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criminal code" would be realized if this Court were to allow this plaintiff to be removed from service on the record now before the Court. Thus, the Court finds that plaintiff's removal was arbitrary and capricious.

III. CONCLUSION

The Court holds that plaintiff, convicted for shoplifting and subsequently fully and unconditionally pardoned, cannot be removed from service by the defendants for "conviction for a crime," without defendants establishing a nexus between the plaintiff's removal and the promotion of the efficiency of the service. Accordingly, the Court will grant summary judgment for the plaintiff.[11]

An Order in accordance with the foregoing will be issued of even date herewith.

Yona OWENS et al., Individually and on behalf of all others similarly situated, Plaintiffs,

v.

Harold BROWN, Secretary of Defense and W. Graham Claytor, Secretary of the Navy, Defendants.

Civ. A. No. 76–2086.

United States District Court, District of Columbia.

July 27, 1978.

Action was brought challenging statutory ban on assignment of female personnel to duty on navy vessels other than hospital ships and transports. Motion was filed to certify suit as class action. In addition, cross motions for summary judgment on the merits were filed. The District Court, Sirica, J., held that: (1) suit was appropriate for class action treatment; (2) military judgments by political branches are reviewable by the courts for constitutional infirmities; (3) degree to which sex-centered generalizations actually comport with facts must be substantial to withstand equal protection challenge; (4) absolute ban on assignment of female personnel to sea duty, except on certain ships, abridges equal protection guaranty embodied in due process clause of Fifth Amendment, and (5) whatever problems might arise from integrating ships or crews were matters that could be dealt with through appropriate training and planning.

Certifications granted; summary judgment for plaintiffs.

1. Federal Civil Procedure 🔑181

Action challenging statutory bar on assignment of female personnel to duty on navy vessels other than hospital ships and transports was certified as class action, notwithstanding concern that some female personnel might not share representative plaintiff's desire to remove such bar, since issue was not whether Navy must assign female personnel to ship duty against their wishes but whether navy authorities must exclude women from ship assignments whether or not they wish to go to sea. 10 U.S.C.A. § 6015; Fed.Rules Civ.Proc. rule 23(b)(2), 28 U.S.C.A.

2. Armed Services 🔑14, 24
Constitutional Law 🔑278.6

Statute barring assignment of female personnel to duty on navy vessels other than hospital ships and transports violates equality principle embodied in the Fifth Amendment. U.S.C.A.Const. Amend. 5; 10 U.S.C.A. § 6015.

11. Although the plaintiff has raised some procedural objections to the defendants' actions, the Court is withholding ruling upon them because they were inadequately briefed and because the Court is relatively confident that plaintiff will decide to forego his procedural objections in view of the Court's resolution of plaintiff's main contention that his removal was arbitrary and capricious.

3. Constitutional Law ⇨68(1)

Fact that military affairs were implicated did not mean that Fifth Amendment challenge to statutory ban on assignment of female personnel to duty on navy vessels other than hospital ships and transports raised a nonjusticiable political question. 10 U.S.C.A. § 6015; U.S.C.A.Const. art. 1, § 8, cl. 14; art. 2, § 2, cl. 1; Amend. 5.

4. Armed Services ⇨3

A high degree of deference is owed to the political branches of government in the area of military affairs. U.S.C.A.Const. art. 1, § 8, cl. 14; art. 2, § 2, cl. 1.

5. Constitutional Law ⇨70.1(7), 72

Courts should ordinarily exercise a large measure of self-restraint when asked to interpose the judicial will above that of the Congress and the president, as regards military affairs; however, courts may not be required to abdicate their responsibility to decide cases and controversies merely because they arise in the military context. U.S.C.A.Const. art. 1, § 8, cl. 14; art. 2, § 2, cl. 1.

6. Constitutional Law ⇨70.1(7), 72

Whether deference due particular military determinations rises to the level of 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. U.S.C.A.Const. art. 1, § 8, cl. 14; art. 2, § 2, cl. 1.

7. Constitutional Law ⇨70.1(7), 72

Military judgments by the political branches are reviewable by the courts for constitutional infirmities. U.S.C.A.Const. art. 1, § 8, cl. 14; art. 2, § 2, cl. 1; Amend. 5.

8. Constitutional Law ⇨278.6

Likelihood of influencing legislative efforts to revise statutory ban on assignment of female personnel to duty on navy vessels other than hospital ships and transports did not afford a principled basis for avoiding a determination of whether ban violated the Fifth Amendment. U.S.C.A.Const. Amend. 5; 10 U.S.C.A. § 6015.

9. Constitutional Law ⇨208(3)

Even where a classification is viewed as actually furthering a proper statutory purpose, a sex-based distinction must bear a strong relation to the government's objective. U.S.C.A.Const. Amend. 5.

10. Constitutional Law ⇨208(3)

Legislative classifications between the sexes must advance legitimate objectives. U.S.C.A.Const. Amend. 5.

11. Constitutional Law ⇨208(3)

Required degree of correlation between differences in treatment accorded to men and women and legislative objectives sought to be achieved is the principal factor that fixes the strictness with which gender classifications are to be scrutinized; as the necessary measure of correlation moves higher, the level of scrutiny intensifies to the same extent, and as a weaker "congruence" becomes sufficient, the level of review is correspondingly relaxed. U.S.C.A. Const. Amend. 5.

12. Constitutional Law ⇨208(3)

Degree to which a sex-centered generalization actually comports with the fact must be substantial to withstand constitutional challenge; classifications by gender must be substantially related to achievement of important objectives. U.S.C.A. Const. Amend. 5.

13. Constitutional Law ⇨213.1(2)

Although in equal protection cases the court need not accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been the goal of the legislature there is no requirement that the court must overlook unexpressed legislative objectives that reasonably could have formed the basis of classification. U.S.C.A. Const. Amend. 5.

14. Constitutional Law ⇨208(3)

To extent that legislative classifications are based on overbroad generalizations about traits, behavior and capabilities of the different sexes, their reasonableness is rightly called into question. U.S.C.A. Const. Amend. 5.

15. Constitutional Law ⇐224(1)

Legislative distinctions between members of the opposite sexes need not be drawn with perfect precision to withstand equal protection challenge; however, validity does depend on an unusually high degree of correlation between sexual traits underlying differences in treatment and important legislative objectives. U.S.C.A.Const. Amend. 5.

16. Armed Services ⇐14, 24

Alleged morale and discipline problems caused by integration of men and women aboard navy ships furnished no basis for upholding statutory ban on assignment of female personnel to duty on navy vessels other than hospital ships and transports since whatever problems might arise from integrating ships and crews were matters that could be dealt with through appropriate training and planning. U.S.C.A.Const. Amend. 5; 10 U.S.C.A. § 6015.

Marjorie M. Smith, Jill Laurie Goodman, Susan Deller Ross, New York City, Katherine A. Mazzaferri, Trudy Levy, Washington, D. C., for plaintiffs.

Earl J. Silbert, U. S. Atty., Michael J. Ryan, Lt. Arthur P. Leary, JAGC, USNR, Washington, D. C., for defendants.

ORDER GRANTING CLASS CERTIFICATION

SIRICA, District Judge.

[1] The only serious objection to certifying this case as a [23]b(2) class action on behalf of Navy women stems from the concern voiced by defendants that some female personnel may not share plaintiffs' desire to remove the statutory bar of 10 U.S.C. § 6015 (1970) that prevents their being assigned to duties aboard Navy vessels. Defendants point is not well taken for two principal reasons.

First, defendants have not substantiated their concern that there is actually an antagonism among Navy women concerning duty assignment aboard Navy ships. In an effort to illustrate a difference in opinion in this respect, defendants point only to the results of an unpublished and admittedly inconclusive survey that was taken by defendants' employees of 81 female members of the Navy. While this survey shows that some of the persons interviewed "do not think women should go to sea," the overwhelming consensus is to the contrary.

More importantly, even accepting defendants' assertion of a division of opinion among class members, this difference does not appear to be legally significant on the question of class certification. The issue in this case is not whether the Navy must assign female personnel to ship duty against their wishes. Rather, the question is whether Navy authorities must exclude women from ship assignments whether or not they wish to go to sea. Viewing the issue in this light, it appears that any antagonism that may exist among class members is insignificant since it can readily be obviated by the Navy Department itself when it develops policies concerning the assignment of women aboard Navy vessels. Commanding officers enjoy broad discretion in making duty assignments; and certainly, in assigning women to duty, the Navy can take account of the fact that some females may have joined the service with neither an expectation nor a desire to serve aboard Navy ships. *See* Defs. Ans. to Pl. Sec. Int. No. 21. In short, it is in defendants' power to obviate any adverse effect that might flow from the difference in attitude that they offer as grounds for denying class certification.

Accordingly, because the Court finds that all requirements of rule 23(a) and 23(b)(2) are satisfied in this instance, it is by the Court this 27th day of July, 1978,

ORDERED that plaintiffs' motion for class certification be, and the same hereby is, granted, and the class is defined to consist of all women serving in the Navy who are or will be adversely affected in their service careers by the enforcement of 10 U.S.C. § 6015 (1970).

OPINION

[2] This civil rights action presents a challenge to the constitutionality of a federal statute that bars women members of the Navy from performing any duty in any capacity aboard any ship that is currently in service in the Navy's fleet. The provision that occasions this challenge is 10 U.S.C. § 6015 (1970).[1] Section 6015 begins by conferring on the Secretary of the Navy broad discretion to qualify women for naval duty and to prescribe the range of their training and assignments. But the statute concludes with an absolute prohibition that prevents the Secretary from exercising his discretion to assign female personnel to duty at sea. Plaintiffs, a group of female officers and enlisted women in the Navy, challenge this prohibition as abridging the equal protection guarantee embodied in the due process clause of the fifth amendment.[2] Their complaint seeks an order declaring section 6015's absolute bar unlawful and enjoining defendants, the Secretary of the Navy and the Secretary of Defense, from relying on it when formulating policy for the training and assignment of Navy women to duty.[3] As will appear more fully below, plaintiffs' position is well taken. The application of developing equal protection principles convinces the Court that to the extent that section 6015 operates without counter-balancing justification to foreclose the discretion of the Secretary of the Navy regarding the assignment of female personnel to duty aboard Navy vessels, the sweep of the statute is too broad to pass constitutional muster.

I. *Facts and Background*

Out of a total personnel complement of approximately half a million individuals, there are some 25,000 women currently serving in the Navy. This number reflects a marked increase in the recruitment of females over recent years and is part of a general trend towards relying more heavily on female personnel to fill the ranks of the several military forces. But none of these many thousands of Navy women is presently permitted to hold any of the wide range of positions available aboard the Navy's fleet. This holds true even when commanding officers find particular women recruits equally as qualified for particular assignments as their male counterparts. This is also the case even when their superiors find them affirmatively more qualified. The reason for this mandated disparate treatment is section 6015, a provision that allows of but one distinction, that of male and female.

The distinction wrought by the statute is the source of numerous and easily documented differences in the prospects facing men and women members of the Navy. But none is more pronounced than exists in the area of duty assignments. The range of duties and assignments available to female members of the Navy is severely re-

1. Originally enacted as part of the Women's Armed Services Integration Act of 1948, Pub. L.No. 80–625, 62 Stat. 368 (1948), 10 U.S.C. § 6015 (1970) now provides:

> The Secretary of the Navy may prescribe the manner in which women officers appointed under section 5590 of this title, women warrant officers, and enlisted women members of the Regular Navy and the Regular Marine Corps shall be trained and qualified for military duty. The Secretary may prescribe the kind of military duty to which such women members may be assigned and the military authority which they may exercise. *However, women may not* be assigned to duty in aircraft that are engaged in combat missions nor may they *be assigned to duty on vessels of the Navy other than hospital ships and transports.* (emphasis supplied).

It is undisputed that there are no hospital ships or transports currently in service in the Navy.

2. *Schlesinger v. Ballard*, 419 U.S. 498, 500 n. 3, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975); *Frontiero v. Richardson*, 411 U.S. 677, 680 n. 5, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973); *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

3. Plaintiffs' amended complaint also seeks an award of damages to compensate plaintiffs for the impairment to their fifth amendment rights caused by section 6015. Plaintiffs, however, have apparently abandoned this claim for relief.

stricted in comparison with assignments open to men for the simple reason that, under the statute, women are eligible exclusively for shore duty, while their male counterparts may serve both on shore billets and in the more numerous positions available at sea. This disparity stands out starkly when a comparison is made between the categories of job classifications that are open to members of the respective sexes. Of the scores of ratings and career classifications available in naval service, females are barred from all but a small fraction, while men, by contrast, are allowed to compete for all available positions. Women are not only excluded from billets that involve assignments at sea, they are also precluded from a significant number of shore billets because these posts are restricted to persons who are *eligible* for duty aboard ships.

The exclusion of women from most job classifications also operates to preclude them from gaining access to a wide range of opportunities for the development of job skills and areas of technical expertise. There is presently little reason for military officials to train and qualify female members to perform jobs that are foreclosed to them by statute. And the Navy has understandably and with almost uniform consistency refrained from training women for callings reserved entirely for members of the opposite sex. Aside from the obvious effect this has on the advancement of females within the Navy, this limitation works the additional consequence of depriving women members of skills that in all likelihood will prove vital to their ability to compete for and secure satisfactory employment when they end their military careers and reenter the private sector.

The disadvantage faced by women in the private sector as a result of section 6015 is heightened by the fact that the statute effectively places a ceiling on the level of female recruitment by the Navy. Despite the current policy to enlarge the female component in the naval forces, the fact remains that only so many shore-confined members are capable of being integrated into a contingent that is "organized, trained and equipped primarily for prompt and sustained combat incident to operations at sea." 10 U.S.C. § 5012(a) (1970). The practical effect of this limitation is that a disproportionately small number of women will have the opportunity to embark upon a career whose successful completion carries with it numerous and economically significant veterans' benefits and preferences.

But a career in the Navy is not measured entirely in terms of the employment opportunities and veterans' privileges that accompany military service. There is in addition to the practical benefits that inure upon serving in the Navy a moral element that forms an integral part of the overall experience. This springs from the idea of individuals taking part in an essential national enterprise to the limits of their abilities. This aspect of a naval career is not something plainly reserved for one gender rather than the other. But because of section 6015, sex is required to take precedence over individual ability where the essential part of naval service is concerned.

Significantly, none of the limitations and disadvantages facing Navy women is traceable to any studied evaluation made of male and female capabilities that reveals that women lack the native ability to perform competently in positions held exclusively by men. Indeed, several reports on the subject made under military auspices suggest that just the opposite is true with respect to some women and some positions. The distinction is rather the product of the statutory presumption reflected in section 6015 that all women are unqualified to discharge any of the duties performed on any of the Navy's ships.

For obvious reasons, the harsh effects occasioned by this presumptive disqualification in individual cases are not difficult to picture. They are amply illustrated by looking at the limitations placed on the military careers of several of the plaintiffs named in this action. Plaintiff Yona Owens, for example, serves in the Navy as an Interior Communications Electrician. Her position involves the repair and maintenance of sophisticated electrical equipment that is primarily used for navigation and found aboard Navy ships. To develop and utilize her skills more fully, plaintiff Owens has requested that she be assigned to a shipboard position. However, because of section 6015, the Navy has refused to even consider her for duty at sea irrespective of her personal qualifications. The Navy has similarly refused to consider plaintiff Natoka Peden, a photographer and diver, for assignment as a support diver because the diving unit with which she wishes to work is deployed from a ship. This, too, is without regard to plaintiff Peden's individual abilities.

Plaintiff Kathleen Byerly is a naval officer with approximately twelve years of experience. Ranked as a lieutenant commander, and recognized by the Navy as a distinguished officer, she holds the position of Aide and Flag Secretary to the Commander Training Command in the Pacific Fleet. This assignment entails the performance of administrative and liaison functions between the commanding admiral, his staff and his ten subordinate commands. Plaintiff Byerly is the first woman to hold a position of this type. But unlike male officers with comparable backgrounds and experience, she is precluded by section 6015's absolute prohibition from advancing to the prized position of shipboard command. This is so solely because the command of a vessel necessarily involves an assignment at sea and because plaintiff Byerly is a female.

Like plaintiff Byerly, plaintiff Joellen Drag serves as a naval officer. As part of an experimental program, the Navy recruited her to become a member of the first group of women to be trained as Navy pilots. After qualifying as a helicopter pilot, plaintiff Drag was assigned to a support squadron whose primary function involves servicing vessels at sea with supplies. This duty typically requires a temporary assignment to a supply ship and regular flights to and from cruising vessels. Yet because of section 6015, plaintiff Drag is barred from this kind of duty, while equally qualified males are not. As her commanding officer noted to the Secretary of the Navy, plaintiff Drag "is excluded from virtually all operational commitments routinely undertaken by her contemporaries" despite her "demonstrated outstanding performance in all aspects of her assigned duties."[4] In addition, this same limitation on assignments also impairs plaintiff's ability to accumulate the flight time she needs to advance to higher ratings even as a *shore*-based aviation specialist. The reason is that helicopter pilots are required as a condition to advancement to qualify as aircraft commanders with 300 hours of flight time, a goal that is made especially difficult for women because of the scarcity of flight opportunities that are not precluded by the broad sweep of the statute.

