and if so, how much pay) to the Secretary. *See Huston*, 956 F.2d at 262 (holding that regulations were not money-mandating where "the regulations . . . do not curtail discretion; they merely explain the requirements an employee must satisfy to be eligible for a pay increase which might or might not be forthcoming"). Indeed, to hold that the statute is money-mandating notwithstanding its discretionary nature "would 'render 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.'" *Army & Air Force Exch. Serv. v. Sheehan*, 456 U.S. 728, 740 (1982) (quoting *Testan*, 424 U.S. at 404); *see also Smith v.*

Sec'y of Army, 384 F.3d 1288, 1295 (Fed. Cir. 2004) (explaining that Military Pay Act, 37 U.S.C. § 204, is money-mandating in certain instances, because it "confers on an officer the right to pay of the rank he was appointed to up until he is properly separated from the service").

Further, that Congress required the Secretary to proscribe regulations for the administration of separation pay does not support that the statute is money-mandating. While the statute requires that the Secretary proscribe such regulations, it in no way limits the Secretary's discretion in crafting the regulations. Indeed, as explained above, the statute leaves the decision regarding whether to award separation pay and, if so, the amount of pay, to the Secretary. Moreover, as we explained in our motion, both the Department of Defense Instruction ("DoDI") and the Air Force Instruction ("AFI") are discretionary as well. *See* AFI 36-3208, 9.2, 9.6.2 ("9.2. Full Separation Pay (Nondisability). Members involuntarily separated from [active duty] *may* be entitled to full separation pay . . . if they meet the criteria in paragraph 9.1 and the following conditions. . . ."; in extraordinary cases, the Secretary may direct "that the member does not warrant separation pay") (emphasis added); DoDI 3.1, 3.4.12 (stating that full separation pay "is authorized" and that, in extraordinary cases, the Secretary may decide not to grant any separation pay).

Mr. Collins also asserts that, pursuant to *Samish Indian Nation v. United States*, 419 F.3d 1355, 1364-65 (Fed. Cir. 2005), the statute is money-mandating because it: (1) provides "clear standards for paying" money to recipients; (2) states the precise amounts that must be paid; and (3) compels payment on satisfaction of certain conditions. Opposition, at 17. Mr. Collins is incorrect. The statute provides no standards at all for paying money to recipients – it leaves that decision to the Secretary. Further, the regulations provide discretion to the Secretary to award

separation pay; they cannot be said to provide clear standards under which pay must be made. Nor do the statute and regulations state the precise amounts that must be paid. Rather, the statute leaves the decision to award separation pay to the Secretary. The regulations are likewise discretionary. Indeed, under the regulations, the Secretary may decide not to provide any separation pay to a given service member. Neither the statute nor the regulations compel payment even if certain conditions are met.

Finally, Mr. Collins asserts in a footnote that *Office of Personnel Management v. Richmond*, 496 U.S. 414, 426 (1990), has no bearing here because Congress has appropriated funds necessary to pay any damage award based upon a money-mandating statute under the Tucker Act. Opposition, at 21, n.7. According to Mr. Collins, *Richmond* held only that a plaintiff may not invoke estoppel based on faulty advice from a Government employee and that the case "has nothing to do with whether damages may be awarded to cure a constitutional violation." *Id.* Mr. Collins fails to recognize that in *Richmond* the Supreme Court made clear that "[t]he general appropriation for payment of judgments, in any event, does not create an all-purpose fund for judicial disbursement" and that "funds may be paid out only on the basis of a judgment based on a substantive right to compensation based on the *express terms* of a specific statute." *Richmond*, 496 U.S. at 432 (emphasis added). In our case, the statute (and regulations), by its express terms, does not mandate payment of any money to Mr. Collins. Further, as explained below, precedent makes clear that the Court's ability to provide for payment of money based upon a constitutional claim is limited to situations not present here.

Because the statute is not money-mandating, this Court does not possess jurisdiction to entertain Mr. Collins' claim.

II. Mr. Collins' Claim Is Nonjusticiable

As we noted in our motion, there are certain claims that are nonjusticiable. We explained that this case is simply another of the "thousands of [ ] routine personnel decisions regularly made by the services which are variously held nonjusticiable or beyond the competence or the jurisdiction of courts to wrestle with." *See Murphy v. United States*, 993 F.2d 871, 873 (Fed. Cir. 1993) (quoting *Vogel v. United States*, 844 F.2d 776, 780 (Fed. Cir. 1988)).

