

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

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

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici:

Case Nos. 01-5319 and 01-5405 were consolidated on the Court's own motion for purposes of this appeal. *See* Order of Nov. 21, 2001, Case No. 00cv01461.

Appellant in both cases is Robert Vinson Brannum.

Defendants in *Brannum v. Lake*, No. 01-5319, are: William Lake, Gordon Janiec, Michael Mee, Laura C. Count, Robert Cerha, Ellen J. Calle, and Wade Palmore, all of whom are commissioned officers in the United States Air Force, as well as James Laquerre and William Hoffman, who are civilian employees of the Air Force. Defendants in *Brannum v. Jumper*, No. 01-5405, are: commissioned Air Force officers John P. Jumper, Ennen J. Calle, Robert H. Foglesong, William T. Hobbins, Norman Seip, Wade Palmore, Douglas M. Hulsey, Jr., Gordon Janiec, Michael Mee, Laura C. Count, and Robert Cerha, as well as civilian Air Force employees James Laquerre and William Hoffman.

Amicus Curiae was appointed pursuant to this Court's order of January 30, 2002 to present arguments in support of the position of appellant with respect to his claims for equitable relief.

(B) Rulings Under Review:

Appeal is taken from the ruling of the lower court (Hon. Royce C. Lamberth) entered on August 28, 2001.

On January 30, 2002, this Court granted appellees' motion for summary affirmance "with respect to the district court's dismissal of all but appellant's claims for equitable relief concerning his nonjudicial punishment." Order of Jan. 30, 2002. The Court ordered merits briefing on Appellant's equitable claims.

(C) Related Cases:

Brannum v. Lake, No. 00-5306 (D.C. Cir.) (dismissed for lack of prosecution, Oct. 17, 2000); *Brannum v. Jumper*, Civ. A. No. 01-0137 (D.D.C.); *Brannum v. Ashcroft*, Civ. A. No. 01-2046 (D.D.C.).

RULE 26.1 DISCLOSURE STATEMENT

Counsel for the court-appointed *amicus curiae* are Evan M. Tager and Richard B. Katskee of the law firm of Mayer, Brown, Rowe & Maw (“MBR&M”), and Arnon D. Siegel of the law firm of Robbins, Russell, Englert, Orseck & Untereiner LLP (“RREOU”). Both MBR&M and RREOU are private law firms organized as partnerships. No parent company or publicly-held entity has any partnership share or other ownership interest in either firm. Neither MBR&M nor RREOU, nor any partner of either, has any financial interest in this litigation.

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AND INTERNAL PROCEDURES (Jan. 1, 2002 ed.) 37

PETER H. SCHUCK, *SUING GOVERNMENT* (1983) 24

Earl Warren, *The Bill of Rights and the Military*,
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GLOSSARY

App.	Appendix of appellant Robert Brannum. Citations to the Brannum Appendix will take the form “App. ____, at ____.”
Defendants	Defendants are all officers or civilian employees of the U.S. Air Force. Defendants are also referred to collectively as the “ military ,” the “ Air Force ,” and the “ government .”
Feres Doctrine	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).
FTCA	Federal Tort Claims Act, 28 U.S.C. § 2671 <i>et seq.</i>
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 or 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.
TRO	Temporary Restraining Order.
UCMJ or Code	Uniform Code of Military Justice, 10 U.S.C. § 801 <i>et seq.</i>

IDENTITY AND INTEREST OF THE *AMICUS CURIAE*

Pursuant to this Court's order of January 30, 2002, *amicus curiae* was appointed on the Court's own motion to present arguments in support of the position of appellant with respect to his claims for equitable relief. Counsel for *amicus* are Evan M. Tager and Richard B. Katskee of the law firm of Mayer, Brown, Rowe & Maw and Arnon D. Siegel of the law firm of Robbins, Russell, Englert, Orseck & Untereiner LLP. *Amicus* has no interest in this case beyond that conferred by the appointment of the Court.

JURISDICTIONAL STATEMENT

The district court ruled that appellant's claims are barred by the *Feres* doctrine — *i.e.*, that the court lacked subject matter jurisdiction to hear them. *Amicus* submits that the district court in fact had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1361. This Court has jurisdiction under 28 U.S.C. § 1291. The district court entered final judgment on August 28, 2001. Appellant timely filed his notice of appeal on September 7, 2001.

STATEMENT OF ISSUES

1. Whether the district court erred in concluding that the *Feres* doctrine categorically bars military personnel from bringing actions for equitable relief for deprivations of their constitutional rights.
2. Whether the unlawful recall of a military reservist to active duty is an injury incident to the reservist's service for purposes of the *Feres* doctrine.

INTRODUCTION

In *Feres v. United States*, 340 U.S. 135 (1950), the Supreme Court held that “the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.” *Id.* at 146. In other words, the Court created an unenumerated exception to the Federal Tort Claims Act (“FTCA”), 28 U.S.C. § 2671 *et seq.*, to preserve sovereign immunity from liability for common law torts committed upon military personnel in a service-related context. Thirty-three years later, in *Chappell v. Wallace*, 462 U.S. 296 (1983), the Supreme Court extended this “*Feres* doctrine” to bar military personnel from bringing *Bivens* actions to recover damages for constitutional torts committed by their superior officers. *See id.* at 304. *See generally Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (authorizing damages actions against federal officials who engage in unconstitutional conduct). Subsequently, in *United States v. Stanley*, 483 U.S. 669 (1987), the Court clarified that

this official immunity applies not only to *Bivens* claims against the plaintiff's superior officers (*i.e.*, those in the direct chain of command), but to all claims for damages resulting from constitutional deprivations that were "incident to" the plaintiff's military service. *See id.* at 683-84.

Neither the Supreme Court nor this Court has ever expanded *Feres* beyond suits for damages and held it to bar claims for injunctive relief. Against the great weight of authority, however, the district court in this case did just that. In so doing, it dramatically contracted the scope of its subject matter jurisdiction and closed the only avenue previously available to members of the armed forces to vindicate their constitutional rights — an avenue that the Supreme Court sought to preserve in *Chappell* and *Stanley*. This case thus squarely presents the question whether the federal courts have subject matter jurisdiction to review equitable claims by members of the armed forces for alleged deprivations of their constitutional and statutory rights.¹

¹ For the sake of clarity, the term "immunity" will refer only to the issue of whether the government or its officials may be held liable for damages. "Reviewability" and "justiciability" will refer more generally to the issue of whether a civilian court may exercise judicial review over suits against the military. As one court has explained, "the nomenclature in this area is flexible, and while our choice of terms may seem arbitrary, it is designed to minimize confusion." *See Jordan v. Nat'l Guard Bureau*, 799 F.2d 99, 100 n.1 (3d Cir. 1986). The question of the district court's subject matter jurisdiction implicates both immunity and reviewability concerns.

