

ARGUMENT SCHEDULED — OCTOBER 18, 2002

Case Nos. 01-5319; 01-5405

**In the United States Court of Appeals
for the District of Columbia Circuit**

ROBERT VINSON BRANNUM,

Appellant,

— v. —

WILLIAM LAKE, Brig. Gen., USAF, *et al.*

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

**REPLY BRIEF OF *AMICUS CURIAE* IN SUPPORT OF
APPELLANT ROBERT VINSON BRANNUM**

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GLOSSARY

Defendants	Defendants are all officers or civilian employees of the U.S. Air Force. Defendants are also referred to collectively as the “ military ” and the “ Air Force. ”
<i>Feres Doctrine</i>	Doctrine preserving sovereign immunity from liability for injuries to members of the armed forces that “arise out of or are in the course of activity incident to [their military] service.” <i>Feres v. United States</i> , 340 U.S. 135, 146 (1950).
Immunity	Sovereign immunity from liability for damages.
Individual Mobilization Augmentee	A military reservist who is not assigned to any particular reserve unit. An Individual Mobilization Augmentee may be temporarily assigned to an active-duty military unit to meet a specific wartime staffing need.
Justiciability <i>or</i> Reviewability	Ability of a federal court to exercise judicial review over a case.
Non-Judicial Punishment	Military punishment administered pursuant to 10 U.S.C. § 815 by a superior officer upon waiver of one’s right to a formal court-martial.
UCMJ	Uniform Code of Military Justice, 10 U.S.C. § 801 <i>et seq.</i>

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Rather than address head-on the substantial legal questions presented by this appeal, defendants recast appellant Brannum's claims as nothing more than gripes about routine Air Force personnel decisions. *See* Appellees' Br. at 12-13, 23-24. This attempt to deflect the Court's attention notwithstanding, the central question raised by this appeal remains whether the federal courts may hear constitutional challenges to the military's *ultra vires* assertion of authority over a civilian. Defendants offer no arguments and present no substantial authority to justify a departure by this Court from the principle that "[r]esolution of jurisdictional questions such as this are historically within an Article III court's jurisdiction." *Murphy v. Dalton*, 81 F.3d 343, 346 (3d Cir. 1996).

ARGUMENT

1. Defendants rely chiefly on this Court's decision in *McKinney v. White*, 291 F.3d 851 (D.C. Cir. 2002), for the proposition that the district court lacks jurisdiction to review the decisions of military tribunals. But that is entirely beside the point. We do not here contend that federal courts have jurisdiction to review penalties imposed by courts-martial. Instead, our principal argument is that the order calling Brannum to active duty for the sake of imposing non-judicial punishment exceeded the Air Force's statutory authority under the Uniform Code of Military

Justice (“UCMJ”), 10 U.S.C. § 802. The invalidity of the punishment flows from the impropriety of the recall order.

The jurisdiction to order reservists to active duty for the sake of imposing punishment is carefully circumscribed by the UCMJ. *See* 10 U.S.C. § 802.¹ And *McKinney* never suggests otherwise. Indeed, *McKinney* does nothing more than recognize both “the general rule that ‘the acts of a court martial, within the scope of its jurisdiction and duty, cannot be controlled or reviewed in the civil courts, by writ of prohibition or otherwise,’ and the limited exception for collateral attack seeking a declaration that a judgment is void, having no res judicata effect, ‘because of lack of jurisdiction or some other equally fundamental defect.’” 291 F.3d at 853 (quoting *Schlesinger v. Councilman*, 420 U.S. 738, 746, 747 (1975)). It is precisely this “exception” that Brannum invokes in the present case.²

¹ By law, courts-martial are not courts of general jurisdiction. Instead, the UCMJ limits their authority to situations satisfying three elements: “(1) the accused must be in a status subject to the UCMJ at the time the offense was committed; (2) personal jurisdiction must attach at the time of the court-martial; and (3) ‘the accused must be ‘amenable’ to trial by court-martial for the alleged offense.’” *Murphy*, 81 F.3d at 346 (quoting Earle A. Partington, *Court-Martial Jurisdiction Over Weekend Reservists After United States v. Caputo*, 37 Naval L. Rev. 183, 194 (1988)); *see generally* 10 U.S.C. § 802. Because non-judicial punishment is a substitute for formal trial by court-martial under the UCMJ, these jurisdictional limitations apply with equal force to the instant case. *See* 10 U.S.C. §§ 802(d)(1)(C), (d)(4).