In response, Mr. Collins asserts that this argument is without merit because he has asserted constitutional claims. Those claims, he contends, are plainly subject to review notwithstanding the discretion afforded the Secretary under the statute and implementing regulations. Opposition, at 19-20. Finally, Mr. Collins cites the fact that courts have reviewed the "Don't Ask Don't Tell" statute and have declined to dismiss challenges to "Don't Ask Don't Tell," as support for the argument that this case is justiciable.

The Court should reject Mr. Collins' arguments. The premise of Mr. Collins' arguments is incorrect. The Court is not precluded from finding this case to be nonjusticiable simply because Mr. Collins asserts a constitutional violation. Indeed, courts have dismissed constitutional challenges on justiciability grounds. *See, e.g., Gilligan v. Morgan*, 413 U.S. 1 (1973) (declining to hear constitutional challenge because "training, weaponry and orders" of the National Guard present nonjusticiable issue); *Nieszner v. Mark*, 684 F.2d 562, 565 (8th Cir. 1982) (holding that constitutional challenge to Air Force regulation imposing mandatory age restrictions for commissioned officers is nonjusticiable).

Further, that the Court of Appeals for the Federal Circuit and other courts have reviewed the "Don't Ask Don't Tell" statute on constitutional grounds is irrelevant here. Mr. Collins has

made abundantly clear that he is not challenging "Don't Ask Don't Tell." Indeed, the very caselaw upon which Mr. Collins relies makes clear that "[w]hether the deference due particular military determinations rises to the level of occasioning nonreviewability is a question that varies from case to case and turns on the degree to which the specific determinations are laden with discretion and the likelihood that judicial resolution will involve the courts in an inappropriate degree of supervision over primary military activities." *Wilkins v. United States*, 279 F.3d 782, 788 (9th Cir. 2002) (quoting *Doe v. Sullivan*, 938 F.2d 1370, 1381 n.16 (D.C. Cir. 1991)).

Further, the "Don't Ask Don't Tell" statute does not afford the Secretary the level of broad discretion as does the separation pay statute. *Compare* 10 U.S.C. § 654 ("A member of the armed forces shall be separated from the armed forces . . . ."), *with* 10 U.S.C. § 1174. Mr. Collins is simply challenging the administration of a statute that affords the Secretary complete discretion to award additional pay to a service member who is separated under certain conditions.

Finally, as explained in our motion and below, the only way in which the Court can award such pay is if it rewrites the regulations. *Adkins v. United States*, 68 F. 3d 1317, 1322 (Fed. Cir. 1995) (explaining that a determination of justiciability is also dependent upon the court's "ability to supply relief"). Put simply, courts generally must defer to the military's judgment on military matters, including personnel matters, unless Congress has limited the military's discretion. *Murphy*, 993 F.2d at 872-73 ("judicial review is only appropriate where the Secretary's discretion is limited, and Congress has established 'tests and standards' against which the court can measure his conduct"). Here, Congress explicitly provided the Secretary with discretion to determine when separation pay should be awarded, and, if so, how much pay. Given the discretionary nature of the separation pay statute, this case is nonjusticiable.

III. Because Mr. Collins Does Not Fall Within The Category Of Service Members Eligible For Full Separation Pay, His Claim Does Not Fit Within The Scope Of The Alleged Money-Mandating Source And This Court Cannot Grant The Requested Relief

A. The Court May Not Strike Down The Entire Statute Or Regulations

In our motion, we explained that Mr. Collins could not be granted any relief, regardless of the merits of his half-separation-pay argument, because the alleged money-mandating source – 10 U.S.C. § 1174 and its implementing regulations – does not authorize him to be paid full separation pay.

As an initial matter, although he does not seek this remedy in his complaint, Mr. Collins suggests that this Court may strike down the entire separation pay statute if it determines that the allegedly unconstitutional portion of the regulations are not severable. Mr. Collins is incorrect. While relying heavily upon *Gentry v. United States*, 546 F.2d 343 (Ct. Cl. 1976), Mr. Collins ignores the key language from *Gentry* on this issue: "Obviously, for plaintiff's claim to succeed, the remaining provisions must be able to stand, giving rise to plaintiff's entitlement to benefits . . . If the [unconstitutional] requirement is not separable from the other language of the statute, this court has no jurisdiction to grant recovery to plaintiff, whether the requirement is constitutional or not." *Id.* at 347. Put simply, if this Court were to strike the entire statute and regulations, there would be no money-mandating provision under which Mr. Collins could receive separation pay.