STATEMENT OF THE CASE

This is an appeal from a final decision of the United States District Court for the District of Columbia (Hon. Royce C. Lamberth) granting defendants' motions to dismiss appellant's complaints for lack of subject matter jurisdiction. Appellant, acting *pro se*, filed his complaint in *Brannum v. Lake*, No. 01-5319, on June 20, 2000 and his complaint in *Brannum v. Jumper*, No. 01-5405, on September 29, 2000. On August 25, 2000, defendants moved to dismiss *Brannum v. Lake* pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). On December 13, 2000, they moved to dismiss *Brannum v. Jumper* pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(2), 12(b)(3), and 12(b)(6). On August 28, 2001, the district court dismissed both actions pursuant to Federal Rule of Civil Procedure 12(b)(1). In a single Memorandum Opinion, the court held that the *Feres* doctrine deprived it of subject matter jurisdiction over appellant's claims in both cases. Appellant timely filed his notice of appeal on September 7, 2001.

On November 8, 2001, defendants moved for summary affirmance. This Court granted that motion in part and denied it in part on January 30, 2002. The Court ordered merits briefing with respect to appellant's claims for equitable relief and, on its own motion, appointed *amicus curiae* to present arguments in favor of appellant's position with respect to those surviving claims.

STATEMENT OF FACTS

According to the allegations in the complaints (as amended) and other filings in the court below, appellant Robert Brannum is a highly-decorated non-commissioned officer in the United States Air Force Reserves. Brannum is an Individual Mobilization Augmentee and hence is not a member of any particular unit of the Air Force or Air Force Reserves.² On March 21, 2000, Brannum was called for a tour of active duty at Holloman Air Force Base in New Mexico (“Holloman”). On May 26, 2000, during the course of that duty cycle, Brannum learned that he was the target of an investigation into claims of sexual harassment. On June 8, Brannum filed a complaint with the Air Force Inspector General at Holloman, alleging that defendants Mee and LaQuerre had discriminated against him on the basis of race and had violated his rights under Air Force regulations. The next day he amended the Inspector General complaint to add allegations that defendant Mee had threatened him with reprisals for making the original filing. At or about the same time, Brannum

² Individual Mobilization Augmentees “are assigned to active-duty units in specific wartime positions and train on an individual basis. Their mission is to augment active-duty manning by filling wartime surge requirements.” Air Force Reserve Command, *USAF Fact Sheet*, available at http://www.af.mil/news/factsheets/Air_Force_Reserve_Command.html (n.d.).

voluntarily terminated his active duty, departed Holloman, and returned to civilian life.³

On June 14, 2000, the Air Force issued an order pursuant to 10 U.S.C. § 12301(d) that purported to recall Brannum to active duty for purposes of bringing disciplinary proceedings against him under the Uniform Code of Military Justice (“UCMJ” or “Code”). Brannum sought and obtained a temporary restraining order (“TRO”) from the United States District Court for the District of Columbia to enjoin enforcement of the Air Force’s recall order on the ground that Section 12301(d) does not authorize the involuntary recall of reservists to active duty. At the same time, he filed a complaint in the district court in *Brannum v. Lake*, Civ. A. No. 00-1461, alleging that defendants had engaged in race discrimination, reprisals for the filing of the Inspector General complaint, defamation, malicious prosecution, and various violations of Air Force regulations. In response to the grant of the TRO, the Air Force rescinded the recall order, and the court therefore dissolved the TRO.

Approximately one month later, the Air Force issued new orders under the UCMJ — this time pursuant to 10 U.S.C. § 802(d) — directing Brannum to report for

³ The complaints below make no mention of the sexual harassment investigation or of Brannum’s termination of his active duty. These factual allegations appear instead in various filings by the defendants in the district court and are repeated in the district court’s memorandum opinion. *See* App. G, at 3. Because these factual assertions are irrelevant to the legal issues, *amicus* has not undertaken to verify their accuracy.

active duty at Holloman so that he could be subjected to disciplinary punishment. Brannum once again sought a TRO in the district court to enjoin enforcement of the recall order. This time he argued principally that, although Section 802(d) authorizes involuntary recall of “member[s] of a reserve component” (*see id.* § 802(d)(1)), as an Individual Mobilization Augmentee Brannum was not a member of any reserve component, and hence was not subject to recall under that provision. The district court held a hearing in Brannum’s absence (as Brannum was in the hospital at the time) and denied the TRO. Accordingly, Brannum reported to Holloman for duty. On September 8, 2000, he was offered and accepted non-judicial punishment in lieu of trial by court-martial, and was demoted from the rank of Master Sergeant to Technical Sergeant.⁴

Brannum’s active duty ended on September 28, 2000, after which he filed a second complaint in the district court (*Brannum v. Jumper*, Civ. A. No. 00-2333). In that complaint, he restated the claims from his pending suit and also added a number of new ones under the Fourth Amendment; the Due Process, Equal Protection, and Confrontation Clauses; and various federal statutes and regulations. Among these, he alleged that the defendants had violated his rights by unlawfully recalling him to

⁴ Article 15 of the UCMJ provides that, if a service person charged with a violation of the Code waives the right to a formal court-martial, his or her commanding officer may then impose any of a number of statutorily-defined “non-judicial punishment[s].” *See* 10 U.S.C. § 815.

active duty, pre-judging his case, failing to disclose the identity of his accusers, failing to produce copies of the evidence against him, and, more generally, imposing non-judicial punishment in contravention of the UCMJ and the Air Force's own regulations. He also alleged violations of the Freedom of Information Act and the Privacy Act. His complaint seeks compensatory and punitive damages, an injunction setting aside his non-judicial punishment, and "such other relief as th[e] Court may deem proper." *Jumper* Complaint at 6.

On August 28, 2001, the district court dismissed Brannum's claims for both money damages and equitable relief for lack of subject matter jurisdiction under the *Feres* doctrine.⁵ With respect to the latter, the court believed the question whether *Feres* bars equitable actions to be an open one in this Circuit. *See* App. G, at 12. "[A]gree[ing] with the majority of circuits that have decided the issue," the district court held that it would "not allow suits seeking injunctive relief for non-facial constitutional challenges of military decisions." *Id.* at 15. Accordingly, the court did not address the merits of Brannum's claims.

⁵ In a footnote, the court ruled in the alternative that it lacked subject matter jurisdiction because Brannum had failed to comply with the statutory administrative exhaustion requirements of the FTCA. *See* App. G, at 12 n.11. Because the FTCA on its face applies only to suits for money damages, that holding cannot extend to Brannum's equitable claims. *See* 28 U.S.C. § 2674; *see also* 28 U.S.C. § 1346(b) (provision of Westfall Act — which amended the FTCA — providing that "the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages").