² Defendants’ “parade of horrors” is, therefore, a fictive one. *See* Appellees’ Br. at 12-13 (arguing that a determination of reviewability in this case would enmesh the courts in disputes “[a]nytime an active duty military member or reservist is

For the same reason, defendants' reliance on *Knutson v. Wisconsin Air National Guard*, 995 F.2d 765 (7th Cir. 1993), and *Jones v. New York State Division of Military & Naval Affairs*, 166 F.3d 45 (2d Cir. 1999), is misplaced. Although *Knutson* concludes that routine discretionary personnel decisions are not justiciable, at the same time it reaffirms that constitutional challenges are reviewable in federal court. *See* 995 F.2d at 771 (explaining that both the Supreme Court and the Seventh Circuit have held constitutional challenges to be reviewable). And *Jones* holds that claims that the military failed to follow its own mandatory regulations are similarly justiciable. *See* 166 F.3d at 52 (both the *Feres* doctrine and the Second Circuit's policy of prudential non-reviewability of discretionary military decisions are inapplicable to claims that the military violated its own regulations).

2. Defendants' suggestion that the *Feres* doctrine applies to claims for injunctive relief as well as claims for damages flies in the face of both logic and Supreme Court precedent. First of all, *Chappell v. Wallace*, 462 U.S. 296, 304 (1983), and *United States v. Stanley*, 483 U.S. 669 (1987), firmly establish the distinction between legal and equitable actions that defendants in this case seek to

displeased with the manner in which he is treated or disciplined by his superior officers"). The fundamental question presented by this case is who gets to decide when a civilian ceases to be a civilian. It thus concerns the extent and limits of the jurisdiction of the court-martial, and does not intrude upon particular decisions made within the scope of the court-martial's legitimate authority. *See Murphy*, 81 F.3d at 346; *Valn v. United States*, 708 F.2d 116, 119-20 (3d Cir. 1983).

deny. In *Chappell*, the Supreme Court justified application of the *Feres* doctrine by explaining that “[t]he special nature of military life — the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel — would be undermined by a judicially created remedy exposing officers to **personal liability** at the hands of those they are charged to command.” 462 U.S. at 304 (emphasis added). In explaining *Chappell*’s rejection of the idea that “military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service” (*id.*), moreover, the Court explained in *Stanley* that the avenue of relief *Chappell* preserved “referred to redress designed to halt or prevent the constitutional violation rather than the award of money damages” (483 U.S. at 683). In other words, the Supreme Court recognized the difference between holding military officials personally liable for past transgressions and simply making them cease their unconstitutional practices on a going-forward basis.

That distinction is an entirely logical one. As the Third Circuit elaborated:

One of the concerns underlying *Chappell* is the need for military officers’ uninhibited decisionmaking, and the threat to such decisionmaking if officers fear personal liability. The threat of personal liability for damages poses a unique deterrent to vigorous decisionmaking. On the other hand, the possibility that an officer may be compelled by a court to cease applying a particular regulation in an arbitrary manner, or to reinstate an improperly discharged soldier, poses much less of a threat to vigorous decisionmaking.

Jorden v. National Guard Bureau, 799 F.2d 99, 110 (3d Cir. 1986) (citation omitted).

