

“MILITARY PAY CASES”: AN INTRODUCTION

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Administrative law, perhaps more than any other field of law, is crowded with separate nooks and crannies, each with its own distinctive history, character, and governing legal rules. Because of the pervasiveness of the administrative state, marked by the growth of the Executive Branch and Congress's unsuccessful attempt at administrative uniformity, individual claims against the State are adjudicated by a mixture of individual decisionmakers, boards, commissions, and agencies. The distinctive way in which those adjudicative bodies function, and the different way that courts approach judicial review of their decisions, is much of what makes the study of administrative law intriguing.

The two thoughtful Articles set out below deal with a facet of administrative law that is not widely studied, but that has a long history and largely governs the manner in which the civilian judicial system interacts with military personnel decisions. Since the early days of the Court of Claims—and its present-day successor, the Court of Federal Claims—the court has dealt with service member claims relating to personnel decisions, such as denial of promotion, unlawful discharge, involuntary retirement, and failure to make appropriate determinations as to medical condition or disability. Those claims have all been addressed under the rubric of “military pay cases,” based on the fact that the Court of Federal Claims has jurisdiction over those cases stemming from the claimed denial of payments that the service member contends are due.¹ The following two essays, one by Court of Federal Claims Judge Charles Lettow and the other by military law expert Eugene Fidell, set forth some details of the intricate system of

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1. As Judge Lettow explains in detail, the Court of Federal Claims gets its jurisdiction over many of the “military pay cases” from the Military Pay Act, 37 U.S.C. § 204 (2006), which is a “money-mandating” statute that creates a cause of action within the jurisdiction of the Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491 (2006). In the case of claims for disability pay, the court's jurisdiction stems from 10 U.S.C. § 1201 (2006). *Chambers v. United States*, 417 F.3d 1218, 1223 (Fed. Cir. 2005); *Fisher v. United States*, 402 F.3d 1167, 1174–75 (Fed. Cir. 2005); *McHenry v. United States*, 367 F.3d 1370, 1378 (Fed. Cir. 2004).

administrative and judicial decisionmaking in this area. Their expertise in the field greatly exceeds my own, and I offer only a few general comments by way of introduction to their more substantive remarks.

The history of military pay cases has been the story of the evolving relationship between the military and the court, with the court struggling to balance its responsibility to provide meaningful review of agency action against the principle that civilian courts may not lightly second-guess military personnel decisions. Over time, there has been a significant change in the role of the court as well as in the role played by the administrative bodies within the military personnel system itself.

In the early years, the Court of Claims acted with what would strike modern jurists as uncommon boldness in dealing with military personnel issues. For example, in 1869, in one of the Court of Claims’ earliest decisions in a military pay case, the court dealt with a pay claim by a union soldier, one Thomas W. Kelly, who had left his unit but later returned and surrendered himself as a deserter.² He was accepted back into his unit with the condition that he “made good the time lost by desertion.”³ He served the extra time and was ultimately given an honorable discharge.⁴ He then sought payment of the \$225 remaining balance of the \$400 bonus he had been promised when he enlisted.⁵ The War Department, however, determined that by deserting he had forfeited his right to the unpaid portion of his enlistment bonus.⁶ Feeling aggrieved, Kelly sued in the Court of Claims and won. After stating the facts, the Court of Claims simply said, “We think the law as applied to these facts authorizes us to render a judgment in favor of the claimant”⁷ While acknowledging the government’s argument that a deserter should forfeit all pay and bonuses, the court found telling that the claimant was accepted back into his unit.⁸ Although it did not “feel inclined to excuse or extenuate the desertion,” the court concluded that “the contract for continuous service between claimant and defendants, which was broken by the claimant, was revived upon terms and conditions proposed to the claimant, accepted by him, and faithfully observed.”⁹ That being the case, the court held that the claimant was entitled to his bonus.¹⁰ The Supreme Court affirmed in a

2. Kelly v. United States, 5 Ct. Cl. 476 (1869), *aff’d*, 82 U.S. (15 Wall.) 34 (1872).

3. *Id.* at 482.

4. *Id.*

5. *See id.* at 481.

6. *Id.* at 484.

7. *Id.* at 482.

8. *Id.* at 483.