The obstacles to career development and national service faced by these women are by no means unprecedented. Traditionally, service in the Navy has been a masculine calling and until World War II the only females allowed to serve as members of the Navy were employed in the traditional areas of nursing and office work.[5] Constraints on female service in the naval forces were somewhat relaxed, however, in 1948 with the enactment of the Women's Armed Services Integration Act.[6] This piece of legislation signified a major step in the direction of expanding the range of career opportunities available to women interested in pursing a career in the Navy and towards equalizing the distribution of privileges and benefits that accompany naval service.[7] But it also contained fundamental limitations.[8] One of the most prominent of these restrictions is the absolute bar against shipboard duty currently reflected in 10 U.S.C. § 6015 (1970).

4. First Endorsement dated March 15, 1976, Pl. Mot. for Sum. Judg., Exhib. A.

5. M. Binkin & S. Bach, *Women and the Military*, at 4–6 (1977).

6. Pub.L.No. 80–625, 62 Stat. 356 (1948).

7. *Id.* *See also* Binkin & Bach, *supra* note 5, at 10–12.

8. *Id.*

Many of the limitations brought into effect by the Integration Act of 1948 were removed by amendments passed in 1967.[9] These changes were for the most part directed at eliminating general ceilings on the level of female recruitment and specific restrictions on the ability of women to hold permanent positions in some of the Navy's higher grades.[10] The 1967 amendments did not, however, modify the scope of section 6015's blanket prohibition. Far from doing that, they heightened the adverse effect of the constraint by allowing an increasing number of female members to enter the Navy and advance upward through the ranks, while at the same time denying them the career opportunities that comprise the primary mission of the naval forces.

The decision in 1970 to end the draft added a significant impetus for military authorities to reevaluate the utilization of women in the armed services.[11] This reevaluation was necessitated because of the serious and evenly debated question concerning the ability of the military to recruit sufficient numbers of male volunteers without an unacceptable increase in costs and without compromising the quality of new recruits.[12] The effort was also influenced by congressional approval of an Equal Rights provision that did not contain an exception for military affairs.[13] An exception of this kind was offered during the debate on the Equal Rights Amendment, but was defeated by a wide margin.[14] Finally, the reevaluation of the issue of women in the military was occasioned by the enactment of legislation[15] in 1975 that allowed the admission of women to the military academies, the primary source of combat officers, and by the introduction of several bills[16] to prohibit the exclusion of women from combat duty.

As part of this review process, a number of studies were undertaken to look into the relationship between women in the military and military needs and effectiveness.[17] These reports recognize that the projected decline in the number of eligible males makes an increase in the number of women recruits inevitable.[18] In addition, once female enlistments are significantly increased, considerations of personnel management and flexibility require a corresponding expansion in female utilization.[19] This is because, as the Deputy Chief of Naval Personnel recently explained, "If you build into your structure too many people who can't go to sea, then this interferes with the rotation of those who can go either place, and who are experienced."[20]

These reports also recognize that the female population offers a greater reservoir of quality recruits than the male population.[21] Indeed, statistics compiled by the

9. Pub.L.No. 90-130, 81 Stat. 374 (1967).

10. *Id. See also Schlesinger v. Ballard,* 419 U.S. 498, 505 n. 10, 95 S.Ct. 572, 42 L.Ed.2d 610, Binkin & Bach, *supra* note 5, at 12.

11. Binkin & Bach, *supra* note 5, at 13-14.

12. *Id.*

13. 86 Stat. 1523. The text of the Equal Rights Amendment reads:

> Equality of Rights under law shall not be denied or abridged by the United States or by any state on account of sex.

14. 118 Cong.Rec. 9337 (1972); *see also id.* at 9336, 9351.

15. Pub.L.No. 94–106, 89 Stat. 538 (1975).

16. See H.R. 58 (introduced Jan. 1, 1975); H.R. 2190 (introduced Jan. 28, 1975); H.R. 12649 (introduced Mar. 18, 1976).

17. *See, e.g.,* Use of Women in the Military, Office of the Assistant Secretary of Defense (1977), Defs. Ans. to Pl. First Int., Attach. 1; Report of the Task Group of Equal Treatment of Service Women (1973), *id.,* Attach. 20; Navy Affirmative Plan (1976), *id.,* Attach. 18; Report on the Evaluation of the Assignment of Women to the *USS Sanctuary* (1973), *id.,* Attach. 7. *See also* Binkin & Bach, *supra,* note 5.

18. *See* Graph Projection, Defs. Ans. to Pl. Sec. Int. No. 23 & Attach. 6.

19. *Id. See also* Binkin & Bach, *supra* note 5, at 24–26.

20. Statement of Rear Admiral Charles Rauch, Pl. Mot. for Sum. Judg., Exhibit H.

21. Use of Women in the Military, *supra* note 17, at 22–23.

Defense Department reveal that female recruits are on the average brighter than their males counterparts, test higher in areas that are used to predict success in the military and are more apt than males to remain in the military beyond their minimum terms.[22] Moreover, "As male recruiting pressure tightens, these differences in quality between the marginal male and female accession can be expected to widen further." [23]

Cost savings to the military are also a likely consequence of increasing the utilization of women in the armed forces. The marginal cost of recruiting high quality men is approximately $2,000 in comparison with $150 for recruiting women of equal quality.[24] This figure for women compares favorably with the cost of enlisting lower quality men, leading military authorities to conclude: "If women can do enough of the jobs which must be done, considerable savings can be realized." [25] The importance of these savings is particularly apparent given the fact that with the recent decision to employ an all-volunteer military force, increasing expenditures are necessary to maintain an adequate number of recruits.[26] "Indeed, whether this nation can sustain its armed forces solely by voluntary means could well depend on how effectively the female labor resource is employed." [27]

Based on the information brought out in these studies and by an experiment conducted between 1972 and 1974 in which women were allowed to take part in the general management of a Navy vessel,[28] the Department of Defense has forthrightly looked for ways to increase the use of women in the Navy.[29] But the broad sweep and absolute terms of section 6015 have effectively thwarted military authorities in their attempt to expand female utilization. The realization that the statutory bar is as far reaching as the broad terms of the section imply has prompted the Department of Defense to initiate efforts to amend the statute so as to limit the prohibition against women serving on shipboard billets.[30] The Department, through the Secretary of the Navy, has not taken the position that section 6015 should be repealed completely. This is because the likely effects of *total* integration on military effectiveness is presently unclear. But the Department is clear about the positive effects that will flow from moving in measured steps to *enlarge* the areas of female utilization.

The amendments proposed by the Navy to modify section 6015 are limited yet, when the opportunities presently open to female members are considered, they are by no means insignificant. The proposed changes would make it possible to assign qualified women to temporary duty on any vessel not engaged in combat missions and to permanent duty on vessels of a classification similar to hospital ships and transports.[31] This relaxation of the statutory bar would of necessity broaden the training and occupational opportunities open to female recruits and officers by initiating the assignment of both male and female personnel to shipboard duties. In addition, the proposal would enhance career opportunities for Navy women by opening up additional rat-

22. *Id.* at 23.

23. *Id.*

24. *Id.*

25. *Id.*

26. Binkin & Bach, *supra* note 5, at 65–71.

27. *Id.* at 71.

28. Defs. Ans. to Pl. Sec. Int. Nos. 25, 31, 37, 39 & Attachs. 7, 9.

29. Memoranda Regarding Naval Personnel, *id.*, Attach. 19. These materials reflect efforts directed at inquiring into whether some areas of shipboard female utilization might fall outside the scope of section 6015. The conclusions reached are that section 6015 is as encompassing in its prohibition as its absolute terms imply.

30. Letter of W. Graham Claytor, Secretary of the Navy, to the Speaker of the House, dated May 9, 1977, *id.*, Attach. 9.

31. Defs. Ans. to Pl. Sec. Int. Nos. 2, 3 & 4.

ings and classifications that are currently precluded by the statute.[32]

The support shown for the proposal by the Navy and the Department of Defense has created somewhat of an anomaly in the context of the present litigation. In seeking a partial repeal of section 6015, defendants have taken the position that an absolute prohibition against women serving aboard Navy ships is undesirable as a matter of policy and unnecessary as a matter of military preparedness. However, in defending the lawfulness of the provision against plaintiffs' constitutional challenge, defendants have maintained that the classification drawn by section 6015 nevertheless rests on legitimate considerations that justify the disparate treatment accorded Navy men and women. These seemingly conflicting assertions have required defendants to walk somewhat of a narrow line between the two sides of an apparent contradiction. They also explain why defendants have chosen to press the point that the constitutionality of section 6015 raises a nonjusticiable political question. However, for the reasons that follow, the Court is convinced that the distinction drawn by the statute is capable of judicial review and that, to the extent that it represents a generalization about women that even the highest defense authorities concede is unsound, it is not "substantially related to the achievement of . . . [important governmental] objectives." *Craig v. Boren*, 429 U.S. 190, 197, 97 S.Ct. 451, 457, 50 L.Ed.2d 397 (1976).

II. *Plaintiffs' Claims are Justiciable.*

[3] Defendants preface their defense on the merits in this case with the claim that because military affairs are implicated, the issue of section 6015's constitutionality raises a nonjusticiable political question. The focus of this argument is on provisions of the Constitution that empower the Congress[33] "To provide and maintain a Navy" and the President[34] to act as the "Commander in Chief of the . . . Navy of the United States." Defendants read these provisions as signifying an intent to commit decisions regarding the military to the discretion of the legislative and executive branches of government and to leave no room for the third branch to exercise independent review. This argument proves too much, however.[35]

[4] To be sure, a high degree of deference is owed to the political branches of government in the area of military affairs. This is so for obvious and compelling reasons. To begin with, there are few "area[s] of government activity in which the courts have less competence" to act than in the highly specialized field of military decision-making. *Gilligan v. Morgan*, 413 U.S. 1, 10, 93 S.Ct. 2440, 2446, 37 L.Ed.2d 407 (1973). Oversight of military operations typically involves "complex, subtle and professional" judgments that are best left to those steeped in the pertinent learning. *Id.* Moreover, defense decisions arise in the

32. *Id.*

33. U.S.Const., Art. I, § 8, cl. 14. This provision reads:
The Congress shall have power—
To provide and maintain a Navy . . . .

34. *Id.*, Art. II, § 2, cl. 1. It reads:
The President shall be Commander in Chief of the Army and Navy of the United States . . . . .

35. The Court does not understand defendants to be making the argument that questions of personnel utilization in the military are *absolutely* committed to the legislative and executive branches of government in the sense that the Constitution explicitly commits to Congress questions concerning the designated qualifications for its membership, *see Powell v. McCormack*, 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969), and compliance with the republican form of government guarantee, *see Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 32 S.Ct. 224, 56 L.Ed. 377 (1912); *Luther v. Borden*, 48 U.S. (7 How.) 1, 12 L.Ed. 581 (1842), and to the President particular questions concerning foreign policy, *see Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 68 S.Ct. 431, 92 L.Ed. 568 (1948); *Braniff Airways Inc. v. CAB [Chicago-Montreal]*, No. 76-2043 (D.C. Cir. July 10, 1978). Instead, it appears that defendants are basing their justiciability argument upon the fact that military questions are within the constitutional powers of the legislative and executive branches and that, *for prudential reasons*, courts should ordinarily regard the exercise of those powers as conclusive.

context of an area of national concern unparalleled in importance to the nation as a whole and thus are of the sort customarily entrusted to the political branches of government. "In framing policies relating to the great issues of national defense, the people are and must be, in a sense, at the mercy of their elected representatives." *Pauling v. McNamara,* 118 U.S.App.D.C. 50, 53, 331 F.2d 796, 799 *cert. denied,* 377 U.S. 933, 84 S.Ct. 1336, 12 L.Ed.2d 297 (1964). Beyond that, there are essential differences between the military and civilian communities that counsel strongly in favor of executive autonomy in military matters subject to legislative guidance. By contrast to the relationship between the government and employees and citizens, the defense establishment relates to military personnel as "employer, landlord, provisioner and lawgiver rolled into one." *Parker v. Levy,* 417 U.S. 733, 751, 94 S.Ct. 2547, 2559, 41 L.Ed.2d 439 (1974). This all-encompassing relationship is one that is largely unfamiliar to the courts and, coupled with the peculiar demands of military discipline and duty, adds impetus to the idea that military judgments deserve an especially high degree of respect.

[5, 6] Properly understood, these prudential and separation of powers considerations settle the point that courts should ordinarily exercise a large measure of self-restraint when asked to "interpose the judicial will above that of the Congress and the President." *Pauling, supra,* 118 U.S.App. D.C. at 53, 331 F.2d at 799. But by the same token they do not of necessity compel the courts to abdicate their responsibility to decide cases and controversies merely because they arise in the military context. Contrary to defendants' assertion, the deserved margin of latitude afforded the political branches of government in rendering military judgments seems *as a general matter* to figure more prominently into whether particular decisions are lawful than into whether they are susceptible to review at all. Whether 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. *See Gilligan v. Morgan,* 413 U.S. 1, 93 S.Ct. 2440, 37 L.Ed.2d 407 (1973); *Mindes v. Seaman,* 453 F.2d 197, 201-202 (5th Cir. 1971). Adoption of defendants' blanket assertion would blur these important distinctions.

[7] This conclusion finds firm support in the case law. The leading precedent is *Schlesinger v. Ballard,* 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975). In that case, a Navy lieutenant brought suit to challenge a federal statutory scheme that favored the promotion of women officers over men. Plaintiff claimed that this difference in personnel policy offended the equal protection guarantee of the fifth amendment. Ultimately, plaintiff's challenge was rejected by the Supreme Court. But significantly the Court did not reach this result by refraining from a decision on the merits based on notions of nonreviewability. Quite to the contrary, the Court resolved the dispute by applying substantive equal protection principles and by concluding that the disparate treatment occasioned by the statutory arrangement was rational because, as a result of 10 U.S.C. § 6015 (1970), "female lieutenants will not generally have compiled records of seagoing services comparable to those of male lieutenants." *Id.* at 509, 95 S.Ct. at 577.[36]

Nor did considerations of deference for the other branches of government prevent substantive review of military personnel policies in *Frontiero v. Richardson,* 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973).

36. It should be pointed out that the Court in *Schlesinger* expressed great deference for legislative and executive oversight in the field of military affairs. 419 U.S. at 510, 95 S.Ct. 572, 578. But the Court concluded by reinforcing the idea that military judgments by the political branches are nevertheless reviewable by the courts for constitutional infirmities: "We cannot say that, in exercising its broad constitutional power here, Congress has violated the Due Process Clause of the Fifth Amendment." *Id.*

There, a statutory difference between male and female members of the uniformed services that involved entitlements to housing, medical, and dental benefits was stricken on equal protection grounds. A review of the Court's decision shows not the slightest hesitancy about reaching the merits even though military affairs were involved.

In a like vein, deference for legislative and executive oversight of the military did not preclude independent review in *Parker v. Levy,* 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974). At issue in *Parker* was the constitutionality of Army regulations that permitted the courtmartial of a military physician for making disrespectful and disloyal statements to other military personnel. Even though the case presented a question touching upon the discretionary area of military discipline, the Court went forward to reach the merits. In so doing, it implicitly recognized that while the obvious differences between the military and civilian communities provide the backdrop against which to test the lawfulness of military decisions, they do not of necessity furnish a basis for foregoing review.

Nor are *Schlesinger, Frontiero* and *Parker* the only authorities to uphold the ability of the courts to inquire into internal military affairs. Indeed, as the Court of Appeals for the Second Circuit has noted, "a succession of cases in this circuit and elsewhere has reiterated the proposition that the military is subject to the Bill of Rights and its constitutional implications." *Crawford v. Cushman,* 531 F.2d 1114, 1120 (2d Cir. 1976). In the First Circuit, for example, the reach of the courts was held to extend to discharge petitions where constitutional rights are at stake. *See, e. g., Ashe v. McNamara,* 355 F.2d 277 (1st Cir. 1965). The decisions of the Second and Fourth Circuits are to the same general effect. *See, e. g., Hammond v. Lenfest,* 398 F.2d 705 (2d Cir. 1968); *Reed v. Franke,* 297 F.2d 17 (4th Cir. 1961). Other cases from the Second and Fifth Circuits have allowed review of military actions to determine whether they were undertaken in compliance with constitutional guarantees, *see, e. g., Crawford, supra,* within the scope of official authority, *see, e. g., Mindes v. Seaman,* 453 F.2d 197 (5th Cir. 1971), and in conformity with applicable military regulations, *see, e. g., Smith v. Resor,* 406 F.2d 141 (2d Cir. 1969). In the District of Columbia Circuit, the reach of judicial review was recently upheld in *Waldie v. Schlesinger,* 166 U.S.App.D.C. 175, 509 F.2d 508 (1974), to allow an equal protection challenge to a "men only" policy not unlike the one being challenged in the case at bar. There, plaintiffs asserted the unlawfulness of a policy that barred women from being admitted to the United States Air Force and Naval Academies even for training "in specialties *which are open to women.*" *Id.* 166 U.S. App.D.C. at 177, 509 F.2d at 510 (emphasis original).[37] Overturning a decision granting the government's motion for summary judgment, the Court quite forcefully indicated that a decision on the substance of plaintiffs' claims was appropriate and "remanded for a full trial on the merits." *Id.* 166 U.S.App.D.C. at 178, 509 F.2d at 511.