In short, *Feres* addresses the danger that military officials will second-guess their own command decisions or otherwise refrain from acting out of excessive fear that they will be forced to pay out of their own pockets should they mistakenly infringe a subordinate's rights. See, e.g., *Cummings v. Department of the Navy*, 279 F.3d 1051, 1056 (D.C. Cir. 2002) (*Feres* doctrine is concerned with “the ‘peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of [tort] suits on discipline, and the extreme results that might obtain if suits under the [FTCA] were allowed for negligent orders given or negligent acts committed in the course of military duty’”) (quoting *United States v. Brown*, 348 U.S. 110, 112 (1954) (alterations and omission in original; citations omitted). When there is no threat of personal liability and no retrospective legal remedy for erroneous decisions, but instead only the possibility that a court will direct officials to alter their conduct prospectively to comport with constitutional requirements, robust decisionmaking is not inhibited.³ And hence, application of the *Feres* doctrine to bar claims for

³ Thus, the *Feres* doctrine parallels the rule that sovereign immunity bars suits for damages against states and state officers in their official capacity but not actions against state officers for declaratory or injunctive relief. See *Alden v. Maine*, 527 U.S. 706, 757 (1999). It is also consistent with the general principle that government officials are immune from suits for damages but not from suits for injunctive relief to halt future or ongoing violations. See *Jorden*, 799 F.2d at 110 (official immunity from liability for damages but not from actions for injunctive relief is premised on recognition of the difference between halting unlawful conduct and second-guessing past discretionary decision-making) (citing *Supreme Court of Va. v. Consumers Union*, 446 U.S. 719, 737 (1980) (“Prosecutors enjoy absolute immunity from

injunctive relief would serve no purpose other than to perpetuate past abuses and deprive military officials of the courts' guidance in conforming their future behavior to the law.

3. Nor does defendants' attempt to draw a line between facial and as-applied constitutional violations resolve the conflict with Supreme Court precedent. Although defendants are technically correct that *Brown v. Glines*, 444 U.S. 348 (1980), *Parker v. Levy*, 417 U.S. 733 (1974), and *Frontiero v. Richardson*, 411 U.S. 677 (1973) — the cases cited in *Chappell* as support for the proposition that constitutional claims by service personnel are reviewable under *Feres* — all involve facial constitutional challenges, both *Brown* and *Parker* clearly indicate that as-applied challenges are equally justiciable in the federal courts. *See Brown*, 444 U.S. at 357 n.15 (although military regulations requiring service members to obtain approval before circulating written materials on base are not unconstitutional on their face, “[c]ommanders sometimes may *apply* these regulations ‘irrationally, invidiously, or arbitrarily,’ thus giving rise to legitimate claims under the First Amendment”) (emphasis added) (citing *Secretary of Navy v. Huff*, 444 U.S. 453, 457-58 n.5 (1980) (“the federal courts are open to assure that, *in applying* the regulations,

damages liability * * * but they are natural targets for § 1983 injunctive suits.”)); *see also Briggs v. Goodwin*, 569 F.2d 10, 15 n.4 (D.C. Cir. 1977) (“official immunity ordinarily bears only on the availability of a damages remedy, rather than prospective equitable relief”).

commanders do not abuse the discretion necessarily vested in them”) (emphasis added); *Greer v. Spock*, 424 U.S. 828, 840 (1976) (although the regulation in question “might in the future be applied irrationally, invidiously, or arbitrarily,” the case “simply does not raise any question of unconstitutional **application** of the Regulation to any specific situation”) (emphasis added)); *Parker*, 417 U.S. at 760-61 (declining to apply overbreadth doctrine to invalidate provisions of UCMJ but holding open the possibility that they could be held to infringe First Amendment on as-applied basis).

Even more tellingly, the Supreme Court’s post-*Chappell* decision in *Goldman v. Weinberger*, 475 U.S. 503 (1986), does precisely what defendants argue that this Court lacks jurisdiction to do in the instant case: It decides on the merits a purely as-applied challenge to military regulations. *See id.* at 506, 509 (explaining that “[p]etitioner argues that [the Air Force dress code regulation on headgear], **as applied to him**, prohibits religiously motivated conduct,” and concluding that, “[q]uite obviously, to the extent the regulations do not permit the wearing of religious apparel such as a yarmulke, * * * military life may be more objectionable for petitioner and probably others” than it would be for those whose religious obligations are consistent with the dress code) (emphasis added). *Goldman* conclusively refutes defendants’ claim that as-applied constitutional challenges for injunctive relief are barred by *Feres*.