Mr. Collins also asserts that the Court may strike the regulations in their entirety and that he would then be entitled to full separation pay under the statute. Contrary to Mr. Collins' assertion, "the principles of severability analysis" do not allow this Court to sever entire implementing regulations, particularly in this case where Congress made clear that the

implementing regulations would establish the framework for determining who may be eligible for separation pay. *See Gentry*, 546 F.2d at 344 (severing the "live-in" provision that was less than one sentence long, with no references made to any implementing regulation). Indeed, in *Britell v. United States*, 372 F.3d 1370 (Fed. Cir. 2004), the Federal Circuit considered a request to sever a portion of a statute, 10 U.S.C. § 1093(a), that was only one sentence long. In considering that request, the court quoted *Gentry* for the proposition: "If the [arguably unconstitutional provision] is not separable from the other language of the statute, this court has no jurisdiction to grant recovery to plaintiff, whether the [provision] is constitutional or not." *Id.* at 1378-79.[1]

Further, striking the regulations in their entirety would not, in fact, result in Mr. Collins receiving full separation pay. The statute makes clear that payment of any separation pay is conditioned upon the Secretary deciding which service members may receive full separation pay, which may receive half pay, and which are not entitled to any pay at all. *See* 10 U.S.C. § 1174(b) (A servicemember "is entitled to separation pay . . . unless the Secretary determines that the conditions under which the member is discharged do not warrant payment of such pay" and half separation pay may be provided "under criteria prescribed by the Secretary of Defense."). In other words, even if the Court were to strike the entirety of the regulations, the separation pay statute, by itself, is not money-mandating. Without the implementing regulations, there would be

[1] *Sam v. United States*, 230 Ct. Cl. 596 (1982), is not helpful to Mr. Collins' argument. In that case, the court was not being asked to strike or sever anything from the statute or regulations. Rather, plaintiffs argued that if the Navy unlawfully interpreted a regulation and statute, then they would be entitled to payment. *See also Wheeler v. United States*, 3 Cl. Ct. 686, 690 (1983) (holding that Court possessed jurisdiction over equal protection claim that plaintiffs were treated differently from other similarly situated employees.).

no way of assessing whether a service member would be eligible for full separation pay, half separation pay, or no separation pay.

Mr. Collins' approach would also nullify Congress' intent that some service members receive half separation pay instead of full pay and that others receive no separation pay at all. The statute plainly envisions that some members should receive half separation pay, and it leaves the criteria for half separation pay entirely to the discretion of the Secretary. *See* 10 U.S.C. § 1174(b)(2). Mr. Collins' approach also contradicts congressional intent in enacting this section of the separation pay statute. As we explained in our motion to dismiss, prior to 1991, regular enlisted military personnel were not eligible for separation pay. H.R. Rep. No. 101-665, at 135 (1990), *reprinted in* 1990 U.S.C.C.A.N. 2931, 2995. The 1991 National Defense Authorization Act, Pub. L. No. 101-510, § 501(a)-(d), 104 Stat. 1485, 1549-1550 (1990), made regular enlisted personnel with six or more but less than 20 years of active service eligible for separation pay. *Id.* The amendments to the separation pay program were adopted in response to Congress' perception that there would be substantial reductions in force in the ensuing years. *Id.* In other words, while Congress gave the Secretary discretion to craft the implementing regulations, Congress did not intend to provide full separation pay for service members who were discharged for other reasons, like Mr. Collins.

Finally, Mr. Collins' approach would not only far exceed the limits of this Court's authority as set forth in *Gentry*, but also would have significant consequences beyond the scope of Mr. Collins' case. Numerous requirements to qualify for full separation pay, such as that the service member have an "honorable" discharge, are contained in the implementing regulations that Mr. Collins proposes eliminating. *See* DoDI 1332.29, 3.1.2. Thus, under Mr. Collins' view,

even service members separated for misconduct or criminal behavior, with other than honorable discharges, could be entitled to full separation pay. Obviously, this approach would conflict with the very purpose of this portion of the separation pay statute – to allow the military to award separation pay to those members discharged as a result of a downsizing of the military.