Defendants seemingly recognize that the weight of authority is to allow independent review in the field of military affairs. Nevertheless, they argue that in the context of this particular case special factors call for the exercise of judicial restraint. The first and foremost of these special considerations stems from the view that a decision in plaintiffs' favor on the merits of this case is apt to involve the court in the supervision of military activities without the benefit of readily discoverable standards. Defendants suggest that if plaintiffs' challenge is actually reviewed and found to have merit, the inevitable result will be for the *court* to embark upon the unchartered course of supervising the "full sexual inte-

37. It requires noting that, remanding for a trial on the merits, the Court in *Waldie* was directing the trial judge to review a "men only" policy of less import to the military than the policy reflected in section 6015. However, nothing in the court's opinion indicates that if the question presented had been the constitutionality of section 6015, judicial review would have been improper.

gration of our armed services."[38] Defendants conclude that a decision of this magnitude is better left to the political branches in light of "their more extensive resources" and expertise.[39]

Were this a case like *Gilligan v. Morgan,* 413 U.S. 1, 93 S.Ct. 2440, 37 L.Ed.2d 407 (1973), defendants' contention would have force. *Gilligan* involved a suit brought by a group of students at Kent State University to obtain review of the activities of the Ohio National Guard. Plaintiffs sought neither an award of damages nor an injunction to prevent specific unlawful actions. Rather, they sought a comprehensive array of injunctive remedies amounting to "continuing judicial surveillance over the Guard" and the judicial promulgation of "standards for the training, kinds of weapons and scope and kinds of orders to control the actions of the National Guard." *Id.* at 6, 93 S.Ct. at 2443. Understandably, the Court relied on nonjusticiability principles to overturn a decision by the Sixth Circuit that would have assigned to a judge the task of "evolving methods of training, equipping, and controlling military forces." *Id.* at 8, 93 S.Ct. at 2445.

Gilligan is is not this case, however. Contrary to defendants' contention, a decision favorable to the plaintiffs in this case will most assuredly *not* have the effect of requiring "continuing judicial surveillance" over discretionary military activities. *Id.* at 6, 93 S.Ct. 2440. Far from doing that, a decision in plaintiffs' favor will simply lift the bar contained in section 6015 that currently prevents defense authorities from exercising *their* discretion regarding female utilization in the manner *they* see fit.[40] Unlike in *Gilligan,* a decision here will properly leave to experts the task of making "[t]he complex, subtle and professional decisions as to the composition, training, equipping, and control of a military force." *Id.* at 10, 93 S.Ct. at 2446.[41]

[8] Defendants also urge the Court to forego review in this case on the grounds that a decision on the merits will likely affect ongoing congressional consideration of the Navy's proposal to amend section 6015. That, of course, may be true. Yet defendants have offered no authority for the view that judicial review of a statutory policy is in any way to be gauged to the progress of legislative efforts to arrive at a new policy. Moreover, even if it is assumed that a decision here will influence consideration of the Navy's proposal, it is highly unlikely that the effect will be adverse to the political process. Indeed, resolution of plaintiffs' equal protection claims will in all likelihood serve to focus the relevant issues and advance the proposed amendments on the legislative agenda.[42]

In sum, then, neither deference for the decisions of the political branches of government in the area of military affairs, nor concern about undue judicial intervention, nor the likelihood of influencing legislative efforts to revise section 6015 affords a principled basis for avoiding a decision on the precise claims raised by plaintiffs in this case. Notwithstanding defendants' argument to the contrary, these considerations go more to whether section 6015's prohibition is lawful and to the question of appropriate remedy, than to whether the dispute is justiciable. Consequently, if section 6015

38. Defs. Mot. for Sum. Judg., at 6.

39. *Id.*

40. As noted earlier, defendants have proposed an amendment to section 6015 that would allow the assignment of women members of the Navy to noncombat shipboard duties.

41. A decision in the instant case will not do violence to the idea, aptly expressed by Justice Jackson in relation to another branch of the armed services: "judges are not given the task of running the Army." *Orloff v. Willoughby,* 345 U.S. 83, 93, 73 S.Ct. 534, 540, 97 L.Ed. 842 (1953).

42. If anything, defendants' contention on this point is relevant to the question of whether the Court should grant a stay in this case to permit the legislative process to run its course. Defendants, however, have not asked the Court to stay its hand temporarily pending a legislative solution to plaintiffs' claims. Rather, they have asked the Court to refrain from review altogether. *See* Trans. of Oral Arg., filed April 11, 1978, at 12 13.

is to be upheld, it must be because the statute advances some important government policy.

III. *Equal Protection*

(1)

The Supreme Court first struck down a statute drawing a classification between the sexes in 1971.[43] That result was reached in *Reed v. Reed,* 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971), a case in which a woman challenged a state law that gave men a mandatory preference over women for appointment as the administrators of estates. In the ensuing seven years since *Reed,* the Court has had several occasions to review provisions that in one way or another have drawn distinctions between members of the opposite sex.[44] The result is an uneven and somewhat unsteady trend in the development of a single body of principles to apply in cases raising claims of sex discrimination.

This uncertainty arises less from the problem of identifying the relevant factors to consider in reviewing sex discrimination than from the problem of articulating a single standard that is, on the one hand, strict enough to strike down arbitrary and unreasonable classifications and that is, on the other, flexible enough to uphold distinctions that bear a fair relation to legitimate government purposes. Initially, the cases focus on whether the classification under review stems from an outmoded way of thinking about members of the opposite sex. To the extent that differences in treatment can be traced to overbroad generalizations about the roles played by men and women in society, the approach is to view them with suspicion.[45] This approach explains the results reached in the *Stanton v. Stanton,* 421 U.S. 7, 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975), *Weinberger v. Wiesenfeld,* 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975) and *Frontiero v. Richardson,* 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973), decisions. *Stanton* involved a statute that fostered the idea that females reach the age of emancipation sooner than their male counterparts. The *Wiesenfeld* decision struck down a provision that presumed working women always to be dependent on their spouses for support. And *Frontiero* invalidated a federal law that reflected a similar notion about women in the military.

Another essential factor identified in the cases is the importance of the governmental objective that is sought to be achieved by means of treating the sexes differently. Administrative convenience in providing

43. Prior to 1971, the Supreme Court had sustained a number of gender-related classifications, expressing a generally deferential regard for such distinctions. In *Hoyt v. Florida,* 368 U.S. 57, 82 S.Ct. 159, 7 L.Ed.2d 118 (1961), the Court upheld a state jury selection system that hinged the jury duty of women upon whether they had registered for jury service. Likewise, in *Goesaert v. Cleary,* 335 U.S. 464, 64 S.Ct. 198, 93 L.Ed. 163 (1948), the Court validated a law that prohibited women from working as bartenders. And in *Muller v. Oregon,* 208 U.S. 412, 28 S.Ct. 324, 52 L.Ed. 551 (1908), the Court sustained a state statute that placed a limit on the number of hours female employees could work.

44. *Califano v. Goldfarb,* 430 U.S. 199, 97 S.Ct. 1021, 51 L.Ed.2d 270 (1977); *Craig v. Boren,* 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976); *Stanton v. Stanton,* 421 U.S. 7, 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975); *Weinberger v. Wiesenfeld,* 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975); *Schlesinger v. Ballard,* 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975); *Kahn v. Shevin,* 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974); *Frontiero v. Richardson,* 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973).

45. *See, e. g., Califano v. Goldfarb,* 430 U.S. 199, 217, 97 S.Ct. 1021, 51 L.Ed.2d 270 (1977) (presumption about the dependency of surviving spouses); *Craig v. Boren,* 429 U.S. 190, 198–99, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976) (women presumed to mature faster than men); *Stanton v. Stanton,* 421 U.S. 7, 14–15, 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975) (18–20-year-old females presumed less likely than males to need financial support); *Weinberger v. Wiesenfeld,* 420 U.S. 636, 644, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975) (presumption that the husband is the spouse responsible for support of the family); *Frontiero v. Richardson,* 411 U.S. 677, 683–85, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973) (female spouses of servicemen presumed to be dependent upon their husbands); *Reed v. Reed,* 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971) (presumption that men are better qualified than women to serve as the administrators of estates).

men and women government benefits according to different criteria and procedures has generally been regarded as a low priority, *Califano v. Goldfarb,* 430 U.S. 199, 217, 97 S.Ct. 1021, 51 L.Ed.2d 270 (1977), *Frontiero, supra,* 411 U.S. at 688–89, 93 S.Ct. 1764, while public safety, *Craig v. Boren,* 429 U.S. 190, 199, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), efficiency in judicial administration, *Reed, supra,* 404 U.S. at 75, 92 S.Ct. 251, and efforts to alleviate burdens that fall more heavily on one sex than the other, *Schlesinger v. Ballard,* 419 U.S. 498, 508–509, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975), *Kahn v. Shevin,* 416 U.S. 351, 352–55, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974), are acceptable.

[9] Just as critical a factor is the degree to which the classification serves to advance the objective that the government has put forward as the basis for the difference in treatment. Obviously, if the classification under review bears no relation to the statutory purpose, the distinction is suspect. That was the situation in *Wiesenfeld.* At issue there was a statute that purported to provide financial benefits to surviving parents to make it easier for them to stay at home and care for their dependent children. However, because the statute aided only surviving mothers and not fathers, the classification was found to be "entirely irrational" because the objective of facilitating better care for dependent children did not depend on the gender of the surviving parent. 420 U.S. at 651, 95 S.Ct. 1225. Surviving fathers as well as mothers needed financial assistance to remain home to care for their children. *Id.* Moreover, even where a classification is viewed as actually furthering a proper statutory purpose, the distinction must bear a strong relation to the government's objective. This requirement accounts for the result in *Craig.* In that case, a drinking age differential for 18–20-year-olds was invalidated because the evidence failed to show a "substantial" correlation between the classification and the goal of highway safety. 429 U.S. at 204, 97 S.Ct. 451. This principle also explains why the different treatment given male and female officers and widowers and widows was upheld in the *Ballard* and *Kahn* decisions. In those cases, preferential treatment for women was found to be legitimate because female officers were persuasively shown to be at a disadvantage as compared to men in seeking promotions and because the death of a spouse was proved to create a greater financial burden on widows than on widowers. 419 U.S. at 508, 95 S.Ct. 572; 416 U.S. at 355, 94 S.Ct. 1734.

[10, 11] While the cases since *Reed* make clear the factors that are to be applied in sex discrimination cases, questions persist concerning the precise way they are to be fashioned together to form a single framework for review.[46] The most important of these uncertainties relates to the requirement that classifications between the sexes must advance legitimate legislative objectives. The question concerns the degree of correlation that must be shown between the differences in treatment accorded to men and women and the objectives sought to be achieved. This issue is of signal importance because the required degree of correlation is the principal factor that fixes the strictness with which gender

46. These unresolved questions include: are all traditional ways of thinking about the roles of men and women to be viewed as suspicious in like degree; is the appropriate degree of suspicion related to nature of the loss that is occasioned by the difference in treatment between the sexes or to the importance of the disadvantage? How much special deference is due classifications by gender in the areas of tax legislation (*Kahn, e. g.*), military affairs (*Ballard, e. g.*) or social welfare (*Goldfarb, e.g.*); in what other areas are legislative classifications by sex entitled to a deferential regard; how should this deference be manifested; by requiring less of a correlation between the government's objective and the classification under review, by qualifying lesser state objectives as sufficiently important to justify sex-based discrimination? Are courts confined to looking at the actual statutory purposes of sex-based legislation or are they permitted to accept post fact rationalizations; what statutory objectives qualify as of sufficient importance to outweigh different treatment accorded to men and women; is the necessary degree of importance related to the gravity of the harm or loss occasioned by the gender-based classification?

classifications are to be scrutinized. As the necessary measure of correlation moves higher, the level of scrutiny intensifies to the same extent, and as a weaker "congruence" becomes sufficient, the level of review is correspondingly relaxed. *Craig, supra,* 429 U.S. at 199, 97 S.Ct. 451.

[12] But a single standard seems to have emerged. As recently formulated in the *Craig* decision and quoted with approval in *Goldfarb*, the degree to which a "sex-centered generalization actually comport[s] with fact," *Craig, supra,* 429 U.S. at 199, 97 S.Ct. at 458, must be substantial: "[t]o withstand constitutional challenge, . . . classifications by gender must be *substantially related to the achievement of [important] objectives.*" *Goldfarb, supra,* 430 U.S. at 210–11, 97 S.Ct. at 457, *quoting, Craig, supra,* 429 U.S. at 197, 97 S.Ct. 451 (emphasis supplied).[47] Judged by this standard, the classification drawn by section 6015 fails to withstand scrutiny.

(2)

In an effort to demonstrate the validity of section 6015's prohibition, defendants maintain that the basic purpose of the enactment was to increase the combat effectiveness of Navy ships.[48] Unquestionably, this is a governmental objective of the highest order and a purpose entitled to great respect. But nowhere in the papers filed in this action have defendants pointed to any evidence indicating that military preparedness was indeed the objective behind the prohibition. The apparent reason is that the part of section 6015 being challenged in this lawsuit was added casually, over the military's objections and without significant deliberation.[49]

Section 6015 was enacted some 30 years ago as part of a larger piece of legislation, requested by the military, that first admitted women to regular, peace-time military duty.[50] A review of the legislative history behind the provision reveals that section 6015 was originally introduced without the proviso that prohibits women from serving aboard Navy vessels other than hospital ships and transports. The prohibition was added during committee hearings on the legislation following an exchange between a committeeman and Navy officials.[51] In response to an inquiry, the Navy stated that while it had no present intention to assign women to general shipboard duties, it "did not feel . . . that it was necessary to write that into law."[52] However, the committeeman insisted that the question not be left to the Secretary of the Navy's discre-

47. As noted in *Goldfarb*, the substantiality of the correlation between purpose and classification may be measured in terms of the degree to which gender-based classifications are "over-inclusive" or "under-inclusive." 430 U.S. at 211 n. 9, 97 S.Ct. 1021. If, for example, a gender classification presumes all women to have a certain trait when in fact only a fraction do, the classification is "over-inclusive." Conversely, if legislation presumes women to have a certain characteristic when many men have the same trait, the provision may be viewed as "under-inclusive." In the instant case, the problem with section 6015 is "over-inclusiveness" since the statute presumes all women to be unqualified for all positions on all ships currently in use by the Navy.

48. *See* Defs. Mot. for Sum. Judg., at 16 ("maximum combat effectiveness of Navy ships" and "a strong Navy").

49. Defendants seem to admit as much in their answers to plaintiffs' interrogatories. When asked to articulate section 6015's legislative purpose, defendants responded:

> Congress has *apparently* determined that 10 U.S.C. § 6015 bears a rational relationship to and substantially furthers legitimate and important governmental objectives. As this litigation proceeds, defendants *will endeavor* to demonstrate their perception of that congressional determination.

Defs. Ans. to Pl. Sec. Int. No. 66 (emphasis supplied).

To date, defendants have yet to supplement this response regarding section 6015's legislative purpose.

50. Women's Armed Services Integration Act of 1948, Pub.L.No. 80–625, 62 Stat. 368 (1948).

51. *Hearings before the Subcommittee on Organization and Mobilization of the House Committee on Armed Services,* 80th Cong., 2d Sess. 5689–5713 (1948).

52. *Id.* at 5689.

Analogize to HIV?
(rejected in Doe v. Marsh)

tion,[53] and so appropriate language was added during the session.[54]

The discussion with the Navy officials sheds little light on the rationale for excluding women members from serving aboard naval ships. But this much appears to be certain. The provision was not directed at enhancing military preparedness because the sweep of the prohibition was purposely extended to cover both combat assignments and noncombat assignments. Nor was it inserted to take account of the practical considerations associated with integrating shipboard personnel, such as increased costs, the need to equip ships to provide quarters for female personnel, adjustments in functions, or the necessity of preparing all male crews to accommodate their female counterparts. The transcript of the hearing is conspicuously lacking in deliberation on any of these points. Instead, the sense of the discussion is that section 6015's bar against assigning females to shipboard duty was premised on the motion that duty at sea is part of an essentially masculine tradition.