9. *Id.*

10. *Id.* at 482.

single paragraph, concluding that the soldier's honorable discharge removed any impediment to receiving his bonus.¹¹

That case would likely strike a modern court as remarkable for the court's willingness to make its own assessment of the reasonableness of a military decision regarding how to treat deserters, even in the absence of statutory or regulatory guidance. Since that time, and particularly during the past thirty years, the Court of Federal Claims, frequently at the behest of its reviewing court, the Court of Appeals for the Federal Circuit, has become substantially more deferential to the military on matters of personnel decisionmaking. As Judge Lettow notes in his Article, part of the court's reluctance is the result of repeated reminders from the Supreme Court that the military is a "specialized society separate from civilian society" that is not subject to the same degree of judicial oversight as civilian agencies.¹² Part of it results from congressional action, which has created new administrative remedies within the military and correspondingly limited the role of judicial review of military personnel decisions in several important respects.¹³ Part of it also comes from the courts' willingness to defer to the military's internal administrative procedures. Some reasons for this evolution toward increased deference are less doctrinal and more intangible. For example, the creation of the Federal Circuit as the reviewing court for the Court of Federal Claims meant the circuit saw military pay cases much less frequently than did the former Court of Claims. While it may not be true that judicial familiarity breeds contempt, it may be the case that judicial *lack* of familiarity gives rise to a greater willingness to defer. Not surprisingly, courts are typically more willing to act on matters that raise the kinds of issues the courts deal with every day, and less willing to act when they feel the subject matter is out of

11. *United States v. Kelly*, 82 U.S. (15 Wall.) 34, 36 (1872).

12. *Weiss v. United States*, 510 U.S. 163, 174 (1994) (quoting *Parker v. Levy*, 417 U.S. 733, 743 (1974)); *see also* *Chappell v. Wallace*, 462 U.S. 296, 300, 303-04 (1983); *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953).

13. Judge Lettow describes the legislative creation of the boards for the correction of military records (correction boards) in 1946. In 1980, Congress enacted legislation that created special selection boards to make military promotion decisions when it was determined that the officer's record before the original promotion board contained faulty information. *See* 10 U.S.C. § 628(a) (2006). In 2001, Congress enacted 10 U.S.C. § 1558, which addressed the responsibilities of correction boards and selection boards in recommending and reviewing personnel actions; among other things, the statute required a service member to exhaust remedies before a "special board" (including correction boards) before seeking judicial review. *Id.* § 1558. At the same time, Congress amended § 628 to impose similar restrictions on judicial review of decisions not to convene a special selection board, decisions of the special selection boards, and decisions not to select a service member for promotion. *Id.* § 628(g)-(h).

their area of expertise. In the context of military personnel cases, the courts have been willing to give close attention to procedural questions, such as whether the military has followed its own regulations in taking action affecting a service member, but less willing to question the underlying personnel decisions, such as whether the service member’s medical condition was disabling or whether the service member was qualified for promotion.

Several themes have emerged from the cases brought before the Court of Federal Claims and the Federal Circuit over the past three decades. First, while the courts have traditionally treated recourse to boards for the correction of military records (correction boards) within each military branch as optional, they have held that when former service members seek relief from those correction boards, the boards’ decisions are reviewed under standards normally applied to judicial review of agency action under the Administrative Procedure Act (APA).¹⁴ Second, the courts “presume that actions taken by the Correction Board are valid, and the burden is upon the complainant to show otherwise.”¹⁵ Third, the courts have held that, in cases coming to the Court of Federal Claims after the completion of correction board proceedings, claims not raised before the correction boards are deemed waived.¹⁶ Fourth, and relatedly, the Court of Federal Claims ordinarily will not accept new evidence in cases in which the service member previously sought relief from a correction board; if particular evidence could have been submitted to the correction board but was not, the Court of Federal Claims ordinarily will exclude it from consideration, as the court’s review is typically limited to the administrative record.¹⁷ Those principles are essentially borrowed from the APA and reflect what could be called the “APA-ification” of the system of judicial review of military personnel decisions. That has occurred even though, as Eugene Fidell points out, an argument can be made that the administrative proceedings before the correction boards are not sufficiently formal to be

14. 5 U.S.C. §§ 701–06 (2006). As Judge Lettow notes, when judicial review of correction board decisions is sought in the district courts, it is well settled that the Administrative Procedure Act (APA) governs the review proceeding. *See Coburn v. McHugh*, 679 F.3d 924, 929 (D.C. Cir. 2012); *Gillan v. Winter*, 474 F.3d 813, 817 (D.C. Cir. 2007). It is only in recent years, however, that the Federal Circuit has explicitly held the APA judicial review provisions applicable to correction board decisions when review is sought in the Court of Federal Claims. *See, e.g., Walls v. United States*, 582 F.3d 1358, 1367 (Fed. Cir. 2009).

15. *Melendez Camilo v. United States*, 642 F.3d 1040, 1045 (Fed. Cir. 2011) (citing *Cooper v. United States*, 203 Ct. Cl. 300, 304 (1973)).

16. *Metz v. United States*, 466 F.3d 991, 998 (Fed. Cir. 2006).

17. *See Walls*, 582 F.3d at 1367–68; *Metz*, 466 F.3d at 998; *see also Barnick v. United States*, 591 F.3d 1372, 1382 (Fed. Cir. 2010).

entitled to the deference the APA reserves for formal agency adjudications.

