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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT**

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**ROBERT F. CHRISTIAN, II, WILLIAM A. ABEL, DALE W. ABERSOLD, BEN P. ADAMS, RONALD K. ADAMS, WILLIAM M. ADDY, DARRELL G. AGEE, ROBERT T. ALESSI, LUTHER V. ALFORD, JOHN R. AMIGH, JERRY F. ANDERSON, LEE C. ANDERSON, PHILIP W. ANTHONY, ALVIN R. APPLING, ROBERT G. ARCHER, WILLIAM D. ARCHER, HENRY H. ARNOLD, III, ROBERT J. ARSENAULT, WALTER W. ARTISWERGIN, CHARLES F. ASHLEY, LARRY J. ATCHLEY, GARY L. AUS, CHARLES M. AYERS, DOUGLAS S. AYKROYD, ROBERT W. AYLWARD, RODNEY J. BACKMAN, CHARLTON G. BAILEY, STEVEN S. BAILEY, DONALD K. BALDRIDGE, STEPHEN T. BARANZYK, JOHN C. BARBEE, PETER R. BATTEN, THOMAS A. BAUER, EDDIE L. BAYS, RICHARD S. BEAHM, LAWRENCE D. BEARD, MICHAEL W. BEARD, WALTER S. BEARD, DAVID O. BEAVER, ALBERT T. BECK, RAYMOND G. BECK, RONALD G. BECK, JAMES C. BENNETT, RONALD L. BENNETT, CLELAND C. BERG, STEVEN J. BERGANINI, BRADFORD J. BERNARD, MICHAEL W. BESHIRI, DOUGLAS G. BIELENBERG, EDWARD A. BLACK, KENNETH J. BLACK, HENRY C. BLACK, III, CHARLES E. BLAKLEY, RUSSELL R. BLEVINS, DENIS M. BLINDAUER, DANIEL K. BLIZZARD, RICHARD A. BODKIN, JOHN K. BOLES, III, DWIGHT L. BORGES, DONALD A. BORK, GREGORY A. BOSNER, DAVID W. BOWER, WADE H. BOWIE, JR., DAVID G. BOYD, BROOKS A. BOYE, DREW M. BRANDT, ANDREW M. BRANTLEY, RICHARD E.K. BRAWN, RICHARD T. BRAZZEAL, GEORGE O. BRIDEWELL, KENNETH L. BRIGGS, PHILLIP L.**

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MICHAEL D. ZOVATH, ROBERT E. ZURCHER, JR.**

**Plaintiffs-Appellees,**

**v.**

**UNITED STATES,**

**Defendant-Appellant.**

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**ON APPEAL FROM THE UNITED STATES COURT OF FEDERAL  
CLAIMS  
IN 97-CV-165, SENIOR JUDGE LOREN SMITH**

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**BRIEF OF AMICI CURIAE  
RONALD ALVIN, ET AL., AND MICHAEL CHRISTENSEN, ET AL.,  
IN SUPPORT OF THE POSITION OF PLAINTIFFS-APPELLEES  
SUPPORTING AFFIRMANCE**

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**December 26, 2002**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT**

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**No. 02-5165**

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**ROBERT F. CHRISTIAN, ET AL.,  
Plaintiffs-Appellees**

**v.**

**THE UNITED STATES,  
Defendant-Appellant**

---

**ON APPEAL FROM THE UNITED STATES COURT  
OF FEDERAL CLAIMS  
IN 97-CV-165, SENIOR JUDGE LOREN SMITH**

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**BRIEF OF AMICI CURIAE  
RONALD ALVIN, ET AL., AND MICHAEL CHRISTENSEN, ET AL.,  
IN SUPPORT OF THE POSITION OF PLAINTIFFS-APPELLEES  
SUPPORTING AFFIRMANCE**

---

**CONCISE STATEMENT OF IDENTITY OF AMICI CURIAE,  
INTEREST IN THE CASE, AND  
SOURCE OF AUTHORITY TO FILE**

This brief is submitted on behalf of the plaintiffs in two Court of

Federal Claims proceedings, *Alvin v. United States*, No. 99-1011C (Ct. Fed. Cl.), and *Christensen v. United States*, No. 00-355C (Ct. Fed. Cl.). Both of these cases are challenges to military selection board proceedings in which impermissible race and gender classifications were used and both have been stayed pending the resolution of this interlocutory appeal because the issue presented is directly related to the determination of appropriate remedies in them. The central focus of amici's efforts has been meaningful judicial vindication of the constitutional rights of military officers who have been subjected to selection board proceedings in which merit criteria have been compromised by imposed, impermissible considerations of race and gender. The authority for amici participation is the consent of all parties to the appeal.