4. Defendants point to *Speigner v. Alexander*, 248 F.3d 1292 (11th Cir. 2001) — and the district court’s reliance on it — to support the opposite conclusion. See Appellees’ Br. at 20 (“The court in *Speigner* * * *, relied upon by the District Court in this case, compared the various circuits that have addressed this issue and found the majority of courts were in agreement that suits for equitable relief would risk interference with military discipline and readiness in the same manner that suits for monetary damages would impede the military’s function.”).⁴

Quite apart from the fact that the views of the Eleventh Circuit and the court below cannot displace the Supreme Court’s decisions in *Chappell*, *Stanley*, *Goldman*, *Huff*, and *Greer*, we have demonstrated that the *Speigner* court reached an erroneous determination about the state of the law by misreading or entirely ignoring the clear holdings of several other circuits. See Br. of *Amicus* at 19-22.⁵ Defendants neither

⁴ See also *id.* at 9-10 (“[A]s articulated by the District Court, several circuits have addressed the issue of whether equitable relief claims are barred by the *Feres* doctrine and, as determined by the district court, most have held that claimants are barred when they make constitutional challenges against a military regulation, policy, or statute as it applied to them. Therefore, the District Court properly ruled that appellant’s request to set aside the nonjudicial punishment imposed by his commander was barred by *Feres* and its progeny.”).

⁵ As we explained in our opening brief (at 19-22), the decision in *Speigner* resulted from inadequate attention to the Supreme Court’s analysis in *Brown* and *Parker*; straightforward misreading of *Goldman* (compare *Speigner*, 248 F.3d 1297 (describing *Goldman* as a facial challenge) with *Goldman*, 475 U.S. at 506, 509 (expressly describing plaintiff’s claim as an as-applied challenge)); interpretations of *Jones* and *Knutson* that cannot be squared with either the opinions in those cases or

address our arguments nor acknowledge the existence of the overwhelming authority that we cited.⁶

5. Defendants' attempt to contradict Brannum's factual allegations is equally unpersuasive. Both the Air Force materials to which defendants cite and the Third Circuit's decision in *Murphy* confirm what is implicit in the language of 10 U.S.C. § 802(d)(1) — namely, that an Individual Mobilization Augmentee need not be a member of any reserve component, in which case Section 802 would deprive the

the precedent on which they explicitly relied; and apparent unawareness of *Ogden v. United States*, 758 F.2d 1168 (7th Cir. 1985), *Walden v. Bartlett*, 840 F.2d 771 (10th Cir. 1988), and the subsequent decision in *Wilkins v. United States*, 279 F.3d 782 (9th Cir. 2002).

⁶ To the extent that *Crawford v. Texas Army National Guard*, 794 F.2d 1034 (5th Cir. 1986), and *Watson v. Arkansas National Guard*, 886 F.2d 1004 (8th Cir. 1989), hold that as-applied constitutional challenges are non-justiciable, they cannot be squared with *Goldman, Brown, and Parker*. There is good reason to believe, however, that *Crawford* does not mean what defendants claim, and therefore that it does not run afoul of Supreme Court precedent. See Appellees' Br. at 22-23. *Crawford* inaccurately states that *Goldman, Brown, and Frontiero* all “involve challenges to the facial validity of military regulations and were not tied to discrete personnel matters.” 794 F.2d at 1036. But it also concludes that the Seventh Circuit's decision in *Ogden* falls squarely “within the net of earlier Supreme Court decisions expressly approved in *Chappell*, none of which involved direct interference with military personnel decisions.” *Crawford*, 794 F.2d at 1036. Because *Ogden* explicitly addresses the issue of as-applied challenges and holds that they are just as susceptible to review in federal court as facial challenges (*see* 758 F.2d at 1176-77), the *Crawford* court's description of *Ogden* — like its reference to *Goldman* — strongly suggests that the Fifth Circuit intended to hold only that ordinary disputes over “discrete personnel matters” are non-justiciable, and did not mean to suggest that as-applied constitutional challenges merit any different treatment than facial challenges.