B. Even After Severing The Alleged Unconstitutional Portions Of The Regulations, Mr. Collins Would Still Not Be Entitled To Full Separation Pay

In the alternative, Mr. Collins contends that the Court should sever only a portion of the regulations so that he would then receive full separation pay. Mr. Collins suggests severing paragraph 3.2.3.1.4 ("Homosexuality") from DoDI 1332.29. Mr. Collins, however, was discharged under the AFI. For him to succeed in this case, the Court would, among other steps, need to sever paragraph 9.3.1.5 ("Homosexual Conduct") from AFI 36-3208, which permits members separated for homosexual conduct to receive half separation pay. However, severing paragraphs 3.2.3.1.4 from the DoDI and 9.3.1.5 from the AFI would be insufficient to place Mr. Collins within the category of service members eligible for full separation pay, unless the Court also severs the requirement in both regulations that the member be "fully qualified for retention." Mr. Collins is not disputing the legality of his discharge pursuant to the DADT policy. Thus, he cannot logically argue that – despite not being qualified for retention under DADT– he is nevertheless "fully qualified for retention."[2] Further, as explained above, to invalidate the "fully qualified for retention" requirement would collapse the distinction between those eligible for full

[2] Citing *Watson v. United States*, 49 Fed. Cl. 728 (2001), Mr. Collins argues that the constitutionality of DADT and half separation pay are not intertwined; however, *Watson* is inapposite. *Watson* held that a challenge to the constitutionality of DADT in the Court of Appeals for the Ninth Circuit does not preclude a challenge to the separation pay policy in the Court of Federal Claims. Here, however, Mr. Collins fails to state a claim because the statute and implementing regulations do not entitle him to full separation pay.

separation pay and those eligible for half separation pay, contrary to Congress' intent.

In any event, even if the Court severed the requirement in both the DoDI and AFI that the member be "fully qualified for retention," and the provision that members separated for homosexual conduct may receive half separation pay, Mr. Collins would still not qualify for full separation pay under the remainder of the administrative scheme. As explained in our motion, both the DoDI and AFI reserve full separation pay to three specific categories of service members: those denied reenlistment under an early release/date of separation rollback program, those denied reenlistment under established promotion or high year tenure policies, and those involuntarily separated under a reduction in force program. *See* AFI 36-3208, 9.2, Table 9.1. Mr. Collins does not contend that he falls into any of these categories.

Rather, Mr. Collins attempts to draw a distinction between the DoDI and the AFI. He asserts that, under paragraph 3.1.3.1 of the DoDI, the only requirement is that the member be "fully qualified for retention." Opposition, at 29. According to Mr. Collins, members denied reenlistment under promotion or high year tenure policies are but "one example" of potentially many unspecified types of discharges that would qualify for full separation pay under 3.1.3.1. Mr. Collins also asserts that, to the extent AFI 36-3208 conflicts with the DoDI, the AFI is unenforceable. Opposition, at 29.

The AFI and DoDI, however, do not conflict. In *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Supreme Court held that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Id.* at 842; *see also Craft Mach. Works, Inc. v. United States*, 926 F.2d 1110, 1114 (Fed. Cir. 1991) ("This court also accords considerable weight to the prior

long-standing interpretation, if reasonable, of the agency charged with administering a regulatory scheme.").

The Court should afford *Chevron* deference to the Air Force's interpretations of Department of Defense publications. *See Bateson v. United States*, 51 Fed. Cl. 557, 563 (2002) (applying *Chevron* deference to Air Force's interpretation of Department of Defense Directive). The Air Force's interpretation of DoDI 1332.29's requirements for full separation pay is reasonable and has not changed since at least 1994. *See* AFI 36-3208, Administrative Separation of Airmen, 9.2.1 (October 14, 1994), attached as Exhibit A. The reasonableness of an agency interpretation is supported when it has been consistent over time. *See Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993). When the meaning of military regulations and instructions is at issue, the armed service's own interpretation must be given controlling weight and deference, especially when it has been consistently interpreted over a long period of time. *See Champagne v. United States*, 35 Fed. Cl. 198, 210 (1996) (citing *United States v. Clark*, 454 U.S. 555, 565 (1982); *Wronke v. Marsh*, 787 F.2d 1569, 1576 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 853 (1986)). The DoDI, republished in 1996 to incorporate changes, did not amend 3.1.3 or its subparagraphs. *See* DODI 1332.29, page 1. This is a further indication of the reasonableness of the Air Force's interpretation. *Cf. Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