Brannum timely filed his notice of appeal and defendants moved for summary affirmance. On January 30, 2002, this Court granted defendants' motion in part, summarily affirming the dismissal of Brannum's claims for money damages but ordering merits briefing on his claims for equitable relief.

SUMMARY OF THE ARGUMENT

The court below reinterpreted the governmental immunity from liability for money damages preserved by *Feres* as a broad rule barring judicial review of suits against the military regardless of the nature of the action or the relief sought. That view is inconsistent with the language of *Chappell* and *Stanley*, the express holdings of five Circuits, and the strong suggestion in a prior decision of this Court. Moreover, even if this Court were to disagree with the determination of the First, Third, Seventh, Ninth, and Tenth Circuits that *Feres* is inapplicable to equitable actions generally, the doctrine nonetheless would be inapposite to Brannum's claims in this case. In this regard, Brannum does not challenge any discretionary decision or action of the military that is "incident to [his] service," but instead raises the question whether the Air Force acted within the scope of its legitimate authority when it ordered his involuntary recall to active duty for purposes of imposing punishment on him. Brannum's claims, in other words, go to whether the Air Force's conduct implicated

his “military service” or instead unlawfully impinged on his status as a civilian — an issue that goes to the core jurisdiction of Article III courts.⁶

STANDARD OF REVIEW

This Court reviews *de novo* the district court’s grant of a motion to dismiss for lack of subject matter jurisdiction. *See Sloan v. United States Dep’t of Housing & Urban Dev.*, 236 F.3d 756, 759 (D.C. Cir. 2001). On a motion to dismiss, the Court “must treat the complaint’s factual allegations as true, must grant plaintiff the benefit of all reasonable inferences from the facts alleged, and may uphold the dismissal only if ‘it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.’” *Gilvin v. Fire*, 259 F.3d 749, 756 (D.C. Cir. 2001) (citations omitted). Moreover, because the plaintiff in this case is acting *pro se*, the Court should view all of his filings together and construe them liberally to determine what claims he has made and what facts he has alleged in support thereof. *See Richardson v. United States*, 193 F.3d 545, 548 (D.C. Cir. 1999) (district court “abused its discretion in failing to consider [*pro se* plaintiff’s] complaint in light of his reply to the motion to dismiss” because court “should have read all of [plaintiff’s] filings together before dismissing this case for lack of subject matter jurisdiction”)

⁶ Defendants in this case are Air Force officers and civilian Air Force employees. Because under the *Feres* doctrine there is no practical difference between these officials, the Air Force, and the federal government more broadly, we use the terms “military,” “Air Force,” “government,” and “defendants” interchangeably.

(citing *Anyanwutaku v. Moore*, 151 F.3d 1053, 1059 (D.C. Cir. 1998) (district court abused its discretion by denying *pro se* plaintiff’s motion for reconsideration of *sua sponte* dismissal of “confusing” complaint instead of by construing complaint in light of motion and “addendum” thereto); *Pearson v. Gatto*, 933 F.2d 521, 527 (7th Cir. 1991) (district court improperly failed to construe *pro se* plaintiff’s letter to judge as amended complaint); *Cooper v. Sheriff, Lubbock County, Tex.*, 929 F.2d 1078, 1081 (5th Cir. 1991) (magistrate judge improperly failed to consider *pro se* litigant’s reply to defendant’s answer as motion to amend complaint)). More generally, the Court should “grant plaintiff[] the benefit of all inferences that can be derived from the facts alleged” (*Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994)), and “not assess ‘the truth of what is asserted or determin[e] whether [he] has any evidence to back up what is in the complaint’” (*Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002) (quoting *ACLU Found. of S. Cal. v. Barr*, 952 F.2d 457, 467 (D.C. Cir. 1991))).

ARGUMENT

THE DISTRICT COURT ERRED IN CONCLUDING THAT APPELLANT’S CLAIMS FOR EQUITABLE RELIEF ARE BARRED BY THE *FERES* DOCTRINE.

A. The *Feres* Doctrine Is Inapplicable To Equitable Actions.

Neither the Supreme Court nor this Court has ever held that the *Feres* doctrine applies to equitable actions. On the contrary, the Supreme Court has expressly

recognized that, whatever the precise contours of *Feres* immunity might be, an avenue must remain open for service personnel to obtain redress in Article III courts for alleged constitutional deprivations by the military. Moreover, the First, Third, Seventh, Ninth, and Tenth Circuits have all held the *Feres* doctrine to be inapplicable to actions for injunctive relief, and this Court has at least implicitly reached the same conclusion. In short, the district court’s ruling that Brannum’s equitable claims are not reviewable flies in the face of *Chappell* and *Stanley*, and is irreconcilable with the weight of authority on the issue.

1. The Supreme Court held in *Chappell* that the *Feres* doctrine applies not only to FTCA suits seeking money damages for ordinary torts committed by the military, but also to *Bivens* actions seeking damages for constitutional torts. See *Chappell*, 462 U.S. at 304-05. In doing so, however, the Court made plain that *Feres* immunity does not apply to all suits by service personnel, declaring:

“[O]ur citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes.” 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.

Id. at 304 (quoting Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181, 188 (1962)). The Court buttressed that conclusion by citing to three cases — *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) — in which it had previously

allowed claims by service persons against the military to be decided on the merits.

See id. at 304-05.

In *Stanley*, the Court clarified the meaning of the quoted language from *Chappell* in this way:

As the citations immediately following that statement suggest, it referred to redress designed to halt or prevent the constitutional violation rather than the award of money damages.

Stanley, 483 U.S. at 683. In other words, the Court distinguished between actions for injunctive relief and suits for damages, and indicated that *Chappell* preserved the former while foreclosing the latter. *See also id.* at 690 (Brennan, J., dissenting) (“Serious violations of the constitutional rights of soldiers must be exposed and punished. Of course, experimentation with unconsenting soldiers, like any constitutional violation, may be enjoined *if* and when discovered. An injunction, however, comes too late for those already injured; for these victims, ‘it is damages or nothing.’”) (quoting *Bivens*, 403 U.S. at 410 (Harlan, J., concurring) (emphasis in original)).