[13] Defendants seemingly recognize that this legislative background tends to suggest a statutory purpose more related to the traditional way of thinking about women than to the demands of military preparedness. Nevertheless, they point out that regardless of intent the statutory bar contained in section 6015 serves a number of legitimate governmental objectives.[55] The first and foremost of these is the objective of maintaining the most effective naval combat force possible. Defendants reason that inasmuch as broad prohibitions like section 6015 have impeded military authorities in their efforts to gather information about the capabilities of women and the effects of enlarging female utilization, "there [remain] a number of legitimate concerns with regard to full sexual integration of the combat arms of the United States Armed Forces." [56] These concerns focus on the unknown effects that full sexual integration might have on group dynamics under *combat* conditions, on the ability of the Navy to operate as effectively as it might with all male *combatants*, on the capacity of the American people to accept the prospect of female *combat* casualties, and on the attitude of enemies to engage the United States in *combat* because of a perceived weakness in our *combat* arms. Defendants conclude that "The fact that these are legitimate concerns to which there are presently no considered and studied answers provides a persuasive rationale for the present restrictions on full integration." [57]

This argument is unpersuasive. Defendants' line of reasoning would have force if the issue in this case were the validity of a statute that precluded women from being

53. *Id.* at 5690, 5711, (remarks of Cong. Vinson). The Congressman stated:

> I am just throwing it out for what it is worth. Those are my views. I think it will strengthen the bill to have it positively understood by Congress that ships are not places to which these women are going to be detailed and nobody has any authority to detail them to serve on ships.
>
> Of course, they are not going to be detailed to serve on ships, but you cannot tell what happens . . . somebody might say they need a few of them up there to do communications or other kinds of work and I do not think a ship is a proper place for them to serve. Let them serve on shore in the continental United States and outside of the United States, but keep them off the ships. Of course, they ought to be on hospital ships.
>
> * * * * * *
>
> I would not want to restrict [the prohibition] to combatant vessels. Put down 'serve in sea duty.' You have auxiliary ships as well as combat ships. Just fix it so that they cannot go to sea at all.

54. *Id.* at 5711.

55. While the "Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation," *Wiesenfeld, supra,* 420 U.S. at 648 n. 16, 95 S.Ct. at 1233, there is no requirement that the Court must overlook unexpressed legislative objectives that reasonably *could have* formed the basis of the statute in question. Thus, defendants' rationalization of what purposes are served by section 6015 is entitled to consideration.

56. Defs. Mot. for Sum. Judg., at 14.

57. *Id.* at 15.

considered solely for shipboard *combat* assignments. The same is true if the effect of deciding this case in plaintiffs' favor were to require the *full integration* of men and women in the naval forces. This is so because the seriousness of the unanswered questions raised by defendants is alone a convincing reason why no authority, whether legislative, executive or judicial, should act to bring about the total integration of Navy women into combat roles before the consequences have been fully explored.

But the issue presented in this case is not whether the naval forces should be completely integrated and the roles of male and female members made perfectly equal. Nor is the question whether Navy women should have the same rights as men to receive assignments as combatants aboard Navy ships. The issue is rather the validity of a prohibition that not only forecloses the Navy's discretion to integrate women into combat positions for which their qualifications and the effects of their presence are unknown, but also bars Navy authorities from exercising their discretion to assign female personnel to noncombat duties for which they are or can be qualified. Contrary to defendants' assertion, then, the question presented is the reasonableness of a statutory bar that draws no distinctions based on considerations of military effectiveness among any of various assignments available to Navy personnel on ships.

Once the questions about full sexual integration and combat assignments are put aside, the overbreadth of section 6015 becomes apparent. Significantly, defendants do not make the argument that the demands of military preparedness and effectiveness justify excluding *all* women from *all* shipboard duties. Nor could they given the fact that they have proposed changes in section 6015 [58] that would permit qualified women to serve on ships in a wide variety of noncombat positions.[59] As the Secretary of the Navy has observed, "the revised law would permit temporary duty assignments of women on any naval vessel not engaged or expected to be engaged in combat." And as the Secretary has also noted, if the absolute bar contained in section 6015 were lifted, "women pilots could land aircraft on a carrier, women inspectors and technicians could go aboard a destroyer or cruiser, and our female midshipmen could get real training at sea." [60]

Unlike with the original version of section 6015, the proposed amendments are based on evidence compiled as a result of studies and experiments conducted by military authorities.[61] This information shows not only that women can "capably perform" at sea, but also that increasing the range of their assignments will enhance "the operational effectiveness and flexibility of available forces." [62] Moreover, "more efficient utilization of women" will help to solve the "particularly worrisome" problem posed by "[t]he shrinking manpower pool that we see in front of use in the next decade." [63] And finally, permitting women to serve aboard ships "would not increase the budgetary

58. Letter of W. Graham Claytor, Secretary of the Navy, to the Speaker of the House, dated May 9, 1977, Defs. Ans. to Pl. First Int., Attach. 9. The proposed amendments to section 6015 would replace the current prohibition with this language:

> However, women may not be assigned to duty in vessels or aircraft that are engaged in combat missions nor may they be assigned to other than temporary duty on vessels of the Navy except for hospital ships, transports, and vessels of a similar classification not expected to be assigned combat missions.

59. *See* SEC–NAV Instruction 5030.1G, Defs. Ans. to Pl. First Int., Attach. 16 (listing combat ship, combat craft, auxiliary ship and service craft classifications).

60. Address of W. Graham Claytor, Secretary of the Navy, delivered July 21, 1977, *id.*, Attach. 13, at 5.

61. *See* note 17 *supra*. *See also* Statement of Edward Hidalgo, Assistant Secretary of the Navy, on Employment and Utilization of Women in the Navy, delivered July 1977 to The Priorities and Economy Subcommittee of the Joint Economic Committee, Defs. Ans. to Pl. First Int., Attach. 12.

62. Letter of W. Graham Claytor, *supra* note 58, at 1.

63. Address of W. Graham Claytor, *supra* note 60, at 5.

requirements of the Department of Defense."[64]

[14] These considerations are particularly well suited for study by Congress in regards to defining the limits of female utilization in the Navy. But they are also highly relevant to the question of whether section 6015 is "so unjustifiable as to be violative of due process." *Bolling v. Sharpe,* 347 U.S. 497, 499, 74 S.Ct. 693, 694, 98 L.Ed. 884 (1954). The core protection afforded by the equal protection component of the fifth amendment is that laws favoring members of one gender and disadvantaging members of the other be reasonably and, beyond that, substantially related to the achievement of some important objective. *Goldfarb, supra; Craig, supra.* To the extent that legislative classifications are based on "overbroad generalizations" about the traits, behavior and capabilities of the different sexes, *Ballard, supra,* 419 U.S. at 507, 95 S.Ct. 572, their reasonableness is rightly called into question. Because section 6015 operates to bar an entire sex from a wide, though by no means unlimited, range of career and service opportunities for which the highest military authorities have determined them to be qualified, the sweep of the statute is too broad to pass muster.[65]

[15] Obviously, legislative distinctions between members of the opposite sexes need not be drawn with *perfect* precision to withstand challenge. This is so even though "heightened levels of scrutiny" apply in the area of sex discrimination. *Goldfarb, supra,* 430 U.S. at 225, 97 S.Ct. 1021 (dissenting opinion). But validity *does* depend on an unusually high degree of correlation between sexual traits underlying differences in treatment and important legislative objectives. As the Supreme Court found in *Goldfarb* with respect to financial aid, a correlation of approximately 90% between the characteristic and the objective was insufficient to withstand attack, *id.* at 238 n. 7, 97 S.Ct. 1021 (dissenting opinion), even though Congress is "wide latitude to create classifications that allocate noncontractual benefits under a social welfare program." *Id.* at 210, 97 S.Ct. 1021 at 1028.

Congress, of course, enjoys the same degree of latitude in legislating in the area of military affairs. *Ballard, supra,* 419 U.S. at 510, 95 S.Ct. 572. However, the record in the case at bar does not suggest that the correlation between female capabilities and overall naval effectiveness even approaches that deemed to be inadequate in *Goldfarb.*

(3)

[16] In addition to military efficiency, defendants argue that section 6015's absolute bar should be upheld because *any* degree of integration of men and women aboard Navy ships is apt to cause morale

64. Letter of W. Graham Claytor, *supra* note 58, at 2.

65. In reaching this conclusion, the Court has focused on those noncombat positions for which the evidence shows women are fully qualified. As to those assignments, the statutory bar is irrational because both men and women can perform capably. However, looking at the entire range of noncombat *and* combat assignments available to Navy personnel, the statute takes on a less irrational appearance because most positions in the Navy are combat positions and the available data is unclear about the effect of integrating women into combat roles.

This feature of the instant case, that more than one type of opportunity or entitlement is distributed along sexual lines, distinguishes this case from the facts of the sex discrimination cases decided since *Reed.* In those decisions, the issue was whether a government objective was reasonably or substantially furthered by providing *a single* benefit or preference to one sex rather than another. Thus the issue never arose of whether a legislative classification should be struck down because it was highly irrational as to one benefit and less irrational as to another.

In the present case, the Court has chosen to measure section 6015's rationality both from the standpoint of women's proven ability to perform capably in noncombat shipboard positions and from the perspective of their yet unproven ability to be satisfactorily integrated into the entire range of Navy duties, noncombat and combat alike. The result is that the statutory presumption is wholly irrational as to noncombat assignments and largely rational but not rational enough as to the full range of naval duties.

and discipline problems among crews. Wholly aside from the fact that any uncertainties in this regard are largely traceable to the statute's obvious limitation on experimenting with mixed crews, this argument is also belied by the facts. Indeed, the results of the experiment conducted by the Navy on the USS Sanctuary provide ample refuting evidence that assigning women to noncombat duty on vessels will pose no insurmountable obstacles.[66] As the Commander of the Atlantic Fleet has stated: "Commanding Officers have sufficient authority to deal with persons having difficulty adjusting to mixed crews. Special authority is not required any more than in handling racial problems."[67] And: "Adjustments and thawing of previously held barriers to the presence of women and acceptance by the male ship's company are social facts of life which must be recognized and dealt with."[68]

Defendants' concerns about undermining morale and discipline argue more for prudent planning in the assignment of women to Navy ships than for not beginning the process at all. In the words of the Chief of Naval Operations: "the transition would have to be carefully planned. Any time you have boys-girls it's a little difficult, but the problems, I guess, are no different than what's happening in college dormitories."[69]

Nor would permitting women to join men on duty at sea pose serious problems in terms of providing separate quarters and facilities. As with morale and discipline, this concern also speaks more to careful planning than to not beginning at all since, as defendants themselves concede, Navy vessels are periodically refitted and modernized to take account of changing needs.[70]

In short, none of the practical concerns voiced by defendants regarding the integration of male and female personnel afford a warrant for upholding the total exclusion reflected in section 6015. Whatever problems might arise from integrating shipboard crews are matters that can be dealt with through appropriate training and planning.

IV. *Conclusion*

Once the decision is reached that section 6015's barrier to women's career and service opportunities is too broad to pass muster, a few comments are required to put this decision in perspective. As the Court has viewed it, the crucial question raised by plaintiffs in this case centers on the exercise of discretion. Ordinarily, and for obvious and understandable reasons, the exercise of discretion in the area of military affairs is left to the executive branch of government subject, of course, to legislative oversight. Thus when, 30 years ago, Congress enacted section 6015 to guide the Navy's discretion in qualifying and assigning women to military duty, it was unquestionably acting within the scope of its constitutional authority to oversee the development and use of a military force. But merely because this legislative choice fell within the bounds of congressional power did not of necessity make it invulnerable to the requirement of reasonableness imposed by the fifth amendment. As the record in this case makes amply clear over a generation later, when Congress carved out the disputed exception to the Navy's ability to use women aboard Navy vessels, it acted without serious deliberation, against the expressed judgment of the military and, by foreclosing the Navy's discretion regarding women well beyond the legitimate demands of military preparedness and efficiency, it acted arbitrarily.

Because the Court has concluded that the blanket limitation imposed by section 6015 cannot presently be justified, the effect of today's decision is to restore to the military an area of discretion that the 80th Congress

66. Defs. Ans. to Pl. Sec. Int. Nos. 37–39 & Attach. 7.

67. *Id.*, Attach. 7, Third Endorsement on *USS Sanctuary*, at 6.

68. *Id.*, Attach. 7, Second Endorsement, at 4.

69. *Id.*, Attach. 15, Quoted Statement of Admiral James L. Holloway 3d.

70. *Id.*, Nos. 60–61 & Attach. 1.

unreasonably withheld. This, of course, may well be a temporary adjustment. Defendants have made the Court quite aware of the fact that a considerably narrower limitation on the use of Navy women is currently being considered by Congress. But until the Congress does exercise its discretion in this area, it is incumbent upon the executive to fashion policy regarding women without regard to the absolute and overbroad presumption reflected in section 6015. That much is required by the equality principle embodied in the fifth amendment.

However, nothing in this decision is meant to shape the contours of Navy policy concerning the utilization of female personnel. As the Court has noted in deciding the merits of plaintiffs' claims, there remain many unanswered questions about the effects of full sexual integration that may well convince military authorities that women members should be excluded from shipboard combat assignments, or even from permanent assignment to some noncombat positions, or for that matter, from all shipboard duties until such time as the vessels are properly equipped and crew members properly trained to accommodate their female counterparts. Those are essentially military decisions that are entrusted to executive authorities and the Court expresses no view whatever on what their outcome should be. But what the Court is requiring is that executive authorities move forward in measured steps to approach these issues free from the absolute bar erected by section 6015.

V. *Disposition*

For the foregoing reasons, the Court concludes that plaintiffs' motion for summary judgment must be granted, and defendants' crossmotion denied. An appropriate order will issue of even date herewith.

COMMONWEALTH PETROCHEMICALS, INC., et al.

v.

S/S PUERTO RICO, her engines, boilers, tackle, etc., Puerto Rico Maritime Shipping Authority and Leonard Bros. Trucking Co.

Civ. A. No. M-76-1126.

United States District Court, D. Maryland.

July 27, 1978.

Consignees of two transformers brought suit against ship, shipping carrier and trucking company to recover for damage to one of the transformers. The shipping carrier admitted its liability but claimed that the damages were limited under the Carriage of Goods by Sea Act to $500. The District Court, James R. Miller, Jr., J., held that: (1) the bill of lading was subject to the COGSA; (2) under the bill of lading, the COGSA was paramount to any term of the bill of lading; (3) there is a "package" for purposes of the COGSA when, in the course of preparation for transportation or handling by the shipper or shipper's agent the goods are partially or completely covered or contained by the time they are delivered or entrusted to the custody of the carrier, and (4) the transformer, which weighed approximately 44 tons and was attached to a roll on-roll off "low boy" trailer designed for use on a roll on-roll off ship was not a "package" under the COGSA and, therefore, the liability limit was $500 per cubic foot.

Judgment for plaintiffs.

1. Shipping ⚷106(3)

Although the Carriage of Goods by Sea Act does not apply as a matter of course to the carriage of goods by sea between any United States port and any other port of the United States, the Act provides for incorporation of its terms by reference of an incoming administration to reorganize the structure of departments, to readjust departmental priorities, and to initiate new procedures to carry out its functions. 889 F.2d at 1221. It thus accepts the fact that a changeover in administrations is "likely to produce substantial alterations in certain employees' jobs not because those employees are members of the outgoing party but because the incoming party, *as a matter of policy*, does not view those jobs to be important." *Id.* (emphasis in original). For example, if defendant Scott had, soon after her arrival, reorganized the region to streamline costs and in the process eliminated several of the positions held by plaintiffs, she could have used this aspect of the changeover defense to justify her action; however, where, as here, an incoming administration does not eliminate jobs but instead merely removes duties from one set of employees and gives them to another, the changeover defense provides no protection.[7]

[9, 10] The second aspect of the changeover defense "assumes that the new administration may, at times, feel the need to assign duties deemed especially critical to its political philosophy to employees who share that philosophy." *Id.* Such a shift of duties is proper, however, only where the incoming administration "can show a reasonable basis for believing that such an employee would likely be more helpful in implementing the new policies than an employee who is a member of an opposing political party." *Id.* (noting that factfinder should give some deference to the government's explanation of its needs). In cases implicating this prong of the defense, "the factfinder must look specifically at the duties in question to determine whether they concern politically sensitive matters." *Id.* at 1221; *see also Rutan*, 497 U.S. at ——, 110 S.Ct. at 2736–37, 111 L.Ed. at 65–66 (citations omitted) (government interest in securing employees who will loyally implement its policies is valid but can be adequately served by choosing or dismissing certain high-level employees on the basis of their political views); *Monks v. Marlinga*, 923 F.2d 423 (6th Cir.1991) (citations omitted) ("In addressing whether a job is a policy-making position, this court held that the 'relevant focus of analysis is the inherent duties of the position in question, not the work actually performed by the person who happens to occupy the office.' "); *Nekolny v. Painter*, 653 F.2d 1164, 1170 (7th Cir.1981), *cert. denied*, 455 U.S. 1021, 102 S.Ct. 1719, 72 L.Ed.2d 139 (1982) ("The test is whether the position held by the individual authorizes, either directly or indirectly, meaningful input into government decision making on issues where there is room for principled disagreement on goals or their implementation.")

Defendants have not mounted a particularly aggressive attack based on this aspect of the changeover defense.[8] Although defendant Scott referred to the individuals who assumed the duties formerly performed by plaintiffs as her "confidence committee," the evidence showed that plaintiffs were career employees and that their positions could not be classified as "trust" or policymaking positions. Without proof that the positions held by plaintiffs were politically-sensitive positions, defendants fail to establish the most basic element of this aspect of the changeover defense.