military of jurisdiction to order that reservist to active duty for the purpose of imposing punishment. On this motion to dismiss for lack of subject matter jurisdiction, defendants' apparent factual disagreement with Brannum's allegation that he was not a member of a reserve unit at the time of the recall order (*see* Appellees' Br. at 4-5 & n.2) is not properly before the Court. *See Scandinavian Satellite Sys., AS v. Prime TV Ltd.*, 291 F.3d 839, 844 (D.C. Cir. 2002). In any event, *Murphy* makes clear that Brannum would be susceptible to the jurisdiction of the Air Force pursuant to the UCMJ only if his military status satisfied Section 802's statutory criteria both at the time of the supposed infraction and at the time of the order calling him to active duty. *See Murphy*, 81 F.3d at 350-352. Accordingly, even on the facts as alleged by defendants in their brief (*see* Appellees' Br. at 4-5 & n.2), the Air Force lacked jurisdiction over Brannum under Section 802.

6. Defendants' argument that Brannum has failed to exhaust his administrative remedies under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, is similarly ill-founded. They concede that Brannum properly appealed the imposition of non-judicial punishment through the channels provided by the UCMJ, and that his appeal was denied. *See* Appellees' Br. at 24 n.9. Indeed, the record is clear that, in every UCMJ-authorized proceeding, Brannum consistently asserted his claim that the unlawful recall to active duty rendered his punishment

invalid. Defendants contend, however, that Brannum could have sought relief from the Air Force Board for Correction of Military Records — a civilian board authorized by statute to “correct any military record * * * when the Secretary [of any branch of the military] considers it necessary to correct an error or remove an injustice.” 10 U.S.C. § 1552(a)(1). And defendants intimate that the instant action is premature because Brannum did not first obtain a ruling on his claims from that body. *See Appellees’ Br.* at 24 n.9.

In *Cooper v. Marsh*, 807 F.2d 988 (Fed. Cir. 1986), the Federal Circuit considered and flatly rejected this argument. The plaintiff in *Cooper* was an Army officer who filed suit to challenge a court-martial conviction on the ground that it violated his first and fifth amendment rights. *See id.* at 989. The district court dismissed the complaint for failure to exhaust administrative remedies because the plaintiff had not sought review by the Army Board for Correction of Military Records (“ABCMR”) — the Army’s counterpart under 10 U.S.C. § 1552 to the Air Force Board for Correction of Military Records. On appeal, the Federal Circuit reinstated the complaint, concluding:

Implicit in the exhaustion doctrine is the concept that a plaintiff need seek review only before military tribunals empowered to provide the remedy sought. * * *

In Cooper's case, ABCMR is not such a forum. ABCMR has the power to correct military records and, where appropriate, order reinstatement and back pay. * * *

Before [a 1983 amendment to 10 U.S.C. § 1552], ABCMR lacked the power to overturn a court-martial conviction or to declare a military regulation unconstitutional. After the amendment, it still lacks that power and is now limited in the extent to which it can correct a court-martial record. Because of its limited powers, ABCMR is incapable of providing meaningful relief for the constitutional violations claimed in Cooper's amended complaint.

Indeed, the Secretary admitted as much in his brief * * *.

Cooper, 807 F.2d at 990-91. What was true in *Cooper* is equally true here: The Air Force Board for Correction of Military Records "lacks the power to set aside [Brannum's] court-martial conviction" (*id.* at 990), and hence Brannum need not exhaust his administrative remedies in that forum before bringing an action in the district court. *See, e.g., Randolph-Sheppard Vendors v. Weinberger*, 795 F.2d 90, 104-08 (D.C. Cir. 1986) (administrative exhaustion not required when seeking it

would be futile or when the available administrative remedies would be inadequate to “right the wrong”).⁷

7. Finally, defendants fail to offer any explanation of how a claim raising the threshold question whether one must be treated as a soldier or civilian might satisfy the *Feres* doctrine’s “incident to service” test. Instead, they invoke the law-of-the-case doctrine and assert that this Court has already resolved the issue against Brannum. *See* Appellees’ Br. at 17. That doctrine has no bearing here, however.