Nor are the three cases cited by *Chappell* and *Stanley* in any sense unusual. On the contrary, even as the *Feres* doctrine has received increasingly expansive application with respect to non-FTCA damages actions, the Supreme Court and the Courts of Appeals (including this Court) have continued to entertain constitutional challenges by service personnel to actions of the military. *See, e.g., Goldman v.*

Weinberger, 475 U.S. 503 (1986) (as-applied Free Exercise challenge to Air Force's prohibition against wearing yarmulke while in uniform); *Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995) (First Amendment challenge to prohibition against religious practices in on-base childcare); *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (en banc) (facial and as-applied Equal Protection challenges to regulations prohibiting homosexuals from attending Naval Academy or serving in Navy); *Holmes v. California Army Nat'l Guard*, 124 F.3d 1126 (9th Cir. 1997) (facial and as-applied constitutional challenges to Don't Ask/Don't Tell policy); *Doe v. Sullivan*, 938 F.2d 1370, 1380-81 nn.15-16 (D.C. Cir. 1991) (challenge to FDA interim regulation permitting Department of Defense to use unapproved drugs on service members); *Watkins v. United States Army*, 875 F.2d 699 (9th Cir. 1989) (as-applied estoppel claim challenging failure to reenlist known homosexual); *Gay Veterans Ass'n v. Secretary of Def.*, 850 F.2d 764 (D.C. Cir. 1988) (*per curiam*) (as-applied challenge to military regulation permitting issuance of less than honorable discharges for homosexual conduct); *Walden v. Bartlett*, 840 F.2d 771 (10th Cir. 1988) (as-applied due process challenge to military prison discipline); *Emory v. Secretary of the Navy*, 819 F.2d 291, 294 (D.C. Cir. 1987) (*per curiam*) (as-applied race discrimination suit

challenging denial of promotion);⁷ *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984) (constitutional challenge to Navy’s policy mandating discharge of homosexuals).⁸

Because *Chappell* and *Stanley* foreclose all damages actions by military personnel for constitutional torts incident to their service, the Supreme Court’s express rejection of the idea that members of the armed forces “are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service” can mean only one thing: Military personnel must remain as free after *Stanley* to seek non-monetary relief as they were in *Brown*, *Parker*, and *Frontiero*. *Chappell*, 462

⁷ In *Emory*, this Court held:

[C]onstitutional questions that arise out of military decisions regarding the composition of the armed forces are not committed to the other coordinate branches of government. Where it is alleged, as it is here, that the armed forces have trenched upon constitutionally guaranteed rights through the promotion and selection process, the courts are not powerless to act. The military has not been exempted from constitutional provisions that protect the rights of individuals.

819 F.2d at 294.

⁸ In *Dronenburg*, this Court reaffirmed that “the United States and its officers . . . are [not] insulated from suit for injunctive relief by the doctrine of sovereign immunity.” 741 F.2d at 1390 (quoting *Schnapper v. Foley*, 667 F.2d 102, 107 (D.C. Cir. 1981)) (alteration and omission in original). That holding is especially pertinent because *Feres* was designed to preserve pre-existing sovereign immunity in the face of the FTCA’s broad waiver provisions. See pages 2-3, *supra*. As a matter of simple logic, claims for redress against which the government lacks sovereign immunity do not implicate the *Feres* doctrine.

U.S. at 304. “To conclude otherwise would leave military personnel without judicial recourse to challenge unconstitutional policies” — the very result that *Chappell* foreswore. *Wilkins v. United States*, 279 F.3d 782, 787 (9th Cir. 2002).

2. The district court dismissed Brannum’s equitable claims on the ground that “the majority of circuits that have decided the issue * * * will not allow suits seeking injunctive relief for non-facial constitutional challenges of military decisions.”⁹ App. G, at 15.

But neither *Chappell* nor *Stanley* offers any basis for distinguishing between facial and as-applied constitutional challenges. Moreover, contrary to the belief of the court below, at least *five* circuits have expressly held that the *Feres* doctrine simply does not apply to equitable actions — without making the slightest distinction between as-applied challenges and facial ones. See *Wilkins, supra* (as-applied Equal Protection Clause challenge to alleged race and sex discrimination in imposing involuntary early retirement and Establishment Clause challenge to “structure and policies” of military chaplaincy); *Wigginton v. Centracchio*, 205 F.3d 504 (1st Cir. 2000) (as-applied due process challenges to defendants’ decision not to retain plaintiff as member of Rhode Island Army National Guard and to defendants’ failure to inform plaintiff of the reasons for non-retention); *Walden v. Bartlett*, 840 F.2d 771 (10th Cir.

⁹ The district court did not specifically address whether facial challenges would be similarly barred.

1988) (as-applied due process challenge by military prisoner to manner in which defendants conducted his disciplinary proceedings); *Jorden v. Nat'l Guard Bureau*, 799 F.2d 99 (3d Cir. 1986) (as-applied civil rights claim that plaintiff's superiors conspired to harass him and to discharge him on the basis of race and in retaliation for the exercise of his First Amendment rights); *Ogden v. United States*, 758 F.2d 1168 (7th Cir. 1985) (as-applied First Amendment challenge to prohibition against Naval personnel entering certain church facilities). Indeed, one Circuit has directly considered the issue and held in no uncertain terms that **both** as-applied **and** facial challenges are reviewable under *Chappell*. See *Ogden*, 758 F.2d at 1176-77. In short, the First, Third, Seventh, Ninth, and Tenth Circuits all agree that, "taken together, *Chappell* and *Stanley* * * * make it clear that intramilitary suits alleging constitutional violations but not seeking damages are justiciable." *Wigginton*, 205 F.3d at 512; see also *Wilkins*, 279 F.3d at 787; *Walden*, 840 F.2d at 774-75; *Jorden*, 799 F.2d at 109-11; *Ogden*, 758 F.2d at 1176-77.

3. Not only does no decision of this Court conflict with *Wilkins*, *Wigginton*, *Walden*, *Jorden*, and *Ogden*, but this Court has strongly suggested that, as a matter of law, sovereign immunity presents no impediment to adjudication of claims for equitable relief by members of the military. *Doe v. U.S. Air Force*, 812 F.2d 738 (D.C. Cir. 1987), involved a Fourth Amendment challenge to the Air Force's unlawful search and seizure of an airman's property. The airman sought only equitable

remedies — namely, an injunction compelling return of the seized items, destruction of any copies thereof, and a “certificate attesting to compliance.” *Id.* at 739. Citing to 5 U.S.C. § 702, the Court explained in a footnote that the government had not even attempted to claim immunity from suit for equitable relief. *See id.* at 740 n.2. Because Section 702 expressly disavows immunity with respect to non-monetary claims, the clear import of the footnote is that application of the *Feres* doctrine to equitable claims is foreclosed by statute. Thus, *Doe v. Air Force* lends firm support to the rule of reviewability adopted by the First, Third, Seventh, Ninth, and Tenth Circuits.