[11] As a result, the Court reaffirms its finding that defendants have failed to rebut plaintiffs' prima facie showing by either presenting an alternative, non-discriminatory reason for the actions taken or establishing a valid defense to their actions.[9] The Court once again finds that defendants effectuated a severe and politically-motivated change in plaintiffs' work conditions which imposed a substantial burden on their right to free association and that this right was not outweighed by the government's interest in effectively implementing its policies. Plaintiffs' Motion Requesting Judgment is therefore GRANTED and the prior Judgment of this Court is REAFFIRMED.[10]

IT IS SO ORDERED.

7. Even assuming *arguendo* that the defense provides protection for such actions, it only does so where the new administration can point to stated policies which the actions were designed to advance. *See* 889 F.2d at 1221–22 (in evaluating a changeover defense the factfinder should take into account whether the actions occurred precipitately or after some opportunity for appraisal, whether they were connected to previously announced goals, and whether they flowed from a procedural or organizational study). Defendant Scott has asserted that she relied on her own "perceptions" of the policies of the new administration. As a preliminary matter, since defendant Scott does not present the new *administration's* "explanation of how changes made shortly after it assumed power fit into its overall policy objectives" (889 F.2d at 1221), her justifications are entitled to little if any deference. Furthermore, if by stating that she relied on her own perceptions she means that she relied on her own unstated opinions about the needs of the region—the First Amendment related interests of which she has not explained—such opinions are insufficient to support a changeover defense. To the extent that she relied on certain conditions in the region that she felt needed to be addressed immediately, these conditions implicated primarily efficiency concerns which did not justify the actions taken. Finally, to the extent she feels that the changeover defense provided her with the freedom to take whatever actions she desired as long as she did so soon after assuming control of the region, she misperceives the nature of the defense. *Accord* 889 F.2d at 1222 ("drastic changes in job duties and conditions occurring early in the life of an administration may not be made entirely free of political constitutional liability.")

8. During the hearing held in this case, the Court specifically inquired as to whether defendants contend that plaintiffs held sensitive policy-making positions. Defendants asked for, and were granted, an opportunity to address this question in a supplemental memorandum of law. The memorandum of law that was submitted did not, however, address this issue in any way.

9. Had defendants brought forth such evidence, plaintiffs would have been allowed the opportunity to demonstrate that the asserted justification was simply a pretext. 889 F.2d at 1209.

10. Plaintiffs Vázquez and Díaz need not be reinstated, since the former has died and the latter has retired since the onset of this case. The other two prevailing plaintiffs, Agosto and Camacho must be immediately reinstated as ordered.

[HIV] Constitutional claim fails

John DOE; and Local 3936 of the American Federation of Government Employees, Plaintiffs,

v.

Honorable Donald RICE, Secretary of the United States Air Force; Lt. General Conaway, Chief of the National Guard Bureau; Puerto Rico Air National Guard; William Miranda-Marin, the Adjutant General of the Commonwealth of Puerto Rico; Colonel Manuel A. Guzman of the Puerto Rico Air National Guard; Colonel Gilberto Colon, as Personnel Officer of the Puerto Rico Air National Guard; All Officials in Their Individual and Official Capacity, Defendants.

No. Civ. 91-1169CCC.

United States District Court,
D. Puerto Rico.

Aug. 31, 1992.

Puerto Rico Air National Guard (PRANG) member who was discharged after testing positive for Human Immune Deficiency Virus (HIV) and union brought civil rights action alleging unlawful discrimination on basis of handicap. The District Court, Cerezo, J., held that: (1) application of regulation, which resulted in discharge of member, did not violate member's Fifth and Fourteenth Amendment rights; (2) mandate of regulation that PRANG members, who test positive for HIV, are not on active duty, and are not entitled to military medical health care, be transferred to Standby Reserves if they cannot be used in nondeployable position complied with policy statements on HIV of Department of Defense and Department of Air Force in effect at time member was transferred to Standby Reserves; (3) member had no right to hearing and notice under regulation governing PRANG which was derogated prior to his discharge; (4) member did not have property interest in technician position he occupied at time of his separation; and (5) statutes relating to procedure for retirement or separation for physical disability did not apply to member's discharge.

Action dismissed.

See also 776 F.Supp. 633.

1. Constitutional Law ⇐278.6(1)
Militia ⇐10

Application of regulation governing Puerto Rico Air National Guard (PRANG) members who test positive for Human Immune Deficiency Virus (HIV) which resulted in discharge of PRANG member, who was not on active military duty and whose medical care was privately provided, and in his subsequent ineligibility to perform technician employment, as a result of testing positive for HIV, did not violate member's Fifth and Fourteenth Amendment rights; Secretary of Air Force acted within Secretary's discretion in making nondeployability a mandatory requirement for HIV seropositive individuals and no compatible nondeployable position was available. U.S.C.A. Const.Amends. 5, 14.

2. Militia ⇐3

Mandate of regulation governing Puerto Rico Air National Guard (PRANG) that PRANG members, who test positive for Human Immune Deficiency Virus (HIV), are not on active duty, and are not entitled to military medical health care, be transferred to Standby Reserves if they cannot be used in nondeployable position complied with policy statements on HIV of both Department of Defense and Department of Air Force in effect at time that PRANG member, who tested positive for HIV, was transferred to Standby Reserves.

3. Constitutional Law ⇐70.1(12)

Decisions regarding dual function of National Guard, that it has set as goal force readiness for mobilization and deployability of reservists who must r[e]strict physical standards, are matters which can best be entrusted to military itself.

4. Armed Services ⇐4
Constitutional Law ⇐70.1(7)

Decision of whether Air Force Reservists who cannot be deployed overseas can remain in deployable positions must be left to military discretion and expertise.

5. Militia ⇐10

Puerto Rico Air National Guard (PRANG) member who had tested positive for Human Immune Deficiency Virus (HIV) had no right to hearing and notice under regulation governing PRANG which required opportunity of hearing before Administrative Discharge Board, and which was derogated prior to his discharge.

6. Militia ⇐10

Application of regulation governing Puerto Rico Air National Guard (PRANG) members who test positive for Human Immune Deficiency Virus (HIV) which resulted in discharge of PRANG member, who was not on active military duty, for whom a nondeployable position could not be found, and whose medical care was privately provided, and in his subsequent ineligibility to perform technician employment, as a result of testing positive for HIV, did not violate Department of Defense and Air Force policies prohibiting use of results obtained from laboratory tests for HIV as sole basis for service member's separation.

7. Constitutional Law ⇐277(2)
Militia ⇐10

Puerto Rico Air National Guard (PRANG) member who tested positive for Human Immune Deficiency Virus (HIV) and who was subsequently discharged and rendered ineligible to perform technician employment did not have property interest in technician position he occupied at time of his separation; therefore, PRANG's alleged failure to give member any hearing or notify him of his right to appeal prior to his dismissal did not infringe his due process rights. 32 U.S.C.A. § 709(b, e); U.S.C.A. Const.Amends. 5, 14.

8. Militia ⇐10

Statutes relating to procedure for retirement or separation for physical disability did not apply to discharge of Puerto Rico Air National Guard (PRANG) member who had tested positive for Human Immune Deficiency Virus (HIV) pursuant to regulation governing PRANG; member was not retired due to physical disability. 10 U.S.C.A. §§ 1214, 1215.

9. Militia ⇐3

Statute governing consent required for transfer of Air National Guard member did not require that Governor of Puerto Rico approve transfer of Puerto Rico Air National Guard (PRANG) member, who had tested positive for Human Immune Deficiency Virus (HIV), to Standby Reserves. 10 U.S.C.A. §§ 1004, 1004(c).

Nora Vargas-Acosta, Vargas & Ramírez Law Offices, for plaintiffs.

Fidel Sevillano-del-Río, Asst. U.S. Atty., Mayra Maldonado, Dept. of Justice, Com. of Puerto Rico, for defendants.

OPINION AND ORDER

CEREZO, District Judge.

This action for declaratory and injunctive relief arises from alleged violations to 42 U.S.C. §§ 1983, 1988, *et seq.* and the Fifth and Fourteenth Amendments of the Constitution of the United States. Plaintiffs John Doe, a former member of the Puerto Rico Air National Guard (PRANG) with over twenty-one years of civilian employment as a National Guard Technician, and Local 3936 of the American Federation of Government Employees, the union which represents National Guard technicians, brought this action alleging unlawful discrimination on the basis of a handicap (AIDS). Defendants include the Secretary of the Air Force, Chief of the National Guard Bureau, PRANG and various of its officials.

The undisputed facts are as follows:

Plaintiff John Doe has been a member of PRANG since March 1967. He was hired as technician pursuant to the National Guard Technician Act of 1968 in September 1969. On June 29, 1990, Doe tested positive for the Human Immune Deficiency Virus (HIV). On September 21, 1990 plaintiff received Special Order AC-73 by which defendant Colonel Manuel A. Guzmán, citing Air National Guard Regulation (ANGR) 39-10 Chapter 8 as his authority, informed him that effective September 17, 1990 he had been relieved of his duties, honorably discharged and transferred to the Standby Reserves. On October 16, 1990, he received a written communication from defendant Colonel Gilberto Colón, Personnel Officer of PRANG, informing him that he was no longer eligible to continue in his technician employment due to his discharge from military service. Various requests for revision of these decisions brought no replies. Plaintiffs filed this action.

Following an evidentiary hearing held on August 1, 1991, the preliminary issue of whether the Court had jurisdiction to entertain these matters, or whether Doe was required to exhaust administrative remedies was resolved in his favor in an Opinion and Order entered on November 7, 1991 (docket entry 32).

A consolidated hearing on the merits for preliminary and permanent injunction was held on December 16 through 18, 1991, and on February 13, 14, 18 and 19, 1992. The parties submitted their post-trial briefs on March 31, 1992.

Plaintiffs' action focuses on their primary contention—that ANGR 39-10 on its face and as interpreted and applied by defendants violates the Fifth and Fourteenth Amendments to the United States Constitution. Peripheral violations include allegations of noncompliance with 10 U.S.C. §§ 1201-1221, as well as procedural and substantive due process claims related to property rights, liberty rights and interests. We now address them in turn.

ANGR 39-10

[1] ANGR 39-10 Section F Acquired Immune Deficiency Syndrome at paragraph 8-25 states as follows:

a. Members on active duty entitled to military medical health care and who have serologic evidence of HIV infection (antibody positive) shall be medically evaluated to determine fitness for continued service. Those individuals who show no evidence of clinical illness or other impairment related to HIV shall not be separated on the basis of serologic evidence of HIV infection. Evaluation, once completed, must be forwarded to NGB/SG for evaluation and determination as a continued ANG service.

b. Members not entitled to military medical health care who display serologic evidence *will be transferred to the Standby Reserves if they cannot be used in a non-deployable position.*

(Emphasis ours.)

It is undisputed that John Doe was not on active military duty at the time of his discharge and transfer to the Standby Reserves, and that his medical care was privately provided through medical plan benefits to which he was entitled due to his technician employment. That is, Doe's case was processed under paragraph 8-25(b).

A major theme throughout plaintiffs' pleadings, which provides the theory for the case, is that this section directly contravenes the August 4, 1988 Policy Statement of the Secretary of Defense, which states at Paragraph B7:

> Due to the high priority assigned to the continued medical evaluation of military personnel with serologic evidence of HIV infection, such individuals *shall be assigned within the United States.* Additionally, the *Secretaries of the Military may restrict individuals with serologic evidence of HIV infection to non-deployable units or positions for purposes of force readiness.* Further ... the Secretaries of the Military Departments *may, on a case by case basis, limit assignment* of such individuals with respect to the nature and location of the duties performed in accordance with operational requirements.

(Emphasis ours.)

[2] Seizing upon the only mandatory restriction—the limitation of assignment to within the United States—and pointing to the discretional nature of the limitation to non-deployable units for HIV seropositive reservists, the plaintiffs argue that Section 8-25 as interpreted and/or applied is discriminatory because it goes beyond the restriction of the Department of Defense.

In contesting the restriction of non-deployability for HIV seropositive reservists vis a vis the Department of Defense's discretional tone on the issue,[1] plaintiffs have ignored the reality of the policies and regulations. The Department of Defense, in its August 1988 statement, delegated to the Secretaries of the Military the decision to restrict seropositive members of their branches to non-deployable positions. The Department of the Air Force, on May 16, 1989, issued its *Policy on Identification, Surveillance and Administration of Personnel Infected with Human Immune Deficiency Virus* (HIV)—Action Memorandum in which at Section B, paragraph 9 it states:

> Due to the high priority assigned to the continued medical evaluation of military personnel with serological evidence of HIV infection, such individuals shall only be assigned within the United States and not be deployed overseas. *Additionally, military personnel with serologic evidence of HIV shall only be assigned to non-deployable units and positions.* Further, ... the assignments of such personnel may be limited with respect to the nature and location of the duties performed in accordance with operational requirements.

(Emphasis ours.) Thus, the Secretary of the Air Force, exercised the discretion to make non-deployability a mandatory requirement for HIV seropositive individuals. This policy statement was then notified for incorporation into the policy statement to all Air National Guard Units on July 2, 1989.[2] We, therefore, note that the paragraph 8-25(b) mandate did comply with the policy statements on HIV of both the Department of Defense and the Department of the Air Force in effect at the time that John Doe was transferred to the Standby Reserves.

John Doe indicated that his unit has not been mobilized outside the United States since 1967, although it has been mobilized to the United States about every two years. However, Doe himself has been deployed to Honduras, Venezuela and Panama for periods of seven to ten days.

Defendants' witness Sgt. Michael Romeo, Superintendent of Physician Standards, Medical Waivers and Aerospace Programs, clarified that the concept of deployability involves meeting specific medical standards, i.e., immunizations, specific training, ability to donate blood, in order to be considered medically qualified for worldwide deployment. Thus, an HIV seropositive reservist, although completely asymptomatic, would not be deployable worldwide due to, among other things, restricted ability to be immunized and inability to donate blood. With regard to deployability as a function of medical limitations, plaintiff's own medical expert, Dr. Rafael Rivera-Castaño, testified that persons with HIV are subject to opportunistic diseases, that one cannot tell when symptoms might appear. HIV patients must avoid possible bruises, cuts, and individuals with other diseases; good nutrition, rest and exercise are very important.

Dr. Carlos León-Valiente, plaintiffs' expert on HIV and who has treated John Doe, testified that at the time of his discharge, Doe was asymptomatic and not disabled. On cross-examination he stated that plaintiff could travel as long as he does not expose himself to places dangerous not only to him but to others, such as Peru which was having a cholera epidemic. Doe could not travel to places where he would be exposed to bacterial infection or fungi, or places for which he would require vaccinations, such as cities where epidemics are present or where possibility of exposure to unknown disease exists. Dr. León-Valiente also emphasized the possibility and unpredictability of the onset of symptoms.

Further explanation of the concept of deployability was provided by the testimony and Declaration (defendants' Exhibit A) of Joseph Robinson, Jr., Chief of Enlisted Policies and Programs, National Guard Bureau, who is also a captain in the United States Air Force. Captain Robinson explained that the National Guard is different from the regular active duty Air Force in that the National Guard's whole reason for being is to be ready to be deployed, generally outside of the United States. An individual guard unit has a very limited number of positions identified as non-deployable. All of the rest are deployable.

They further contend that he was not given a hearing to determine, among other things, the necessity of his transfer to a non-deployable position. Plaintiffs' argument focuses on the fact that, although Doe's squadron is deployable, it has not been mobilized overseas since 1967.

Luis José Márquez-Ramos, a civilian technician employed by PRANG for nineteen years, who is also President of plaintiff Union, testified that he has been deployed seven times outside of Puerto Rico, four times to various states and three times to Panama, for relatively short assignments. Explaining that deployment usually involves designation of only a few people to other duty states, Márquez-Ramos stated that usually more reservists want to be sent overseas than there are

1. In plaintiffs' Memorandum in Support of Motion for Preliminary and Permanent Injunction (docket entry 12) at p. 43, they state: "Certainly all enlisted personnel who test seropositive for the H.I.V. and are in the regular Army and Air Force are on active duty and are at any given moment deployable, yet they are allowed to continue in the service. Except for some possible accommodation, the regular Armed forces are none the worse for keeping on these individuals." Repeated at page 33, Post-Trial Brief. We note, however, that plaintiffs did not raise as an issue in their complaint or present evidence at trial an equal protection claim related to disparate treatment of reservists vis a vis active duty regular military personnel. We, therefore, do not address this matter as it has not been properly raised before.

2. Plaintiffs emphasize, at page 40 of their Memorandum in Support of Preliminary and Permanent Injunction that the July 2, 1989 memorandum clarifies that memo 89-62 represented "the *current* Air Force policy and *supersedes* all previous documents on this issue and most importantly that *this policy applies to the Air National Guard* as well.... (Emphasis in original.) Plaintiff cites this with approval.

opportunities to do so available. The term "mobilization" refers to deployment of the entire squadron. The squadron practices for mobilization and every three years simulates such an event. He also testified that the deployment determination is a military matter and that disciplinary action can be taken against an individual who refuses deployment.