### **STATEMENT OF THE ISSUE**

Whether, in a case in which liability for imposed impermissible considerations of gender and race by a military selection board has been established, the Court of Federal Claims correctly concluded that the government may not avoid application of the constructive service doctrine and payment of back pay and benefits through the creation of new evidence

by reconstituted selection boards to be conducted ten years after the constitutionally defective proceedings?

### **STATEMENT OF THE CASE**

Amici adopt the Appellees' Statement of the Case.

Appellant's Statement of Facts erroneously asserts "The court ruled that, even though at most only 341 women and minorities were retained by the 1992 Board, the entire class of approximately 1,030 non-minority male officers had been harmed by the unconstitutional procedures and were thus entitled to active duty pay from the date they were improperly separated and other constructive service remedies until the date they are properly separated." Appellant's Brief at 7. The court's ruling nowhere purports to address an "at most" number of minorities and women retained by the Board. JA 33-39; *Christian v. United States*, 49 Fed. Cl. 720, 726-27 (2001). Additionally, the record contains conflicting numbers, probably attributable to the subjective nature of the board and its view of what constituted a minority. The government's purported 341 number for minorities and women (including "unknown") is lower than the aggregate number shown in the record, and the certified class is 882 officers, not the

1030 represented by the government. Accordingly, it is impossible to ascertain numerical impacts of the unconstitutional instruction on the results of the board.

### **SUMMARY OF ARGUMENT**

As effectively set forth in the brief of the Appellees, the Court of Federal Claims correctly applied the constructive service doctrine and denied the government's request to conduct new, but retroactive proceedings as the purported remedy for the fundamentally defective 1992 Selective Early Retirement Board (SERB) proceedings. The government request for reversal of that decision is contrary to *Doyle v. United States*, 599 F.2d 984 (Ct. Cl.), *modified*, 609 F.2d 990 (Ct. Cl. 1979), *cert. denied* 446 U.S. 982 (1980) as well as inconsistent with the application of harmless error analysis outside the context of fundamentally flawed military selection board proceedings. *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977). The government's extensive reliance upon *Texas v. Lesage*, 528 U.S. 18 (1999), is entirely misplaced because (1) *Lesage* offers no authority supporting the government's request to conduct a harmless error analysis based upon newly created evidence, (2) The *Mt. Healthy/Lesage*

harmless error defense, even if relevant, applies to liability not damages and (3) the government waived the presentation of this affirmative defense. Moreover, the government's reliance on cases interpreting Title VII of the Civil Rights Act of 1964, other irrelevant statutory causes of action and recently enacted but inapplicable legislation establishes no predicate to deviate from the controlling applicable precedents followed by the Court of Federal Claims.

## **ARGUMENT**

### **I. There Is No Cogent Authority Supporting the Government's Request to Conduct a Harmless Error Analysis Based upon Newly Created Evidence**

Before the trial court the government requested that the Court, as the remedy in this proceeding, remand the case to the service secretary, who imposed the unconstitutional instructions, for the conduct of an entirely new selection board. Appellant's Brief, p. 7. The government did not present or seek to present any evidence describing probative aspects of the 1992 SERB evaluations. In essence, the government did not seek to present a harmless error defense. Rather it simply sought to conduct a new selection board with retroactive application. Such a procedure is contrary to the decisions

in both *Doyle* and *Mt. Healthy*.

The *Doyle* opinion dismisses the prospect of a retroactive replay of fundamentally flawed selection board proceedings for a variety of reasons and concludes

The defective process can be corrected ... by giving the adversely affected officers the opportunity to be promoted in strict compliance with the law. **But this new opportunity does not demonstrate that the error was harmless nor render the original error harmless as to those officers passed over by the new procedure;** instead, it is simply the best remedy that legal ingenuity can provide.

*Doyle v. United States*, 599 F.2d at 304 (emphasis added). The same conclusion was reached by Judge Smith applying the logic of *Mt. Healthy* and *Lesage* to the government proposal:

..., the "harmless error" rule of *Lesage* concerned proof of facts as they were at the time of the alleged violation and injury, not creation of new procedures and analysis of new outcomes. Tellingly, the government is not offering to produce affidavits or records documenting the journeys of individual personnel files through secret SERB proceedings held all the way back in 1992; nor can it do so. The reconstituted board procedure cannot produce any, much less conclusive evidence of the 1992 SERB's decision-making.

*Christian v. United States*, 49 Fed. Cl. at 724-25.