4. In dismissing Brannum’s equitable claims, the district court did not independently analyze *Ogden*, *Jorden*, *Walden*, *Wilkins*, and *Wigginton*, much less point to any flaw in their reasoning.¹⁰ Nor, apparently, was it aware of this Court’s

¹⁰ To be fair, the district court did not have the benefit of *Wilkins*, which was decided five months after issuance of the district court’s decision. The other four decisions all pre-date the district court’s order, however, and the memorandum decision did cite *Wigginton* and *Jorden*. Perhaps because of incomplete party submissions, the district court failed to discover *Walden* but did cite to an unpublished decision of the Tenth Circuit as standing for the contrary proposition. *See* App. G, at 14 n.12 (citing *Oram v. Alsip*, 39 F.3d 1192, 1994 WL 596853 (10th Cir. Nov. 12, 1994)). *Oram* not only is unpublished, but, to the extent that it finds the plaintiffs’ claims for injunctive relief barred, is irreconcilable with the Tenth Circuit’s prior published decision. *See Walden*, 840 F.2d at 774 (“Although the district court did not specifically mention Walden’s claims for injunctive and declaratory relief, it apparently found them barred by *Feres* and *Chappell*. We disagree. *Chappell* itself suggests it leaves open claims for equitable relief against the military. Further, the rationales supporting *Feres* are not implicated by an action for injunctive and declaratory relief.”). Thus, *Oram* not only is not binding precedent in the Tenth

decision in *Doe v. Air Force*. See App. G, at 12 (concluding, without reference to *Doe v. Air Force*, that “[t]he District of Columbia Circuit has yet to examine whether military personnel may bring claims for equitable relief for injuries arising incident to their service”). The district court also failed to take account of the fact that this Court regularly has considered the merits of as-applied challenges by service persons without even so much as hinting that *Feres* might be an impediment to the exercise of jurisdiction. See, e.g., *Steffan*, *supra* (facial and as-applied Equal Protection challenges to regulations prohibiting homosexuals from attending Naval Academy or serving in Navy); *Gay Veterans Ass’n*, *supra* (as-applied challenge to military regulation permitting issuance of less than honorable discharges for homosexual conduct); *Emory*, *supra* (as-applied race discrimination suit challenging denial of promotion).

Instead, the district court apparently accepted at face value the Eleventh Circuit’s conclusion that “the majority of circuits that have addressed this issue” have held that “cases brought by enlisted personnel against the military for injuries incident to service are nonjusticiable, whether the claims request monetary damages or injunctive relief” (*Speigner v. Alexander*, 248 F.3d 1292, 1296, 1298 (11th Cir.), *cert.*

Circuit (see Tenth Cir. R. 36.3(A)), but, in light of *Walden*, may not even be cited as persuasive authority under the rules of that court (see *id.* R. 36.3(B) (declaring that citation of an unpublished decision is “disfavored” and allowing it only if the decision “has persuasive value with respect to a material issue that has not been addressed in a published opinion”).

denied, 122 S. Ct. 647 (2001)). *See* App. G, at 12-15. Even if *Doe v. Air Force* does not conclusively settle the issue, the district court’s reliance on *Speigner* is misplaced because that decision is premised on (i) an incomplete survey of out-of-circuit precedent, (ii) a misreading of several of the cases it does consider, and (iii) an interpretation of *Chappell* and *Stanley* that finds no support in the language of those decisions.

Speigner in effect rejects the conclusion that the Supreme Court’s statement in *Chappell* — that military personnel are not “barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service” (462 U.S. at 304; *see also Stanley*, 483 U.S. at 683) — preserves the right to seek a remedy for constitutional deprivations. Instead of taking the Supreme Court to mean what it said, *Speigner* views *Chappell* and *Stanley* as severely restricting the availability of relief for constitutional violations. It does so principally by drawing a negative inference from the fact that *Parker*, *Brown*, and *Frontiero* — the three cases specifically referenced by the Supreme Court — happen to have involved facial rather than as-applied challenges. *See Speigner*, 248 F.3d at 1297-98 (rejecting argument that claims for injunctive relief may be brought against the military because “the ‘citations immediately following’ the *Chappell* quote that the Court referred to in *Stanley* are all cases challenging military regulations on their faces, rather than their application to discrete personnel decisions”) (citation omitted). *Speigner* neglects to mention,

however, that — as the Seventh Circuit recognized in *Ogden* — “the [Supreme] Court in *Parker* and *Brown* also indicated the propriety of civilian judicial review of specific applications of the challenged provisions.” 758 F.2d at 1176 (citing *Brown*, 444 U.S. at 357 n.15 (“Commanders sometimes may apply these regulations [regarding internal discipline] irrationally, invidiously, or arbitrarily,’ thus giving rise to legitimate claims under the First Amendment.”) (citation omitted); *Parker*, 417 U.S. at 760-61 (rejecting plaintiffs’ First Amendment challenge to provisions of UCMJ but recognizing that those same provisions potentially could infringe on some protected conduct, and implying that such violations would be remediable in court)). And it ignores the fact that, since *Chappell*, the Supreme Court has done what *Brown* and *Parker* made clear was permissible — ruled on the merits of an as-applied challenge to military regulations. See *Goldman*, 475 U.S. at 506 (“Petitioner argues that ARF 35-10, as applied to him, prohibits religiously motivated conduct”).

Beyond that, *Speigner* conflates the *Feres* doctrine — which imposes an absolute bar on suits within its purview — with prudential limits on justiciability of actions against the military that courts apply on a case-by-case basis. In this regard, the *Speigner* court claimed to find support in *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), for its extension of *Feres* to as-applied challenges seeking declaratory and injunctive relief. But far from barring as-applied

challenges to actions of the military, both of those cases explicitly found claims for injunctive relief of the sort that Brannum raises to be within the subject matter jurisdiction of the district court.¹¹

In the end, *Speigner* finds support for its application of *Feres* to as-applied constitutional challenges in only two decisions: *Watson v. Arkansas National Guard*, 886 F.2d 1004 (8th Cir. 1989), and *Crawford v. Texas Army National Guard*, 794 F.2d 1034 (5th Cir. 1986). And even these do not provide the firm footing that *Speigner* suggests.

¹¹ *Jones* was a due process challenge to the Army National Guard's removal of the plaintiff from aviation service in violation of its own regulations. The Second Circuit concluded that the *Feres* doctrine barred the plaintiff from seeking damages (*see* 166 F.3d at 51), but then went on to evaluate the justiciability of the plaintiff's claims for injunctive relief under that court's non-absolute policy against review of discretionary military decisions — a policy of prudential non-reviewability that is inapplicable to claims that the military failed to follow its own mandatory regulations. *See id.* at 52. And that is precisely the sort of claim that Brannum raises in this case. *See* Part B., *infra*. *Knutson*, meanwhile, was an attack on the substance of a military personnel decision, albeit one that the plaintiff unsuccessfully attempted to dress up as a due process challenge. *See Knutson*, 995 F.2d at 766-67, 770 (explaining that plaintiff's claims went to the military's factual determinations regarding his past misconduct and fitness for duty, and hence took issue with purely discretionary decisions). Indeed, the Seventh Circuit expressly distinguished the plaintiff's claims from those in *Jorden* on the ground that the latter — which were as-applied challenges (*see* page 17, *supra*) — presented “constitutional issues more akin to those addressed by the Supreme Court in cases such as *Goldman, Rostker* [*v. Goldberg*, 453 U.S. 57 (1981)], *Parker*, and *Frontiero*, as well as by us in *Ogden*” — a case that specifically recognized the reviewability of as-applied constitutional challenges under *Feres*. *Knutson*, 995 F.2d at 771.