[3, 4] It is argued that the National Guard is primarily a state militia which is only federalized for mobilization purposes. Likewise, plaintiffs also contend that the possibility of John Doe's being mobilized for active duty overseas is minimal, as well as the general applicability of the Bill of Rights to all citizens, discrimination as a major obstacle in combating the spread of AIDS, the United States Public Health policy against discrimination on the basis of HIV Status or AIDS, all necessitate that the Court rule against this allegedly discriminatory action by the National Guard. Their arguments, however, fail to take into consideration the unique role of the military establishment. "A heavy reliance on readiness needs has guided the evolution of DOD and Air Force HIV policy." Colonel John A. Anderson, United States Air Force, et al *AIDS Issues in the Military*, 32 Air Force L.Rev. 353, 362 (1990). Decisions regarding the dual function of the National Guard, that it has set as a goal force readiness for mobilization, and the deployability of reservists who must meet strict physical standards, are matters which can best be entrusted to the military itself. *See Peña-garicano v. Llenza*, 747 F.2d 55 (1st Cir. 1984); *Mindes v. Seaman*, 453 F.2d 197 (5th Cir.1971). That the Air Force has decided that reservists who cannot be deployed overseas cannot remain in deployable positions must be left to military discretion and expertise.

[5] Plaintiffs also argue that defendants did not follow their own policy by failing to give John Doe a hearing and notice, pursuant to ANGR 39–10, paragraph 8–26 prior to his transfer to the Standby Reserves.[3] Paragraph 8–26 contains the procedure for discharge, incorporating the notice procedure of Chapter 1, Section D, as well as the Administrative Discharge Board of paragraph 1–23. While ANGR 39–10 paragraph 1–23 requires that the reservists be offered the opportunity of a hearing before the administrative discharge board, the applicability of Paragraph 8–26 to HIV seropositive reservists was derogated on August 10, 1990,[4] prior to Doe's discharge,[5] and therefore he had no right to a hearing and notice under this paragraph. As explained by Captain Robinson, the change was a recognition that an administrative discharge board was not the proper forum to deal with these cases. The administrative discharge board is made up of members of the unit who do not have medical backgrounds. Moreover, considering that plaintiffs themselves have consistently agreed that the fitness of an HIV seropositive reservist to continue his duties should be a medical determination, we find their challenge on this point contradictory.

Plaintiffs also take issue with the fact that no medical board was convened. The procedure followed, as described by Sgt. Romeo, calls for convening a medical board *after* it is determined that a non-deployable

3. Paragraph 8–26 states as follows:
Procedure: The notification procedure (Chapter 1, Section D) is required for separations. Comply with paragraph 1–23 for involuntary discharges.

4. The actual August 10, 1990 notification, which forms part of defendant's Exhibit A, states as follows in pertinent part:
SUBJECT: Update on Regulation Corrections; ANGR 39–10 dated 15 Sep 1987.
1. The information in ANGR 39–10, Administrative Separation of Airman, Paragraph 8–26, is no longer applicable and will be changed in the revision of ANGR 39–10.

5. Doe testified that he believes it was during the August 1990 weekend exercise that he was told by Dr. Agapito Miranda, the base doctor, that he had tested positive for HIV and the information would be passed on to the base commander to take appropriate action. He also advised Doe to see a private doctor, recommending Dr. Valiente. During the weekend exercise of September 1990 he was told that he would be severed from the National Guard. He was told that on a Sunday, and that he had thirty days from Monday to take sick leave and then he would be discontinued from the technician program.

position(s) exists for which the reservist would otherwise qualify. Inasmuch as the initial policy determination required that Doe be restricted to a non-deployable position, and no compatible[6] non-deployable position was available for him,[7] defendants determined that a medical review board was not needed to evaluate plaintiffs' particular fitness to fill a non-existent job. Moreover, considering that reservists such as Doe who are not on extended active duty do not receive their medical care through the military establishment, the National Guard does not put the reservist to the expense of medical testing for the futile purpose of evaluation by a medical board that would have no position for which to evaluate his fitness. We, therefore, find that the procedure described by Captain Robinson falls within the parameters of the further case-by-case consideration to determine the specific suitability of an individual HIV positive reservist for an available position.

[6] Plaintiffs' allegation that ANGR 39–10, as applied, violates the Department of Defense and Air Force policies prohibiting the use of results obtained from laboratory tests for HIV as the sole basis for the service member's separation are equally meritless. It is clear from the evidence that John Doe's separation was based upon the fact that he tested seropositive *and* a non-deployable position compatible to his could not be found. Moreover, both policies allow for separation as specifically authorized in the corresponding memorandum. In this case, the policy specifically states that reservists not on extended active duty can be involuntarily transferred to the Standby Reserve, if they cannot be utilized in the Selected Reserve.[8]

Property Interest in Technician Employment

[7] John Doe's allegation of infringement of his due process rights by PRANG's failure to give him any hearing or notify him of his right to appeal prior to his dismissal is belied by his lack of a property interest in the technician position he occupied at the time of his separation, pursuant to the basic statutory provision which created the same. Section 2(1) of the National Guard Technicians Act, 32 U.S.C. § 709 at (b) states that:

> Except as prescribed by the Secretary concerned, a technician employed under subsection (a) *shall, while so employed, be a member of the National Guard* and hold the military grade specified by the Secretary concerned for that position.

(Emphasis ours.) 32 U.S.C. § 709(e) further states that:

> Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned—
>
> (1) a technician who is employed in a position in which National Guard membership is required as a condition of employment and who is separated from the National Guard or ceases to hold the military grade specified for his position by the Secretary concerned *shall be promptly separated from his technician employment by the adju-*

6. Captain Robinson testified that the necessity of compatibility means that the military position must coincide with the civilian job because the reservists must still be proficient in the civilian position.

7. Plaintiffs' only evidence on this matter was a vague hearsay statement by Márquez-Ramos that he had been told there were vacant non-deployable positions. He had no information as to whether they were compatible to Doe's civilian position. Major Nilda Urrutia, the Military Personnel Management Officer testified that she examined the Managing Unit Documents as early as late July or early August 1990, to search for an available non-deployable position for Doe, and that her efforts to locate such a position continued through 1991. She also testified that she looked for positions in other units as well. There was some confusion with the documents which were brought to court for the hearing inasmuch as she brought 1991 documents instead of the ones which she would have actually used. She explained that there is very little change in the documents, and emphasized that she had searched for a non-deployable position at the time she stated. We give complete credibility to her testimony.

8. Captain Robinson testified that when a non-deployable position is available the individual is placed in the Selective Reserve.

> *tant general of the jurisdiction concerned;*
>
> . . . .
>
> (6) a technician *shall be notified in writing* of the termination of his employment as a technician and such notification shall be given *at least thirty days prior to the termination date* of such employment.

(Emphasis ours.) As is evident from the statutory language, any property interest in a technician position ceases with separation from the National Guard. The termination is mandatory. Courts have affirmed that civilian technicians lose any entitlement to their positions when their enlistment as a military member of the National Guard ends. *See Tennessee v. Dunlap,* 426 U.S. 312, 96 S.Ct. 2099, 48 L.Ed.2d 660 (1976). The only procedural due process required is the thirty days written notice established by statute, which in this case was given to Doe.[9]

Retirement

[8, 9] Although plaintiffs make no claim in their complaint, they argue at page 36 of their memo in Support of Preliminary and Permanent Injunction[10] that defendants' actions violate title 10 U.S.C. § 1214 and 1215 which relate to the procedure for retirement or separation for physical disability. Their argument is fruitless, however, in that these sections are inapplicable to plaintiff's case. Doe was not retired due to a physical disability. Extensive evidence supports plaintiffs' own contention that he is not disabled. Rather, it is the *sui generis* situation of an administrative discharge based upon medical considerations which makes Doe unsuitable to continue in a deployable military position. Another argument similarly made by plaintiffs, is an alleged violation of 10 U.S.C. § 1004 in that the Governor of Puerto Rico failed to approve Doe's transfer. Section 1004(c) is referred to out of context; the relevant section states, in pertinent part, that "... no member of the ... Air National Guard of the United States may be transferred under this subsection without the consent of the governor *or other appropriate authority of the jurisdiction concerned.*" (Emphasis ours.) The plaintiffs, however, have failed to present any evidence to demonstrate that Doe's transfer to the Standby Reserve was made without the appropriate authorization; that is, they have not shown that the decision was taken by individuals without the authority to do so.[11]

Liberty Interests

Allegations of infringement of Doe's liberty interest are somewhat puzzling. Specifically mentioned are his right to engage in his occupation, the right to education, the right to seek employment and the right to contract. Plaintiffs fail to identify how these rights are affected, nor do we see any infringement.[12]

9. A termination letter dated October 16, 1990 was sent to plaintiff informing him of the mandatory separation due to his discharge from PRANG. The letter states that the separation from his technician employment would be no earlier than November 19, 1990. (Plaintiff's Exhibit 5.)

10. Similarly, although no claim is made under the Rehabilitation Act, 29 U.S.C. § 794, defendant William Miranda-Marin has extensively argued its inapplicability. *See* Opposition to the Motion for Preliminary Injunction, Motion to Dismiss and Response to Order to Show Cause (docket entry 7) repeated in their Motion in Compliance with Court Order of February 19, 1992 (docket entry 44).

11. Footnote 3 at page 3 of plaintiff's Post-Trial Brief, states that "the authority to separate members from the Air National Guard rests with the State Adjutant General who further delegate to a Commander...." Inasmuch as Doe's discharge order was issued by PRANG Commander Colonel Manuel Guzmán, we question plaintiff's having raised this as an argument.

12. Doe originally requested that his identity be maintained confidential in order to "maintain his seropositive status confidential, exercise his right to privacy and protect himself and his family from discrimination and stigmatization." Complaint, paragraph 3. If what he means is that these rights are infringed because his seropositive status may result in discrimination against him, making it difficult to obtain other employment, education or favorable contractual agreements, we can only remind Doe that it was his decision to publicize in a major newspaper his identity and his seropositive status.

Plaintiffs cite five cases—two prisoner cases, an abortion law case, an education law case, and only one employment prohibition case—without explaining how any of these cases apply to the facts at bar. We note the case of *Hampton v. Mow Sun Wong,* 426 U.S. 88, 96 S.Ct. 1895, 48 L.Ed.2d 495 (1976), which dealt with the exclusion of all persons except American citizens and natives of Samoa from employment in most positions of federal service. It is apparent here, however, that Doe was restricted only from engaging in a deployable position in the military service.

The Court is not insensitive to the extreme hardships faced by plaintiff resulting from his situation. However, given the medical testimony regarding the medical restrictions and requirements of HIV positive patients, and the non-justiciability of questions related to military force readiness, mobilization, deployability and the dual function of the National Guard, we find that plaintiffs have failed to demonstrate that defendants' application or interpretation of the PRANG regulations has violated their constitutional rights.

Accordingly, this action is DISMISSED.

SO ORDERED.

Jaime LORA-RIVERA, Plaintiff,

v.

DRUG ENFORCEMENT ADMINISTRATION DEPARTMENT OF JUSTICE, Pedro Nieves, Jorge L. Arroyo United States of America, Defendants.

No. Civ. 90-2307CCC.

United States District Court,
D. Puerto Rico.

Sept. 30, 1992.

Action was filed under Federal Tort Claims Act seeking damages for malicious prosecution. On motion to dismiss, the District Court, Cerezo, J., held that: (1) subject matter jurisdiction was lacking as to defendant federal agencies and employees, and (2) malicious prosecution was not shown in that indictment of the present plaintiffs and finding of probable cause by United States Magistrate precluded determination of lack of probable cause, and prior proceedings could not have been deemed to have concluded in plaintiffs' favor when they entered into a plea agreement requiring cooperation in prosecution of codefendants in exchange for dismissal of charges against themselves.

Motion granted.

1. United States ⇐78(1)

Federal Tort Claims Act (FTCA) is limited waiver of sovereign immunity that provides exclusive remedy for suits against the United States or its agencies sounding in tort. 28 U.S.C.A. §§ 1346, 2671 et seq.

2. United States ⇐135

Under the Federal Tort Claims Act (FTCA) only the United States could be sued eo nomine, and thus subject matter jurisdiction was lacking as to federal agencies and employees. 28 U.S.C.A. § 2679(a, b).

3. United States ⇐50.20

Appropriate limitations period for *Bivens*-type claims against federal employees is one year.

4. Malicious Prosecution ⇐16, 38

"Malicious prosecution" is groundless institution of criminal proceedings against the claimant, and the four elements thereof under Puerto Rico law are: that criminal action was initiated and instigated by defendants; that criminal action terminated in favor of plaintiffs; that defendants acted with malice and without probable cause; and that plaintiffs suffered damages.

See publication Words and Phrases for other judicial constructions and definitions.

EQUAL PROTECTION

sible person does not act willfully in paying ot creditors when the tax liability accrued prior to the person's becoming a responsible person. *Id.* at 259–60, 98 S.Ct. at 1791. Because the district court correctly found that Wood was a responsible person both before and after the obligations at issue accrued, *Slodov* is not applicable. *Mazo,* 591 F.2d at 1154. Wood received notice that employment taxes were past due by a letter from the IRS dated Septem- 17, 1979. He concedes that after that date he signed checks paying to creditors more t the amount of unpaid withholding ta Thus, he acted willfully as to all taxes unpaid before he received notice that second quarter employment taxes were due.

For dates after he received notice of unpaid employment taxes Wood does not dispute that he is liable for the amount of any withholding tax deposits that Red Ant failed to make. He contends, however, that he is not liable for the amounts of deposits that Red Ant did make. He relies on three theories. First, Wood argues that the IRS ignored express directions on the IRS form accompanying the deposits when it applied the deposits to Red Ant's FICA employers' tax obligations (for which Wood would not be liable) before applying the deposits to Red Ant's withholding tax obligations (for which Wood could be liable). Second, Wood claims that the IRS ignored directions on the check stubs accompanying the checks when it applied the deposits. Third, Wood maintains that because Red Ant did make several of the quarter-monthly deposits he could not have willfully fa to make those deposits.

[9] It is well established that in the absence of a direction by the taxpayer the IRS can apply a payment to any outstanding tax liability of the taxpayer. *National Bank of the Commonwealth v. Mechanics' National Bank,* 94 U.S. 437, 439, 4 Otto 437, 439, 24 L.Ed. 176 (1877); *Liddon v. United States,* 448 F.2d 509, 513 (5th Cir. 1971), *cert. denied,* 406 U.S. 918, 92 S.Ct. 1769, 32 L.Ed.2d 117 (1972). The IRS has announced its intention to follow this practice in applying employment tax deposits. *See* Rev.Rul. 79–284, 1979–2 C.B. 83. This circuit has approved the application of corporate funds to FICA employers' tax liabilities before applying the funds to withholding taxes in the absence of a direction by the taxpayer. *Liddon,* 448 F.2d at 513. But if a taxpayer directs that a payment be applied in a certain manner, the IRS must abide by the taxpayer's direction. *Muntwyler v. United States,* 703 F.2d 1030, 1032 (7th Cir.1983).

[10] Wood's first two theories are attempts to show that he directed the IRS to apply the deposits in a certain way. First, Wood focuses on the heading of Form 941–501, which must accompany every employment tax deposit. 26 C.F.R. § 31.6302(c)–1(a)(2)(ii) (1986). The card reads: "Federal Tax Deposit of Withheld Income and FICA for Tax Quarter Ending ____." Wood argues that the adjective "withheld" modifies both income and FICA. Thus, he contends, the heading on the card directs the IRS to apply the deposit solely to the withholding taxes and not to the employers' FICA tax liability. This argument is not persuasive. The employers' FICA tax is also a FICA tax. *Anderson v. United States,* 497 F.Supp. 563, 565 (E.D.Wisc.1980). Indeed, the employers' FICA and the employees' FICA taxes are grouped under one heading on the employment tax return (Form 941) that Red Ant filled out. "Withheld" modifies only income; therefore the card did not direct the IRS to apply the deposit solely to withholding taxes. Moreover, since the IRS chose the wording of the heading of the card and Wood had no choice but to use the form, we decline to construe the heading to be a direction by Wood as to how the funds should be applied.

[11] Second, Wood argues that the notations on Red Ant check stubs accompanying the checks served as a direction to the IRS. Those notations could be read to reflect the company's FICA employers' tax, FICA employees' tax, and withheld income tax for the period covered by the check. Wood contends that the IRS should have applied the deposits to each of the respec-

tive taxes in the amounts indicated on the check stub. This argument also is without merit. Wood presented no evidence at trial showing that the supposed direction on the check stub ever reached the IRS. Indeed, his attorney agreed at trial that the check stubs likely never left the bank. The notations on the check stubs could be construed as serving Red Ant's internal record keeping. They were too ambiguous and uncertain to serve as directions to the IRS. The district court's finding that Wood made no specific designation is not clearly erroneous. Thus, the court correctly held that IRS could apply the deposits to the employers' FICA taxes before applying them to the withholding taxes. *See Liddon,* 448 F.2d at 513.