There is nothing controversial about the conclusion that, in the

absence of significant contemporaneous evidence, a *Mt. Healthy* harmless error analysis is impossible. Justice Powell reached the same conclusion in the course of rendering his oft cited opinion in the *Bakke* decision:

There is no occasion for remanding the case to permit petitioner to reconstruct what might have happened if it had been operating the type of program described as legitimate in Part V, *supra*. Cf. *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 284-287 (1977). In *Mt. Healthy*, there was considerable doubt whether protected First Amendment activity had been the "but for" cause of Doyle's protested discharge. Here, in contrast, there is no question as to the sole reason for respondent's rejection -- purposeful racial discrimination in the form of the special admissions program. Having injured respondent solely on the basis of an unlawful classification, petitioner cannot now hypothesize that it might have employed lawful means of achieving the same result. See *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S., at 265-266. No one can say how -- or even if -- petitioner would have operated its admissions process if it had known that legitimate alternatives were available. **Nor is there a record revealing that legitimate alternative grounds for the decision existed, as there was in *Mt. Healthy*. In sum, a remand would result in fictitious recasting of past conduct.**

*Regents of the University of California v. Bakke*, 438 U.S. 265, 320 n.54 (1978)(emphasis added). Such a "fictitious recasting of past conduct" is exactly what the government has proposed and which was correctly denied by the Court of Federal Claims.

## **II. The Essential Holding of *Texas v. Lesage* Is That the Same Decision**

## **Defense Recognized in *Mt. Healthy* Is Applicable to Liability, Not Damages**

The government attempts to portray the Supreme Court's per curiam decision in *Texas v. Lesage*, 528 U.S. 18 (1999) as somehow challenging the continued vitality of *Doyle*. For example, the government suggests that if *Doyle* and related cases are viewed as supporting the application of the constructive service doctrine to the plaintiffs, then they "should be reconsidered by this court." Appellant's Brief, pp. 24-25. There is no serious support for this position. Indeed, the government acknowledges, as it must, that *stare decisis* precludes such action unless taken by this Court sitting *en banc*, or unless the earlier decision is overruled by other controlling authority. *Bankers Trust N.Y. Corporation v. United States*, 225 F.3d 1368, 1373 (Fed. Cir. 2000) ("Court of Claims cases, until overturned by this court en banc, are binding precedent, see *South Corp. v. United States*, 690 F.2d 1368, 1370-71 (Fed. Cir. 1982)"). The government incorrectly suggests that *Texas v. Lesage*, 528 U.S. 18 (1999), is authority to revisit *Doyle*.

It is clear that the *Doyle* decision, which was rendered two years after

*Mt. Healthy*, includes careful consideration of the relevance of *Mt. Healthy*. *Doyle v United States*, 599 F.2d at 994-95. Moreover, that analysis was not constrained by any assumption that *Mt Healthy* would not apply to equal protection or other violation of constitutional rights besides those protected by the First Amendment. *Id. Lesage* does not represent any change in this substantive law.

In *Lesage* the Supreme Court summarily ruled that the same decision defense held applicable to a violation of First Amendment rights in *Mt Healthy* was applicable to a violation of the Equal Protection Clause of the Fourteenth Amendment. *Texas v. Lesage*, 528 U.S. at 21. That *Lesage* was a unanimous per curiam decision is likely due to the fact that, as to the scope of the same decision defense, it represented nothing that the Supreme Court had not already anticipated. Indeed, on the very day in 1977 that *Mt. Healthy* was decided, the Supreme Court noted in a footnote in another case that the *Mt. Healthy* analysis was not limited to First Amendment cases:

Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered. If this

were established, the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose. In such circumstances, there would be no justification for judicial interference with the challenged decision. But in this case respondents failed to make the required threshold showing. See *Mt. Healthy v. Doyle*, *post*, p. 274.

*Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 270 n. 21 (1977)<sup>1</sup>. See also, *Regents of the University of California v. Bakke*, 438 U.S. 265, 320 n.54 (1978). Thus, from the very conception of the *Mt. Healthy* same decision defense, the Supreme Court has understood it to be applicable to equal protection cases.

*Lesage* not only fails to provide any reason to revisit *Doyle*, it emphasizes the nature of the *Mt. Healthy* same decision defense as an affirmative defense against liability, not a defense against damages. Francois Lesage unsuccessfully sought admission to the University of Texas. He challenged his denial of admission as a violation of the Equal Protection Clause because the school conducted a race-conscious admissions process. *Texas v. Lesage*, 528 U.S. 18, 19 (1999). In granting

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<sup>1</sup> In addition to *Arlington Heights* citing *Mt. Healthy*, *Mt. Healthy* contains citation to *Arlington Heights*. The *Mt. Healthy* decision cites footnote 21 of *Arlington Heights* in its second footnote. *Mt. Healthy City*

the school's motion for summary judgment, the district court concluded that the record established that race had no effect on the rejection of Mr. Lesage's application. *Id.* The United States Court of Appeals for the Fifth Circuit reversed that entry of summary judgment holding, inter alia:

The possibility that ... Lesage ... would not have been offered admission is relevant only to the quantum of **damages** available -- not to the pure question of the state's **liability**, which is the issue on summary judgment.