In *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735 (D.C. Cir. 1995) — to which defendants point for their statement of the doctrine — this Court explained:

“Law-of-the-case doctrine” refers to a family of rules embodying the general concept that a court involved in later phases of a lawsuit should not re-open questions decided (i.e., established as the law of the case) by that court or a higher one in earlier phases. When there are multiple appeals taken in the course of a single piece of litigation, law-of-the-case doctrine holds that decisions rendered on the first appeal should not be revisited on later trips to the appellate court. What identifies this as true

⁷ Moreover, this Court has held that review by a Board for Correction of Military Records is not required when:

no significant interest is served by forcing the plaintiffs-appellees to proceed through military channels. The issues involved are purely legal, requiring no exercise of military discretion or expertise. The federal courts are in a better position to consider the constitutional issues presented than are the various military bodies [authorized to exercise administrative review].

Committee for GI Rights v. Callaway, 518 F.2d 466, 474 (D.C. Cir. 1975). That is unquestionably the case here. *See* *Murphy*, 81 F.3d at 346.

law-of-the-case preclusion is that the first appeals court has affirmatively decided the issue, be it explicitly or by necessary implication.

Id. at 739 (citing *Northwestern Ind. Tel. Co. v. FCC*, 872 F.2d 465, 471 (D.C. Cir.1989) (appellate court’s prior ruling establishing exhaustion requirement was the law of the case and could not be challenged on second appeal); *Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071, 1090, 1093 (D.C. Cir. 1984) (challenge to district court’s correct application of prior appellate decision barred by law-of-the-case doctrine); 18 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4478, at 801 (1981); *id.* at 625 (1994 Supp.) (“Arguments that were not advanced on appeal may be lost because they are found wrapped up with a larger issue that was decided” previously).

The law-of-the-case doctrine is inapplicable here because the summary affirmance with respect to Brannum’s equitable claims was not a prior appeal or different “phase[]” of the case. The Order of January 20, 2002 simply specified which issues warranted full briefing and oral argument on the merits *in this appeal*, and which did not. Until the judgment of the Court on this appeal becomes final and the mandate issues, however, no “decision” has formally been rendered, and hence the order cannot be the law of the case. *Cf. Lever Bros. Co. v. United States*, 981 F.2d 1330, 1332 (D.C. Cir. 1993) (“[a]n appellate court * * * is normally bound by the law of the case it established on a *prior appeal*”) (emphasis added). Beyond that, the

necessary implication of the Court's Order is that the summary affirmance as to Brannum's legal claims has no bearing whatsoever on his equitable claims; if that were not the case, the merits briefing and oral argument that this Court ordered would have no purpose.

CONCLUSION

The district court's judgment dismissing appellant's causes of action should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Richard B. Katskee, one of the attorneys for the *amicus curiae*, hereby certify that according to the word processing software employed by my firm, the attached brief is 3,781 words in length, and therefore complies with the type-volume limitation of Fed. R. App. P. 29(d) and D.C. Cir. Rule 32(a)(4), and with Section IX.A.3 of this Court's *Handbook of Practice and Internal Procedures* (providing that briefs of court-appointed *amicus curiae* are normally subject to length requirements for party briefs set forth in Fed. R. App. P. 32(a)(7)).

Richard B. Katskee

August 26, 2002

CERTIFICATE OF SERVICE

I, Richard B. Katskee, hereby certify that I caused two copies of the Reply Brief of *Amicus Curiae* in Support of Appellant Robert Vinson Brannum to be served by overnight carrier on the persons listed below.

Robert V. Brannum
158 Adams Street, N.W.
Washington, DC 20001
Appellant

Laurie Weinstein,
Assistant United States Attorney
UNITED STATES ATTORNEY'S OFFICE
Judiciary Center Building, Room 10-113
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Counsel for Appellees

I have also caused an original and 14 copies of the Reply Brief of *Amicus Curiae* in Support of Appellant Robert Vinson Brannum to be filed by hand with the clerk of the United States Court of Appeals for the District of Columbia Circuit.

Richard B. Katskee

August 26, 2002