Wood's third theory is that he did not act willfully as to those deposits made by Red Ant. He argues that because the deposit system established by the IRS must be used to pay employment taxes, *see Cindy's, Inc. v. United States,* 740 F.2d 851, 852 (11th Cir.1984), and because IRS regulations provide that amounts deposited "shall be considered as payment of the tax," 26 C.F.R. § 1.6302–1(b) (1986), he did exactly what the law required and did not willfully fail to make those deposits. He finds further support in *Brown,* in which the court held that a responsible person acted willfully by failing to make the withholding deposits. 591 F.2d at 1141. Wood reasons that if failure to make required deposits constitutes willfulness, then making the deposits should demonstrate a lack of willfulness.

Wood places a hypertechnical construction on part of the duties imposed on employers by IRS regulations. Employers do have a duty to make deposits during a quarter, and when they make those deposits they must use the depository system. But that duty is not the employer's sole duty. The employer also has a duty to pay the remaining taxes due by the last day of the month following the end of the quarter. 26 C.F.R. § 31.6302(c)–1(a)(1)(iv) (1986). Indeed, the amounts deposited throughout the quarter are not considered paid until the date the remaining balance is due. *Id.* § 31.6302(c)–1(a)(2)(iii). While an employer may act willfully by not making deposits during the quarter, *Brown,* 591 F.2d at 1141, it is specious to syllogize that making deposits negates willfulness. The court in *Brown* implicitly recognized this when it stated that "Treasury regulations require withheld funds to be deposited during the quarter and do not *merely* impose a duty to pay them at the end of the period." *Id.* (emphasis added). Wood's reasoning ignores the duty to pay at the end of the quarter.

[12] Because Red Ant did not pay the balance of employment taxes due at the end of the quarter, Wood did not do all the law required of him. His disregard for the obvious risk that the IRS would apply the deposits to the FICA employers' tax rather than the withholding taxes is sufficient to establish willfulness for the amounts deposited by Red Ant. For the same reason, Wood did not demonstrate reasonable cause for his failure to pay. *See Newsome v. United States,* 431 F.2d 742, 746–48 (5th Cir.1970).

The district court's finding of willfulness was not clearly erroneous. Wood was properly held liable for all the withholding taxes due. The judgment appealed from is

AFFIRMED.

Michael G. HOLDINESS, Plaintiff-Appellant,

v.

A.M. STROUD, Jr., et al., Defendants-Appellees.

No. 86–4128

Summary Calendar.

United States Court of Appeals, Fifth Circuit.

Jan. 23, 1987.

Former member of national guard sought to obtain damages from a number of his superior officers for alleged violation of his federal constitutional and statutory rights when he was barred from reenlisting and terminated from his employment as civil technician. The United States District Court for the Western District of Louisiana, Donald E. Walter, J., dismissed suit and former guard member appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) national guard member did not have cause of action under § 1983 for alleged deprivation of his constitutional rights by personnel of national guard; (2) national guard member's complaint failed to sufficiently allege conspiracy to interfere with his personal civil rights under § 1985; and (3) national guard member who had right to intramilitary administrative procedures could not bring *Bivens* cause of action against his superior officers.

As modified, affirmed.

1. Civil Rights ⚬=13.5(3)

A charge that adjutant general of a state deprived a member of the national guard of his constitutional or federal statutory rights satisfies state action requirement of § 1983. 42 U.S.C.A. § 1983.

2. Civil Rights ⚬=13.5(3)

A charge that various members of national guard, including captain in air national guard squadron, a personnel officer for national guard, commanding officer of guard member's squadron and chief of central base administration of guard member's fighter wing deprived member of guard of his constitutional and federal statutory rights, satisfied state action requirement of § 1983. 42 U.S.C.A. § 1983.

3. Civil Rights ⚬=13.4(1)

Section 1983 did not afford cause of action against national guard personnel for their service-connected actions in allegedly violating national guard member's federal constitutional and statutory rights when guard member was involuntarily discharged from national guard and from his employment as civil technician. 42 U.S.C.A. § 1983.

4. Civil Rights ⚬=13.3(1)

Section 1983 protects only against a deprivation of rights secured by the Constitution and laws of the United States. 42 U.S.C.A. § 1983.

5. Civil Rights ⚬=13.3(2)

State action in causing denial of reenlistment to a national guard member and the consequent termination of his employment as a civil technician does not necessarily constitute the deprivation of a constitutionally protected liberty or property interest under § 1983, for the constitutional guarantee does not protect against every injury. 42 U.S.C.A. § 1983.

6. Civil Rights ⚬=13.3(2)

National guard member did not have a property or liberty interest protected by the due process clause in continued military service in the national guard, nor did he have constitutionally protected right to reenlist, and in view of Congress' mandate that a technician be discharged if his military enlistment expired, national guard member, barred from reenlisting, failed to state § 1983 claim regarding action barring his reenlistment and his termination as civilian technician. 42 U.S.C.A. § 1983; U.S.C.A. Const.Amends. 5, 14.

7. Federal Civil Procedure ⚬=648

Plaintiffs who assert claims under § 1983 and other civil rights statutes, such as § 1985, must plead operative facts upon which their claim is based, and mere conclusory allegations are insufficient. 42 U.S.C.A. §§ 1983, 1985, 1985(1–3).

8. Conspiracy ⚬=7.5

The heart of the cause of action accorded by § 1985 is a conspiracy to interfere with a person's civil rights. 42 U.S.C.A. § 1985.

9. Conspiracy ⚬=18

National guard member failed to allege sufficient facts from which it could be inferred that national guard personnel conspired to interfere with guard member's personal civil rights, and thus complaint did not state a cause of action under § 1985. 42 U.S.C.A. §§ 1985, 1985(1–3).

10. United States ⚬=135

The only proper defendant in a suit under the Federal Tort Claims Act was United States, so that Federal Torts Act claims against national guard personnel by national guard member were properly dismissed. 28 U.S.C.A. § 2671.

11. United States ⚬=50.10(5)

National guard member, barred from reenlisting in guard and terminated from employment as civil technician, who had resort to intramilitary administrative procedures to address his complaints, was precluded from maintaining *Bivens* damage suit against military guard personnel for alleged violations of his constitutional and statutory rights.

12. Militia ⚬=10, 12

Absent express congressional provisions for judicial intervention, national guard member's state law tort claims against national guard personnel, arising from refusal to allow guard member to reenlist and termination of his employment as civil technician, were barred.

Paul Henry Kidd, Kidd & Kidd, Monroe, La., for plaintiff-appellant.

Joseph S. Cage, Jr., U.S.Atty., D.H. Perkins, Jr., John R. Halliburton, Asst. U.S. Attys., Shreveport, La., for all defendants-appellees.

Charles E. Welsh, Asst. Atty. Gen., Shreveport, La., for State of Louisiana.

Appeal from the United States District Court for the Western District of Louisiana.

Before RUBIN, RANDALL, and HIGGINBOTHAM, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

A former member of the National Guard, who was also employed as a civilian technician for the Guard, seeks to obtain damages from a number of his superior officers for alleged violation of his federal constitutional and statutory rights when he was barred from reenlisting, being thus involuntarily discharged from the Guard and from his employment as a civilian technician. Although his complaint invoked numerous bases for jurisdiction and asserted a number of separate claims, the district judge dismissed his suit for failure to state a claim for which relief can be granted in any respect. We affirm the judgment of the district court but modify it to make clear that the dismissal is without prejudice to the plaintiff's right to seek judicial review of any action taken by the Army Board for the Correction of Military Records.

I. Facts As Set Forth by the Complaint

Because the suit was dismissed for failure of the complaint to state a claim for which relief can be granted, we recite the facts as alleged. Michael G. Holdiness was a military member of the Louisiana Army National Guard, Company D, 528 Engineering Battalion in Monroe, Louisiana, for approximately fourteen years before his involuntary discharge on February 27, 1983. He had been employed as a civilian technician under the National Guard Technician's Act, 32 U.S.C. § 709, for eleven years.

Holdiness' immediate supervisor, Charles H. Dean, who was also a civilian technician and the general mechanic foreman for Company D, discriminatorily denied him promotions and gave him an arbitrarily low job evaluation report, a score of "61," which, although acceptable, made him subject to transfer to Alexandria, Louisiana, which is more than 100 miles from his home. If Holdiness' performance had been rated fairly, he would not have received a score that made him susceptible to being transferred. Dean's actions were motivated by his dislike of Holdiness' father and his desire to see Holdiness transferred to another Guard unit.

Holdiness attempted to appeal his performance evaluation through administrative channels, but various other National Guard officials, who are also named as defendants, retaliated because he had the "audacity to challenge the 'Guard's' actions." Holdiness then sought assistance from Louisiana State Senator David Ginn. Senator Ginn wrote the Louisiana Adjutant General, A.M. Stroud, J., who is also named as a defendant, and the two United States Senators from Louisiana to enlist their efforts on behalf of Holdiness. The various defendants became so enraged at Senator Ginn's efforts that they undertook retaliatory measures against Holdiness, and, as a result, the officer in charge of civilian assistants reprimanded him. A Guard Lieutenant, Joseph P. Roberts, who is also joined as a defendant, informed Holdiness that he would be barred from re-enlisting as a military member of the Guard, effective February 27, 1983. The Director of Manpower Management for the Guard, Colonel Gerard A. Mumphrey, another defendant, advised Holdiness that his job as a civilian technician would be terminated on the same date because, under the National Guard Technician's Act, a civilian technician must be dismissed if he is no longer a military member of the Guard.[1]

Holdiness' father died after Holdiness had received his poor performance rating and before he was dismissed.

After he had been barred from reenlisting and his civilian employment had been terminated, Holdiness filed this suit, relying on 42 U.S.C. §§ 1983, 1985; the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq.; and Louisiana state law, La.Civ.Code Ann. art. 2315 (West 1979). Holdiness asserted that the defendants' unconstitutional actions were the proximate cause of his father's death. He sought $1,000,000 in damages for loss of past and future wages, pain and suffering, and loss of his father's affection and companionship. In his response to the defendant's motion to dismiss, Holdiness also alleged violations of his federal constitutional rights, citing *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics.*[2]

Holdiness appeals only the dismissal of those defendants who were considered federal employees by the district court, Dean, his immediate supervisor; Captain Phillip L. Arthur, a civilian technician supervisor; Colonel Gerard A.M. Mumphrey, the Guard's Director of Manpower Management; and Major General A.M. Stroud, Jr., the officer in charge of civilian technicians and the man who had responded to the Louisiana State Senator's intercession by writing the Governor of Louisiana. As we have noted, Holdiness has invoked a variety of constitutional and statutory bases for relief, casting a tangled net of claims. Separating their strands, we examine each individually to determine whether any is strong enough to retain the defendants.

II. Status of the National Guard

The constitution empowers Congress "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 the Officers, and the Authority of Training the Militia according to the discipline prescribed by Congress."[3]

As the Supreme Court related in *Maryland v. United States:*

> From the days of the Minutemen of Lexington and Concord until just before World War I, the various militias embodied the concept of a citizen army, but lacked the equipment and training necessary for their use as an integral part of the reserve force of the United States Armed Forces.[4]

The National Defense Act of 1916 materially altered the status of the militias by constituting them the National Guard. Pursuant to the power vested in Congress

1. 32 U.S.C. § 709(e)(1); *Tennessee v. Dunlap,* 426 U.S. 312, 313, 96 S.Ct. 2099, 2100, 48 L.Ed.2d 660 (1976).

2. 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

3. U.S. Const. art. 1, § 8, cl. 15, 16.

4. 381 U.S. 41, 46, 85 S.Ct. 1293, 1296, 14 L.Ed.2d 205, *vacated on other grounds,* 382 U.S. 159, 86 S.Ct. 305, 15 L.Ed.2d 227 (1965).

by the Constitution, the Guard was to be uniformed, equipped, and trained in much the same way as the regular army, subject to federal standards and capable of being "federalized" soldiers. Congress also authorized the allocation of federal equipment to the Guard, and provided federal compensation for members of the Guard, supplementing any state emoluments. The Guard is thus the successor to the State militias, but it is now a hybrid state-federal organization,[5] for the Governor remains in charge of the National Guard in each state except when the Guard is called into active federal service. In most states the Governor administers the Guard through the State Adjutant General, who was required by the 1916 Act to report periodically to the National Guard Bureau, a federal organization, on the Guard's reserve status.

"The basic structure of the 1916 Act has been preserved to the present day."[6] The National Guard is today, therefore, an integral part of this country's military structure. It is "[a]n essential reserve component of the Armed Forces of the United States, available with regular forces in time of war."[7]

III. § 1983

Whether Holdiness has stated a claim for which relief might be granted under 42 U.S.C. § 1983 turns on whether he alleges that state action has deprived him of an interest that is constitutionally recognized as life, liberty, or property without due process of law.

A. State Action

This circuit, like other federal circuits, has several times reviewed the attempts of Guard personnel to invoke judicial aid. The state-national character of the Guard as well as the requirements of § 1983, which affords relief only for state action, require us to focus separately on two questions: whether the defendants' actions constitute actions of the State of Louisiana, a question distinct from whether Holdiness as a civilian technician is a federal or state employee and whether, as a military member of the Guard, he is in federal or state military service.

[1] In *NeSmith v. Fulton,*[8] we held that the Adjutant General of a state is "at least in part a state officer." Relying on *Davis v. Vandiver,*[9] we said that, although the National Guard Technician's Act confers federal status on civilian technicians "while granting administrative authority to *State* officials, headed in each state by the Adjutant General,"[10] by virtue of the hybrid character of the Guard, the Adjutant General is, at least for some purposes, simultaneously a federal agent. A charge that the Adjutant General deprived a member of the Guard of his constitutional or federal statutory rights, therefore, satisfies the state action requirement of § 1983.[11]

[2] In addition to suing the Adjutant General, NeSmith also sued various Guard members, including a captain in his Air National Guard squadron, the Personnel Officer for the Guard, the Commanding Officer of his squadron, and the chief of central base administration of his fighter wing. In *NeSmith* we held that the actions of such officers must be considered state action for at least some purposes, because "in removing NeSmith from his civilian technician position, the defendant adjutant general *and the other defendants, as his agents,* acted sufficiently un-

5. *New Jersey Air Nat'l Guard v. Federal Labor Relations Authority,* 677 F.2d 276, 278 (3d Cir. 1982).

6. *Maryland v. United States,* 381 U.S. at 47, 85 S.Ct. at 1297.

7. *Gilligan v. Morgan,* 413 U.S. 1, 7, 93 S.Ct. 2440, 2444, 37 L.Ed.2d 407 (1973).

8. 615 F.2d 196 (5th Cir.1980).

9. 494 F.2d 830, 832 (5th Cir.1974).

10. *NeSmith v. Fulton,* 615 F.2d at 199 (quoting *Davis v. Vandiver,* 494 F.2d at 832 (emphasis in original)).

11. *Id.,* 615 F.2d at 200.

der color of state law for purposes of Section 1983." [12]

The district court, therefore, was in error in holding that, as a matter of law, the four fe l defendants were not amenable to suit under § 1983 because they were federal employees.

B. Justiciability

[3] Whether § 1983 may be invoked for alleged injuries suffered by military personnel as a result of actions taken by their military superiors, also presents a question of the proper scope of judicial inquiry. Because Guard members serve in a branch of the federal military service, cases considering persons in the regular military services are relevant to this inquiry. In *Mindes v. Seaman*,[13] decided in 1971, we held that the federal courts have jurisdiction to consider a complaint seeking declaratory and injunctive relief by an Air Force officer who sought to avoid an adverse Officer Effectiveness Report after he had unsuc- fully exhausted all available intraservice procedures including application to the Air Force Board for Correction of Military Records. In the interests of good "judicial husbandry," we then reviewed his charges in the complaint and set forth, for the proceedings on remand, "a somewhat detailed analysis of when internal miliary affairs should be subjected to court relief." [14]

Mindes had alleged, inter alia, that the proceedings against him violated due pro- but we did not further evaluate these charges and expressed no opinion about whether his specific claims would, if proved, constitute a denial of a constitutional right, saying only that his "allegati , in toto, are sufficient to withstand a motion to dismiss at the pleading stage." We did, however, set forth factors for the district court to consider in deciding when federal court should review a decision by the "military establishment." [15] We wrote: [16]

> A district court faced with a sufficient allegation [of deprivation of a constitutional right] 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.
>
> 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 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.

The *Mindes* opinion considered the availability of administrative remedies relevant in determining whether federal judicial portals were open to such suits, although, of course, the Supreme Court's ruling in *Patsy v. Florida Board of Regents* [17] has since established that exhaustion of administrative remedies is not a prerequisite to a § 1983 action. In *Penagaricano v. Llenza*,[18] the First Circuit noted the difference between an inquiry into whether availability of administrative remedies affects the availability of access to federal court and an inquiry into whether exhaustion of such remedies is generally a prerequisite to § 1983 actions. It, however, did not resolve the issue whether *Patsy* bars consideration of the availability of administrative remedies for purposes of determining when a court should inquire into military matters because it found that the plaintiffs had not been denied a constitutionally protected interest. The Ninth Circuit has followed the *Mindes* test without distinguishing between different aspects of the exhaustion question [19] and left redress in the hands of the military service. Like Mindes, Holdiness has access to administrative remedies. Unlike Mindes, he has failed to resort to them.