Although the *Crawford* court distinguished the “challenges to the facial validity of military regulations” in *Brown*, *Frontiero*, and *Goldman* from the attacks on “discrete personnel matters” raised in the case before it, and in the process cautioned that an “injunctive-relief exception to *Chappell* * * * could swallow *Chappell*’s rule of deference” (794 F.2d at 1036), the court did not recognize a blanket prohibition against as-applied challenges. Especially pertinent in this regard is the fact that the court chose to make specific reference to *Goldman* — a case not cited in *Chappell* — even though *Goldman* was itself an as-applied constitutional challenge. The court thus appears to have been concerned not with making an untenable distinction between facial and as-applied challenges, but instead with policing the boundaries of judicial review preserved by *Chappell* in order to ensure that the floodgates of litigation over run-of-the-mine military personnel decisions are not opened by it. *See* 794 F.2d at 1036 (concluding that “[t]he nature of the lawsuits, rather than the relief sought, rendered [*Brown*, *Frontiero*, and *Goldman*] justiciable”). Whether they take the form of facial or as-applied challenges, claims like Brannum’s — that the military acted beyond the scope of its legitimate authority in pulling an individual off the street and subjecting him to involuntary active duty and punishment — are hardly “discrete personnel matters” of the sort that the *Crawford* court sought to insulate from possible ongoing regulatory supervision by civilian courts. *Cf. Jorden*, 799 F.2d at 111 (“suits against the military are non-cognizable in federal court only in the rare case where

finding for plaintiff ‘require[s] a court to run the military’”) (alteration in original; citation omitted).

As for *Watson*, the Eighth Circuit regarded it as an entirely open question whether equitable actions by members of the armed forces are reviewable. *See* 886 F.2d at 1008 (“In *Chappell*, the Supreme Court made no direct reference to claims for injunctive relief against the military.”). The court then went on to reason that “military discipline will be [no] less affected by a suit for injunctive relief than by a claim for damages.”¹² *See id.* at 1009. The court’s stated concern thus is not limited to as-applied challenges, but applies equally to facial ones, and hence would

¹² In *Jorden*, the Third Circuit reached precisely the opposite conclusion:

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. Indeed, it is for this reason that government officials are often immune from damages but susceptible to injunctions.

799 F.2d at 110 (citing *Supreme Court of Va. v. Consumers Union*, 446 U.S. 719, 737 (1980) (“Prosecutors enjoy absolute immunity from damages liability * * * but they are natural targets for § 1983 injunctive suits.”); PETER H. SCHUCK, *SUING GOVERNMENT* (1983)). And this view finds the support in Supreme Court precedent that *Watson* lacks. *See, e.g., Stanley*, 483 U.S. at 683 (explaining that, in recognizing that military personnel are not barred from all redress for constitutional wrongs, *Chappell*’s citations to *Brown*, *Parker*, and *Frontiero* “referred to redress designed to halt or prevent the constitutional violation rather than the award of money damages”).

automatically preclude all those actions by military personnel not already barred by *Feres* — an inference that *Chappell* does not permit. Accordingly, *Watson* not only does not provide any reasoning to support *Speigner*'s distinction between facial and as-applied challenges, but also cannot be squared with *Chappell* and *Stanley*.¹³

In the end, the proposition that as-applied constitutional challenges are absolutely barred by the *Feres* doctrine is inconsistent with Supreme Court precedent, the holdings of the vast majority of circuit courts to consider the question, and the strong suggestion of justiciability in this Court's decision in *Doe v. Air Force*. Thus, the district court's conclusion that non-facial challenges by service persons are absolutely barred finds no substantial support in law or logic.

5. The district court's expansion of the *Feres* doctrine should be rejected for another reason as well. As this Court recently recognized, the *Feres* doctrine has

¹³ Obviously aware of this flaw in its reasoning, the *Watson* court declared:

There is a vast difference between judicial review of the constitutionality of a regulation or statute of general applicability and judicial review of a discrete military personnel decision. In the first instance, a legal analysis is required; one which courts are uniquely qualified to perform. The second involves a fact-specific inquiry into an area affecting military order and discipline and implicating all the concerns on which *Feres* and *Chappell* are premised.

886 F.2d at 1010. Unable to reconcile its position with a litany of Supreme Court cases reviewing military actions, the Eighth Circuit was left to draw the same distinction between constitutional deprivations and mere adverse personnel decisions that the Fifth Circuit did in *Crawford* — a distinction supporting the conclusion that claims of unlawful recall to active duty are reviewable.

been the subject of withering judicial criticism virtually since the day it was established. *See Cummings v. Department of the Navy*, 279 F.3d 1051, 1055 (D.C. Cir. 2002) (describing the “oft-criticized” *Feres* doctrine); *id.* at 1058 (Williams, J., dissenting) (“The *Feres* doctrine is under something of a cloud.”). Indeed, at least three current members of the Supreme Court have attacked it: Justices Scalia and Stevens — joined by Justices Brennan and Marshall — have argued at length that *Feres* was wrong when decided (*see United States v. Johnson*, 481 U.S. 681, 692-703 (1987) (Scalia, J., dissenting)), and Justice Ginsburg, while a member of this Court, identified it as “a problematic court precedent” (*Lombard v. United States*, 690 F.2d 215, 228-30, 233 (D.C. Cir. 1982) (Ginsburg, J., concurring in part and dissenting in part) (noting that “the *Feres* Court’s interpretation of the FTCA continues to be questioned”)).¹⁴ Similarly, this Court has noted that the *Feres* doctrine’s “theoretical bases remain subject to serious doubt.” *Hunt v. United States*, 636 F.2d 580, 589 (D.C. Cir. 1980). Without belaboring the point further, suffice it to say that *Feres* has received “widespread, almost universal criticism.” *Johnson*, 481 U.S. at 700.