The combined effect of these trends is that the courts have increasingly deferred to military administrative bodies in military personnel cases, at least with respect to substantive decisionmaking responsibility. That is particularly true for military decisions regarding promotion, which have been viewed as uniquely committed to the discretion of the military branches (and to the President).¹⁸ While courts will still sometimes reverse the military's substantive personnel decisions, those cases are rare in the modern era.¹⁹ The courts have increasingly viewed their responsibility as ensuring military administrative bodies follow procedures prescribed by statute and the military's own regulations, rather than delving deeply into the merits of underlying decisions. As the Federal Circuit put it in *Adkins v. United States*,²⁰ "although the *merits* of a decision committed wholly to the discretion of the military are not subject to judicial review, a challenge to the particular *procedure* followed in rendering a military decision may present a justiciable controversy."²¹ Moreover, although the correction board remedy is still held to be optional,²² the correction boards have assumed an increasingly central role in the decisionmaking process, rather than simply being an informal alternative mechanism for obtaining administrative relief from military personnel decisions. Whether exhaustion of administrative remedies before a correction board is ultimately made a prerequisite to any review in the Court of Federal Claims (by statute, by regulatory change, or by judicial decision) remains to be seen.²³

18. *Lewis v. United States*, 458 F.3d 1372, 1377 (Fed. Cir. 2006); *Dysart v. United States*, 369 F.3d 1303, 1317 (Fed. Cir. 2004).

19. In connection with appointments to military positions, the Federal Circuit has described the availability of judicial relief as limited to cases in which "an individual has a 'clear cut legal entitlement' to a position, but subordinate officials in the government misinterpret the Constitution, statutes, or regulations, and improperly decline to recommend that individual for nomination or appointment." *Lewis*, 458 F.3d at 1377 (quoting *Smith v. Sec'y of the Army*, 384 F.3d 1288, 1294–95 (Fed. Cir. 2004)). With respect to decisions such as discharge decisions, the courts have employed the arbitrary and capricious standard to decisions by the military branches; consequently, such claims are rarely successful, but success is not unknown. *See, e.g., Doe v. United States*, 132 F.3d 1430, 1434 (Fed. Cir. 1997).

20. 68 F.3d 1317 (Fed. Cir. 1995).

21. *Id.* at 1323; *see also Lewis*, 458 F.3d at 1377.

22. *Martinez v. United States*, 333 F.3d 1295, 1306 (Fed. Cir. 2003) (en banc).

23. As Judge Lettow points out, the putatively optional nature of correction board proceedings may be illusory in certain situations. First, as noted, the Federal Circuit's decision in *Metz* effectively requires exhaustion of remedies when the claimant first seeks relief before the correction board. *Metz v. United States*, 466 F.3d 991, 998 (Fed. Cir. 2006). In addition, in disability retirement pay cases, the rule that claims do not accrue until

The increasing judicial deference to the military administrative review process—mainly in the form of correction board review—may or may not be wise. The descriptions of correction board proceedings provided by both Judge Lettow and Eugene Fidell give reason for pause about whether the correction boards are suited to perform an adjudicative rather than an investigative function and whether their proceedings are sufficiently formal and reliable to warrant the degree of deference accorded. But, wise or not, there is no question that the role of the courts in military personnel decisionmaking has dramatically changed since the early days of the Court of Claims, when the court could say, as it did in *Kelly*, that notwithstanding his desertion, Mr. Kelly should receive his enlistment bonus over the objection of the military because the court concluded that it was “equitable and just.”²⁴

a military board denies the claim or refuses to hear it may mean that at least some claimants will be required to submit their claims to a correction board before seeking review in the Court of Federal Claims. *Chambers v. United States*, 417 F.3d 1218, 1224 (Fed. Cir. 2005). Moreover, the Court of Federal Claims has statutory authority to require exhaustion of correction board remedies in cases in which the court considers exhaustion to be beneficial. *Martinez*, 333 F.3d at 1309–10. As Judge Lettow notes, that authority can be exercised to allow the correction board to consider new evidence on remand if the record before the court is incomplete, consistent with the Supreme Court’s guidance in other administrative law contexts. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). Finally, as noted above, Federal Circuit decisions have prohibited the introduction of new evidence in judicial proceedings that was not presented to the correction board when judicial review is sought after relief is requested from a correction board. The Federal Circuit has held that the exhaustion requirement is equally applicable when the administrative process is initiated after judicial relief has been sought and is still pending. *See Richey v. United States*, 322 F.3d 1317, 1325 (Fed. Cir. 2003).

24. *Kelly v. United States*, 5 Ct. Cl. 476, 482 (1869), *aff’d*, 82 U.S. (15 Wall.) 34 (1872).