The consistency of the Air Force interpretation is also evident by the fact that those military members separated under a selective reenlistment program ("SRP") do not receive full separation pay. The Air Force uses selective reenlistment to insure that it retains only airmen

who consistently demonstrate the capability and willingness to maintain high professional standards. *See* AFI 36-2606, Reenlistment in the United States Air Force, 2.1 (May 9, 2011), attached as Exhibit B. Under the SRP, commanders have authority to select or non-select airmen for reenlistment. *Id.* at 2.2. Airmen denied reenlistment through the SRP are not given full separation pay unless they fall into one of the three categories in paragraphs 9.2.1 through 9.2.3 of the AFI.[3] Mr. Collins' interpretation of the DoDI, however, would conflict with that practice.

Further, the Air Force's interpretation of the DoDI gives an internally consistent meaning to paragraph 3.1.3 of DoDI 1332.29, which provides that eligibility for full separation pay requires that the member meet the "following *specific provisions*" listed in paragraphs 3.1.3.1 to 3.1.3.4 (emphasis added). According to Mr. Collins, section 3.1.3.1 requires that the member be "fully qualified for retention" and cites high-year tenure discharges as "merely one example" of the types of discharges that qualify for full separation pay. Opposition, at 28. Interpreted in such a manner, section 3.1.3.1 would cease to be a "specific condition," thereby rendering the term meaningless. *Gen. Elec. Co. v. United States*, 92 Fed. Cl. 798, 812 (2010) (noting the "well-established axiom of statutory construction that a statute is to be interpreted so that no words shall be discarded as being meaningless, redundant, or mere surplusage") (citing *United States v. Castrillon-Gonzalez*, 77 F.3d 403, 406 (11th Cir. 1996)).

Moreover, it is reasonable to conclude that, if paragraph 3.1.3 were intended to list only an example rather than "specific conditions," it would have said so. For instance, paragraph

[3] For example, airmen with more than six years of service who are denied reenlistment by their commander, but who are otherwise fully qualified for retention and reenlistment, can be coded with a "2X." *See* AFI 36-2606, 2.8.2 and Table 5.2, Item 23. Such airmen separated with a "2X" code are eligible for half separation pay, but not full separation pay. AFI 36-3208, Table 9.1, Rule 10.

3.4.1 of the DoDI states that members are not eligible for separation pay when separated at their own request, and gives "the *following examples*" that shall be considered to be a separation at the member's own request. (Emphasis added). Thus, where the drafters of DoDI 1332.39 intended it to provide a list of examples, they did so expressly.

Finally, the Air Force's interpretation of the DoDI is reasonable because it gives meaning to paragraph 3.1.3.2, whereas Mr. Collin's interpretation would render this section redundant. Paragraph 3.1.3.2 requires a member to be "fully qualified for retention" and involuntarily separated under a reduction in force program. If paragraph 3.1.3.1 required only that a member be "fully qualified for retention," as Mr. Collins suggests, it would already include those fully qualified members separated through a reduction in force program. Paragraph 3.1.3.2 would therefore be redundant. *See United States v. Alaska*, 521 U.S. 1, 59 (1997) ("The Court will avoid an interpretation of a statute that renders some words altogether redundant.") (internal quotation marks omitted).

In sum, the Court should defer to the Air Force's reasonable interpretation of the DoDI. *See Champagne*, 35 Fed. Cl. at 210 ("Where a military regulation is susceptible to equally reasonable constructions, a court may not substitute an alternative interpretation for the interpretation of the military service.") (citing *Wronke*, 787 F.2d at 1573). Under that interpretation, even if the Court were to strike the language requested by Mr. Collins, he would still not meet the criteria that would make him eligible for full separation pay. The Court should dismiss Mr. Collins' complaint.

CONCLUSION

For the foregoing reasons and the reasons set forth in our motion to dismiss, we respectfully request that the Court grant our motion to dismiss.

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July 18, 2011