While this Court obviously is not free to abandon the doctrine (*see, e.g., Cummings*, 279 F.3d at 1057 n.4; *id.* at 1061 (Williams, J., dissenting)), no rule of *stare decisis* requires the dramatic extension of *Feres* to a type of action or scope of

¹⁴ In addition, Justice Kennedy joined the opinion in *Veillette v. United States*, 615 F.2d 505, 506 (9th Cir. 1980) (per Fletcher, J.) (stating that the court was applying *Feres* “reluctantly”).

remedy that it was never intended to cover.¹⁵ And when, as here, doing so would conflict with the great weight of authority and render a critical distinction in two Supreme Court decisions a nullity, such an expansion is singularly unwarranted. Accordingly, this Court should instead reaffirm the conclusion that was assumed in *Doe v. Air Force* that such actions are within the subject matter jurisdiction of the district court.

B. Injuries Arising From Unlawful Recall To Active Duty Are Not “Incident To” Military Service.

Even if this Court were to hold — contrary to *Ogden, Jordan, Walden, Wilkins,* and *Wigginton* — that the *Feres* doctrine applies to claims for declaratory and injunctive relief, application of it to the issues at bar would still be inappropriate. As explained above, the *Feres* doctrine precludes members of the armed forces from bringing claims for injuries that “arise out of or are in the course of activity incident to [military] service.” 340 U.S. at 146. In this case, all of Brannum’s injuries flow from defendants’ actions in recalling him to active duty, which he alleges to have been

¹⁵ Although Judge Williams argued in *Cummings* for consistent application of *Feres*’s principle even at the cost of extending this disfavored doctrine to new classes of damages actions (*see id.* at 1061 (Williams, J., dissenting)), a desire for consistency would not justify transmuting it from a doctrine recognizing sovereign immunity from civil damages liability into one prohibiting review of non-monetary claims. In any event, a this-far-but-no-farther approach to *Feres* is necessary in this case to remain consistent with the line that the Supreme Court drew in *Chappell* and *Stanley*. *Cf. id.* (noting that “a rule rather arbitrarily cutting * * * off [the *Feres* doctrine] with the exact applications already found by the Supreme [C]ourt and no more * * * [is an option] available only to the Supreme Court”).

ultra vires and in contravention of his constitutional rights. In other words, they go not to the question whether defendants' treatment of a member of the Air Force was proper, but instead to whether defendants had the right under federal law and the authority under Air Force regulations to treat Brannum as a member of the Air Force in the first place.¹⁶ Regardless of how expansive this Court's *Feres* jurisprudence might be in defining what is "*incident to*" one's service in the armed forces, that should have no bearing on the definition of "*military service*." In other words, even if *Feres* absolutely barred this Court from engaging in any oversight of the military's treatment of those lawfully under its command — which, for the reasons explained above, it does not — the doctrine does not license the Air Force to decide for itself (and without any form of judicial review) who falls within the scope of its lawful authority.

The Supreme Court has never articulated a test for incidence to military service but instead requires case-by-case analysis. *See United States v. Shearer*, 473 U.S. 52, 57 (1985). Accordingly, courts generally consider a number of factors "in light of the totality of the circumstances" to determine whether an alleged injury arises out of the

¹⁶ As explained above, Brannum challenges not only his unlawful recall but also several aspects of the subsequent disciplinary proceedings. *See* pages 6-8, *supra*. If the Air Force did not have a legal right to recall him to active duty, however, then everything that followed was similarly outside the scope of the Air Force's legitimate authority, and no further inquiry into the procedures it employed would be necessary to conclude that the imposition of discipline was unlawful as well.

plaintiff's military service. *Richards v. United States*, 176 F.3d 652, 655 (3d Cir. 1999), *cert. denied*, 528 U.S. 1136 (2000); *accord Schoemer v. United States*, 59 F.3d 26, 29 (5th Cir. 1995). The factors typically identified as relevant to the "incident to service" determination include: (i) the service member's "duty status" at the time of the injury, (ii) the place where the injury occurred, and (iii) the nature of the plaintiff's activities at the time of the injury. *See, e.g., Richards*, 176 F.3d at 655; *Whitley v. United States*, 170 F.3d 1061, 1070 (11th Cir. 1999); *Dreier v. United States*, 106 F.3d 844, 848 (9th Cir. 1996); *Schoemer*, 59 F.3d at 28. At least one Circuit also recognizes a fourth factor — "the benefits accruing to the plaintiff because of his status as a service member." *Dreier*, 106 F.3d at 848.¹⁷ Typically, duty status is regarded as the most important factor. *See Whitley*, 170 F.3d 1070-71; *Schoemer*, 59 F.3d at 28. *See generally Feres*, 340 U.S. at 138 ("The common fact underlying the three cases is that each claimant, **while on active duty and not on furlough**, sustained injury due to negligence of others in the armed forces.") (emphasis added).¹⁸

¹⁷ This additional factor captures *Feres*'s concern to avoid authorizing double recoveries when Congress has already made alternative compensation available to injured military personnel. *See generally Feres*, 340 U.S. at 294-95.

¹⁸ Although this Court has not explicitly adopted this multi-factor test, its method of ascertaining incidence to service is consistent with the approach of these other courts. *See, e.g., Verma v. United States*, 19 F.3d 646, 648 (D.C. Cir. 1994) (considering duty status, place of injury, and nature of plaintiff's activities in determining whether injury was incident to military service).

To the extent that this inquiry makes any sense in the instant case (*but see* pages 30–35, *infra*), the several factors all weigh against the determination that Brannum’s complained-of injuries are incident to his military service. Insofar as the alleged injury is Brannum’s unlawful recall to active duty, at the time of that injury Brannum was not stationed at any military facility and he was not engaged in any military activity. His duty status as a reservist who was neither on active duty nor involved in inactive duty training was that of a civilian. And the constitutional deprivation he suffered was not the sort for which Congress has authorized a military system of compensation. Thus, the injury he suffered by being unlawfully recalled to service does not in any respect satisfy the normal “incident to service” test.

More fundamentally, however, this type of inquiry makes no sense in the instant case. That is because the most important factor — duty status — lies at the heart of the alleged injury, and hence using it to ascertain whether the *Feres* doctrine should apply is circular. Accordingly, the more sensible approach to determining incidence to service in a case like the one at bar is that taken by the Third Circuit in *Valn v. United States*, 708 F.2d 116 (3d Cir. 1983). *Valn* involved an FTCA claim for money damages resulting from the plaintiff’s involuntary activation into the military and his imprisonment for refusing to submit to military authority. *See id.* at 117. The plaintiff in *Valn* had been first a member of the Delaware Army National Guard (“DANG”) and then a member of the U.S. Army. Though he was discharged from the Army for

medical reasons, and hence also relieved of his obligations to the DANG, the DANG mistakenly continued to demand that he fulfill National Guard duties. When he refused, he was involuntarily activated into the Army and ultimately imprisoned and subjected to a court-martial for continuing to refuse to perform military duties. *See id.* at 117-18. After the situation was eventually resolved, the plaintiff filed a tort action for damages against the government, alleging that the Army had been negligent in placing him on active duty and imprisoning him. *See id.* at 118. The government sought dismissal under *Feres*, but the court rejected that gambit, reasoning that the plaintiff's discharge

ended his military commitment to either the National Guard or the regular Army. The injuries that he complains of arose from activities occurring when his status was that of a civilian, not that of a serviceman in the armed forces. As a civilian he is outside the jurisdiction and disciplinary authority of the Uniform Code of Military Justice.