In 1983, more than a decade after we decided *Mindes*, the Supreme Court first considered whether a federal judicial forum was available to adjudicate claims arising from intraservice injuries in the regular military service. In *Chappell v. Wallace*,[20] the Court held that enlisted military personnel may not pursue *Bivens*-type suits to recover damages for the violations of their constitutional right to equal protection of the law as a result of discrimination against them because of their race.[21]

This circuit applied *Chappell* to the due process and equal protection claims of Guard members in *Crawford v. Texas Army National Guard*,[22] holding that § 1983 does not afford a cause of action against Guard personnel for their service-connected actions. This decision is in accord with decisions of the Third,[23] Eighth,[24] and Tenth Circuits.[25] We note that in *Penagaricano v. Llenzo*,[26] the First Circuit held that *Chappell* is not directly controlling but, when analyzed under the *Mindes* tests, such claims are "nonjusticiable." In *Mollnow v. Carlton*,[27] the Ninth Circuit, applying the rationale of *Chappell*, held that § 1985 does not afford military subordinates a remedy against military superiors.

Accordingly, we follow *Crawford* in applying the *Chappell* rule to Guard members and, using the tests in *Chappell* and *Mindes*, hold that the remedy sought by Holdiness would be so disruptive to military service that the claim should not be entertained by the federal courts. We affirm the district court ruling that the complaint does not state a claim for which relief can be granted under § 1983.

C. Liberty or Property

[4, 5] For completeness we note another deficency in the complaint. Section 1983 protects only against a deprivation of rights secured by the Constitution and laws of the United States. State action in causing the denial of reenlistment to a Guard member and the consequent termination of

12. *Id.* (citations omitted) (emphasis added).

13. 453 F.2d 197 (5th Cir.1971).

14. *Id.*, 453 F.2d at 199.

15. *See also West v. Brown*, 558 F.2d 757 (5th Cir.1977), *cert. denied*, 435 U.S. 926, 98 S.Ct. 1493, 55 L.Ed.2d 520 (1978).

16. *Mindes*, 453 F.2d at 201.

17. 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982).

18. 747 F.2d 55 (1st Cir.1984).

19. *Mollnow v. Carlton*, 716 F.2d 627, 629–30 (9th Cir.1983), *cert. denied*, 465 U.S. 1100, 104 S.Ct. 1595, 80 L.Ed.2d 126 (1984).

20. 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983).

21. *See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

22. 794 F.2d 1034 (5th Cir.1986).

23. *Jorden v. National Guard Bureau*, 799 F.2d 99, 108 (3d Cir.1986).

24. *Brown v. United States*, 739 F.2d 362, 366–67 (8th Cir.1984), *cert. denied*, — U.S. —, 105 S.Ct. 3524, 87 L.Ed.2d 650 (1985).

25. *Martelon v. Temple*, 747 F.2d 1348, 1350–51 (10th Cir.1984), *cert. denied*, 471 U.S. 1135, 105 S.Ct. 2675, 86 L.Ed.2d 694 (1985).

26. 747 F.2d 55, 59–61 (1st Cir.1984).

27. 716 F.2d 627, 629–30 (9th Cir.1983), *cert. denied*, 465 U.S. 1100, 104 S.Ct. 1595, 80 L.Ed.2d 126 (1984).

his employment as a civilian technician does not necessarily constitute the deprivation of a constitutionally protected liberty or property interest, for the constitutional guarantee does not protect against every injury.[28]

In *Walker v. Alexander*,[29] we considered whether a Guard officer, who was also employed as a civilian technician, possessed a constitutionally protected property right to be retained in active military service in the Guard, a status on which his civilian employment was contingent. Without applying the *Mindes* tests, we held that the Guard member's asserted interest was not a property right in the constitutional sense and that his civilian-technician status did not "change the quality of the right or the expectancy of the officer to continue in his position for purposes of demonstrating the existence of a property right." [30]

[6] Holdiness did not lose his position as a technician until his enlistment as a military member of the Guard expired. He did not have a property or liberty interest protected by the due process clause in continued military service in the National Guard,[31] nor did he have a constitutionally protected right to re-enlist.[32] Thus, he has failed to allege injury to a constitutionally protected liberty or property interest when his status as a military member of the Guard was terminated. Because Congress has mandated that a technician be discharged if his military enlistment expires, Holdiness has also failed to state a § 1983 claim regarding his termination as a civilian technician.

IV. Section 1985

42 U.S.C. § 1985 accords a cause of action to any person injured as a result of a conspiracy to interfere with the civil rights described in the Act: Subsection 1 relates to a conspiracy to prevent a public official from performing his duty; Subsection 2 relates to a conspiracy to obstruct justice or to intimidate a party, a witness, or a juror; and Subsection 3 concerns the acts of two or more persons in conspiring to, or in going in disguise to, deprive any person of certain rights. Both subsections clause 2 of subsection 2 and 3 relate only to actions motivated by racial or some other type of invidious, class-based discrimination.[33]

[7] Plaintiffs who assert claims under 42 U.S.C. § 1983 and other civil rights statutes, such as § 1985, must plead the operative facts upon which their claim is based. Mere conclusory allegations are insufficient.[34] Equal specificity is required when a charge of conspiracy is made.[35]

[8] Holdiness' complaint fails to satisfy this pleading requirement sufficiently to assert a claim under any of the subsections of § 1985. The heart of the cause of action accorded by § 1985 is a conspiracy to interfere with a person's civil rights.[36] The essence of a conspiracy is an understanding or agreement between the conspirators. Holdiness does not allege that the defendants conspired to commit any of the alleged wrongful acts nor does he allege any facts from which such a conspiracy might be inferred.[37]

[9] Considering each subsection of § 1985 separately, we note that, apart from failure to charge a conspiracy, the complaint does not allege facts sufficient to charge a violation of subsection 1, an effort to prevent a public official from performing his official duties. It alleges only that the defendants acted to deprive Holdiness of his constitutional rights.[38] Holdiness' complaint is also insufficient to state a claim under subsections 2 and 3 for it alleges neither a conspiracy nor class-based animus. It alleges only that the defendants' actions were motivated by Dean's dislike of his father and their desire to punish an insubordinate employee.

The § 1985 claim was therefore properly dismissed.

V. Federal Torts Claims Act

[10] The Federal Torts Claims Act was amended in 1981 to extend protection to "members of the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of Title 32." [39] This provision makes the government liable for the conduct of civilian technicians employed by the Guard.[40] The only proper defendant in a suit under the Act, however, is the United States.[41] The Federal Torts Act claim against the individual defendants was, therefore, properly dismissed.

VI. *Bivens v. Six Unknown Named Agents*

[11] The Supreme Court in *Bivens v. Six Unknown Named Agents* [42] found sanction for a damage suit against federal officials whose actions violate an individual's constitutional rights even though Congress had not expressly authorized such suits. The Court has, however, consistently cautioned that this implied remedy is not available in the presence of "special factors counselling hesitation." [43] In *Chappell*,[44] the Court found that "the need for special regulations in relation to military discipline, and the consequent need and justification of a special and exclusive system of military justice" mitigated against permitting enlisted military personnel to maintain a damage suit against a superior officer for alleged violation of their constitutional rights in failing to assure them desirable duties, threatening them, giving them low performance evaluations, and denying them equal protection of the laws by imposing unusually severe penalties on them because of their race.

The Eleventh Circuit in *Stanley v. United States*,[45] did not read *Chappell* as establishing a *per se rule* prohibiting suits by military personnel against their superiors to recover damages for constitutional viola-

28. *Baker v. McCollan*, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979); *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976); *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

29. 569 F.2d 291 (5th Cir.1978).

30. *Id.*, 569 F.2d at 293.

31. *Walker v. Alexander*, 569 F.2d at 294.

32. *Gant v. Binder*, 596 F.Supp. 757, 766–67 (D.Neb.1984), *aff'd*, 766 F.2d 358 (8th Cir.1985); *see also West v. Brown*, 558 F.2d 757, 760 (5th Cir.1977), *cert. denied*, 435 U.S. 926, 98 S.Ct. 1493, 55 L.Ed.2d 520 (1978).

33. *Kush v. Rutledge*, 460 U.S. 719, 725–26, 103 S.Ct. 1483, 1487–88, 75 L.Ed.2d 413 (1983); *Kimble v. D.J. McDuffy, Inc.*, 648 F.2d 340, 344–47 (5th Cir.), *cert. denied*, 454 U.S.1110, 102 S.Ct. 687, 70 L.Ed.2d 651 (1981); *Rayborn v. Miss. State Bd. of Dental Examiners*, 776 F.2d 530, 532 (5th Cir.1985).

34. *See, e.g., Jewell v. City of Covington*, 425 F.2d 459 (5th Cir.), *cert. denied*, 400 U.S. 929, 91 S.Ct. 195, 27 L.Ed.2d 189 (1970); *Hobson v. Wilson*, 737 F.2d 1, 30 (D.C.Cir.1984); *Ostrer v. Aronwald*, 567 F.2d 551, 553 (2d Cir.1977); *Hoffman v. Halden*, 268 F.2d 280, 295–96 (9th Cir.1959).

35. *Yglesias v. Gulf Stream Park Racing Ass'n*, 201 F.2d 817, 818 (5th Cir.), *cert. denied*, 345 U.S. 993, 73 S.Ct. 1132, 97 L.Ed. 1400 (1953); *Powell v. Workmen's Compensation Bd. of State of New York*, 327 F.2d 131, 137 (2d Cir.1964); *Hoffman v. Halden, supra*.

36. *Kush*, 460 U.S. 719, 103 S.Ct. 1483, 75 L.Ed.2d 413.

37. *See Zernial v. United States*, 714 F.2d 431, 434–35 (5th Cir.1983).

38. *See Lowe v. Letsinger*, 772 F.2d 308, 311 (7th Cir.1985).

39. 28 U.S.C. § 2671; *see also Rhodes v. United States*, 760 F.2d 1180, 1183 (11th Cir.1985).

40. *See Proprietors Ins. Co. v. United States*, 688 F.2d 687, 688–89 (9th Cir.1982).

41. *Mars v. Hanberry*, 752 F.2d 254, 255–56 (6th Cir.1985); *Woods v. United States*, 720 F.2d 1451, 1452 n. 1 (9th Cir.1983); *Anderson v. Bailar*, 459 F.Supp. 792, 793 (M.D.Fla.1978); *aff'd*, 619 F.2d 81 (5th Cir.), *cert. denied*, 449 U.S. 956, 101 S.Ct. 364, 66 L.Ed.2d 221 (1980).

42. 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

43. *Id.*, 403 U.S. at 396, 91 S.Ct. at 2005. *See also Carlson v. Green*, 446 U.S. 14, 18, 100 S.Ct. 1468, 1471, 64 L.Ed.2d 15 (1980); *Chappell v. Wallace*, 462 U.S. 296, 298, 103 S.Ct. 2362, 2365, 76 L.Ed.2d 586 (1983).

44. *Supra*.

45. 786 F.2d 1490 (11th Cir.1986).

ions. The opinion in *Chappell* apparently vows such an intention for it states:

> 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.[46]
>
> * * * * * *
>
> 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 [because] that relationship is at the ...rt of the necessarily unique structure of the military establishment.[47]

The majority of courts to consider the question, however, have reached the opposite conclusion.[48]

It is unnecessary for the purpose of deciding this case for us to express any opinion concerning the *Stanley* interpretation. Like Chappell's contentions, Holdiness' claims present a situation in which military decision making "would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command."[49] Moreover, like the plaintiffs in *Chappell*, and unlike those in *Stanley*, Holdiness may ...rt to intramilitary administrative procedures to redress his complaints.[50]

The district court therefore properly dismissed Holdiness' *Bivens* claims.

VII. State Law Claims

[12] Judicial review of a claim for damages asserted on the basis of state law would constitute no less an unwarranted intrusion into the military personnel structure than the entertainment of claims founded in § 1985, § 1983, and *Bivens*. Absent express Congressional provision for such judicial intervention, the rationale of *Chappell* and *Crawford* bars Holdiness' state law tort claims.[51] These would, of course, fail in any event upon dismissal of the federal claims to which they are pendent.

VIII. Administrative Remedy

As we have previously noted, Holdiness is not left without any remedy if his rights indeed have been violated. Unlike the plaintiff in *Mindes*,[52] he has not availed himself of his right to review from the Army Board for the Correction of Military Records. The Board, established by Congress pursuant to 10 U.S.C. § 1552, has the authority to correct any error or injustice in a military record. It has power to award backpay and other lost benefits[53] although, as a matter of comity and in recognition of the states' role in the Guard,[54] it will not compel reinstatement. Moreover, the Board's decisions are subject to review and may be set aside if they are arbitrary and capricious or are not supported by substantial evidence.[55] This remedy was found sufficient in *Chappell*,[56] for it is the remedy Congress has chosen to provide.[57]

46. *Chappell*, 462 U.S. at 304, 103 S.Ct. at 2368, 76 L.Ed.2d at 593 (citation omitted).

47. *Chappell*, 462 U.S. at 300, 103 S.Ct. at 2366, 76 L.Ed.2d at 591.

48. *See Jorden v. National Guard Bureau*, 799 F.2d 99 (3d Cir.1986); *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, 105 S.Ct. 2675, 86 L.Ed.2d 694 (1985); *Mollnow v. Carlton*, 716 F.2d 627 (9th Cir.1983), *cert. denied*, 465 U.S. 1100, 104 S.Ct. 1595, 80 L.Ed.2d 126 (1984).

49. *Chappell*, 462 U.S. at 304, 103 S.Ct. at 2367, 76 L.E.2d at 593.

50. *See Carlson v. Green*, 446 U.S. 14, 18–19, 100 S.Ct. 1468, 1471–72, 64 L.Ed.2d 15 (1980).

51. *See Trerice v. Pedersen*, 769 F.2d 1398, 1403–04 (9th Cir.1985) (and cases cited therein); *Trerice v. Summons*, 755 F.2d 1081, 1084–85 (4th Cir.1985).

52. *Mindes v. Seaman, supra.*

53. *See Navas v. Gonzalez Vales*, 752 F.2d 765, 770 (1st Cir.1985).

54. *Jorden*, 799 F.2d at 102 n. 5.

55. *Geyen v. Marsh*, 775 F.2d 1303, 1306 (5th Cir.1985).

56. 462 U.S. at 302–03, 103 S.Ct. at 2367; *see also Crawford*, 794 F.2d at 1036.

57. *See also Crawford*, 794 F.2d at 1036.

The judgment of the district court is therefore amended to recognize that dismissal of the suit is to be without prejudice to Holdiness' right to seek judicial review by the Army Board for the Correction of Military Records, and, as thus modified, is affirmed.

Gumecinda, Ortencia, Jaime, Javier, Ofelia and Gerardo DIAZ; Irma and Felipe Diaz; Paula and Iliana Espericueta: Juanita and Jesus P. Martinez and Sara Martinez, Plaintiffs-Appellants Cross-Appellees,

v.

ROBERT RUIZ, INC., Defendant-Appellee Cross-Appellant,

and

Jose Caamel, Roberto Gomez and Roy Herber, Defendants-Appellees.

No. 85–2740.

United States Court of Appeals, Fifth Circuit.

Jan. 27, 1987.

Migrant and seasonal farm workers brought action under Fair Labor Standards Act, Farm Labor Contractor Registration Act, and state contract law against packing shed and various individuals. Following settlement on all claims except claim for attorneys' fees, the United States District Court for the Southern District of Texas, Hayden W. Head, Jr., J., awarded plaintiffs $24,418 in attorneys' fees, and both sides appealed. The Court of Appeals, Edith H. Jones, Circuit Judge, held that: (1) under Texas law, plaintiffs were not entitled to award of attorneys' fees as prevailing parties on their Farm Labor Contractor Registration Act claim, and (2) plaintiffs were entitled to recover attorneys' fees on their Fair Labor Standards Act claim.

Reversed and remanded.

1. Federal Civil Procedure ⇐2737.11

Under Texas law, migrant and seasonal farm workers were not entitled to award of attorneys' fees as prevailing parties on their Farm Labor Contractor Registration Act claim, where plaintiffs did not independently prevail on their contract claim, but rather settled claim prior to trial; FLCRA did not create implied basis for award of attorneys' fees under Texas law. V.T.C.A., Civil Practice & Remedies Code § 38.001; Vernon's Ann.Texas Civ.St. art. 2226 (Repealed).

2. Labor Relations ⇐1569

Migrant and seasonal farm workers, as prevailing parties on Fair Labor Standards Act claim, were entitled to recover attorneys' fees, including recovery for time spent on non-FLSA issues to extent that those issues interrelated and overlapped with FLSA ones. Fair Labor Standards Act of 1938, § 16(b), 29 U.S.C.A. § 216(b).

Debra A. Smith, Texas Rural Legal Aid, Inc., Farm Worker Div., Randall C. Marshall, Hereford, Tex., David G. Hall, Texas Rural Legal Aid, Inc., Weslaco, Tex., for plaintiffs-appellants cross-appellees.

Alejandro Moreno, Jr., Ricardo Flores, Pharr, Tex., for defendant-appellee cross-appellant.

Appeals from the United States District Court for the Southern District of Texas.

Before DAVIS, GARZA, and JONES, Circuit Judges.