Id. at 119-20 (footnote omitted). In short, “[u]nlike the situation where a plaintiff is a *soldier* suing his military superiors for injuries arising out of or in the course of military duty, Valn is a *civilian* suing the government for injuries arising out of its dealings with Valn as a private citizen.” *Id.* at 120 (emphasis in original).¹⁹

¹⁹ *Duffy v. United States*, 966 F.2d 307 (7th Cir. 1992), and *Anderson v. United States*, 724 F.2d 608 (8th Cir. 1983), take the opposite view. Although *Duffy* broadly takes the position that the plaintiff's bare status as a reservist was sufficient to invoke *Feres* and bar a claim that the plaintiff was unlawfully recalled to active duty (*see id.* at 312), that conclusion would prove too much. Such a rule not only would allow the military to run roughshod over the rights of reservists without fear that any civilian authority could ever halt the abuses — a result inimical to *Chappell* — but it would

Although in the instant case Brannum was not fully “discharged” from the Air Force Reserves, his allegations that the Air Force lacked authority to recall him to duty effectively put him in the same position with respect to the military as the plaintiff was in *Valn*, and certainly made his connection to the military more remote than that of a soldier on furlough — the situation that the Supreme Court distinguished when it defined the contours of “inciden[ce] to service” in *Feres* itself. *See* 340 U.S. at 138.

In the end, the thrust of Brannum’s cause of action is that, however much power the UCMJ or other provisions of federal law might afford the military in determining how it treats its personnel once it has established its legal right to exercise control over them, the Air Force does not have the final say in determining who falls within the scope of its legitimate authority. We know of no instance in which a government agency gets the last word in defining the scope and extent of its own authority, even if its judgment is entitled to substantial deference. *Cf. Oklahoma Natural Gas v. FERC*, 28 F.3d 1281, 1283-84 (D.C. Cir. 1994) (agency’s interpretation of its

strip the federal courts of their traditional role in resolving jurisdictional questions (*see* pages 33-35, *infra*). *Anderson* premised application of the *Feres* doctrine on the district court’s finding that “at the time of appellant’s AWOL arrest he was subject to military service.” 724 F.2d at 610. Thus, to apply *Anderson* here would beg the central question on the merits that Brannum raises, namely, whether under the UCMJ he was “subject to military service” at the time of his involuntary recall.

statutory jurisdiction reviewable subject to *Chevron* deference). That, fundamentally, is a matter for Article III courts to decide.

Indeed, the Third Circuit reached that very conclusion in a case that is indistinguishable from the one at bar. *See Murphy v. Dalton*, 81 F.3d 343 (3d Cir. 1996). *Murphy* was a challenge by a reservist and former member of the Marine Corps to the Corps' recall of him to active duty in order to subject him to a trial by court-martial for offenses committed while he was still in the regular Marine Corps. *See id.* at 345. The plaintiff alleged — as Brannum does in this case — that he was not eligible for recall to active duty for purposes of being subjected to disciplinary action because, under the applicable provisions of the UCMJ, the court-martial lacked personal jurisdiction over him and he was not “amenable” to military trial for the offense of which he was accused. *See id.* at 346. At the outset, the court declared:

This case concerns the fundamental question of whether the military had continuing jurisdiction over Plaintiff to subject him to recall and active duty and subsequent court-martial. Resolution of jurisdictional questions such as this are historically within an Article III court's jurisdiction.

Id. (citing *Schlesinger v. Councilman*, 420 U.S. 738, 753 n.26 (1975) (citing *United States v. Frischholz*, 36 C.M.R. 306, 307 (C.M.A. 1966))). The court then proceeded to consider the merits of the plaintiff's claim of unlawful recall and concluded that the court-martial lacked jurisdiction to issue its recall order because the plaintiff did not fit within any of the categories for which the Code authorizes involuntary recall. *See*

Murphy, 81 F.3d at 348 (“it is not ‘status’ as a[n] officer which is determinative of court-martial jurisdiction; rather, it is status as a person belonging to the general category of persons subject to the Code”).

Among the reasons for reaching that result, the Third Circuit explained that the Code authorizes involuntary recall of a “member of a reserve component” (*see id.* at 346 (quoting UCMJ, 10 U.S.C. § 802(d)(1), (2) (1988)), yet, “Plaintiff did not join a reserve unit for more than three months after his discharge from the regular component. This alone evidences a clear break in status under the Code.” *Id.* at 349. In other words, because the plaintiff — though a reservist — was not attached to a reserve unit, he ceased to be subject to the recall authority of the court-martial, and hence his involuntary recall, trial, conviction, and punishment were all unlawful. In the instant case, Brannum makes precisely the same argument: He takes the position that as an Individual Mobilization Augmentee — a reservist not attached to any reserve component — he did not fall into the category of persons subject to involuntary recall for disciplinary proceedings under the Code. Thus, his recall and ensuing non-judicial punishment were legally invalid and the punishment should be enjoined. As a matter “historically within an Article III court’s jurisdiction,” there is no justification for the federal courts to abstain from hearing the merits of his claims.²⁰

²⁰ This argument applies with equal force to Brannum’s claims for equitable relief and for money damages. Indeed, both *Valn* and *Murphy* allowed the plaintiffs to pursue damages claims as well as injunctive relief. Accordingly, *amicus* respectfully

In sum, by alleging that defendants violated his constitutional rights by improperly recalling him for purposes of imposing discipline in violation of both federal law and the Air Force's own regulations, Brannum in this case invokes precisely the jurisdiction that the Supreme Court sought to preserve in *Chappell* and *Stanley*, the Third Circuit recognized in *Murphy*, and this Court acknowledged in *Doe v. Air Force*, *Doe v. Sullivan*, *Emory*, and *Dronenburg*. To deny him access to the courts to contest the fact of his military status on the ground that his unlawful recall was "incident to [his military] service" would be Kafkaesque.

CONCLUSION

For the foregoing reasons, the district court's judgment dismissing appellant's causes of action should be reversed.

requests that this Court reconsider its order of January 30, 2002 summarily affirming the district court's dismissal of Brannum's damages claims.

Respectfully submitted,

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July 12, 2002

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 9,234 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

July 12, 2002

CERTIFICATE OF SERVICE

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

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I have also caused an original and 14 copies of the 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.

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July 12, 2002