*Lesage v. Texas*, 158 F.3d 213, 222 (5<sup>th</sup> Cir. 1998)(emphasis added). The Supreme Court reversed that judgment:

Insofar as the Court of Appeals held that summary judgment was inappropriate on Lesage's § 1983 action seeking damages for the school's rejection of his application for the 1996-1997 academic year even if petitioners conclusively established that Lesage would have been rejected under a race-neutral policy, its decision is inconsistent with this Court's well-established framework for analyzing such claims. Under *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977), even if the government has considered an impermissible criterion in making a decision adverse to the plaintiff, it can nonetheless defeat liability by demonstrating that it would have made the same decision absent the forbidden consideration. See *id.*, at 287. See also *Crawford-El v. Britton*, 523 U.S. 574, 593, 140 L. Ed. 2d 759, 118 S. Ct. 1584 (1998); *Board of Comm'rs, Wabaunsee Cty. v. Umbehr*, 518 U.S. 668, 675, 135 L. Ed. 2d 843, 116 S. Ct. 2342 (1996). Our previous decisions on this point have typically involved

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*Board of Education v. Doyle*, 429 U.S. 274, 287 n.2 (1977).

alleged retaliation for protected First Amendment activity rather than racial discrimination, but that distinction is immaterial. The underlying principle is the same: The government can avoid liability by proving that it would have made the same decision without the impermissible motive.

Simply put, where a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting relief under § 1983.

*Texas v. Lesage*, 528 U.S. at 20-21.

Clearly, the fundamental error of the Fifth Circuit was treating a *Mt.*

*Healthy* defense as running to damages rather than liability:

The crux of the Court's concern was the Fifth Circuit's failure to take sufficient account of the merits defense created by *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977), and its progeny.

*Wooden v. Board of Regents of University System of Georgia*, 247 F.3d 1262, 1276 (11th Cir. 2001). There is nothing in *Lesage* that undermines *Doyle*.

Judge Smith carefully parsed the holding in *Lesage* and articulated the reasons *Doyle* remained the relevant precedent for the disposition of this case.

However, on closer examination of *Lesage*, *Doyle* remains the

relevant precedent in this case. First, the whole-man evaluations challenged in *Doyle* and here cannot be reduced to discrete components in the same way that graduate admissions process can be reduced, at least in a significant part, to rating of applicants by GRE and GPA numbers. Due to the nature of the SERB proceedings and the classification itself, which encouraged SERB member discretion, isolating the effect of the discriminatory Phase I and II standards as well as Phase II procedures is impossible. Second, the "harmless error" rule of *Lesage* concerned proof of facts as they were at the time of the alleged violation and injury, not creation of new procedures and analysis of new outcomes. Tellingly, the government is not offering to produce affidavits or records documenting the journeys of individual personnel files through secret SERB proceedings held all the way back in 1992; nor can it do so. The reconstituted board procedure cannot produce any, much less conclusive evidence of the 1992 SERB's decision-making. Thus, even the arguably more concrete Phase II revote procedure defies post-hoc evidentiary inquiry. Third, *Lesage* did not even mention the line of Supreme Court precedent cited in *Doyle* concerning fundamental procedural violations. *See Doyle*, 220 Ct. Cl. at 302 (citing *Harrington v. California*, 395 U.S. 250, 23 L. Ed. 2d 284, 89 S. Ct. 1726 (1969), *Chapman v. California*, 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967), and *Whitus v. Georgia*, 385 U.S. 545, 17 L. Ed. 2d 599, 87 S. Ct. 643 (1967)). Therefore, *Lesage* in no way repudiates the teaching of *Doyle* that fundamental procedural errors are inherently prejudicial.

*Christian v. United States*, 49 Fed. Cl. 720, 724-25 (2001).

### **III. The Government Waived Assertion of a Harmless Error Defense**

The government asserts that the Court of Federal Claims erred in

applying the constructive service doctrine in the course of determining the appropriate remedy for each officer whose career was prematurely terminated by the SERB. The basis for this assertion is the government's position that the same decision or harmless error defense discussed in *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977) and *Texas v. Lesage*, 528 U.S. 18 (1999) is inconsistent with the Court of Federal Claims's application of *Doyle v. United States*, 599 F.2d 984 (Ct. Cl.), *modified*, 609 F.2d 990 (Ct. Cl. 1979), *cert. denied* 446 U.S. 982 (1980). As set forth in Appellees' Brief there is no merit to the government's position. However, even assuming merit to the argument, the government waived the right to assert it.

The government's decision to wait until the remedies phase of the trial court proceedings to raise an affirmative defense to liability constitutes a waiver of that defense. Rule 8(c) of the Rules of the Court of Federal Claims, both as in existence at the time of the initiation of this litigation and as revised on May 1, 2002, required the government to timely set forth all affirmative defenses. The liability of the government was established on cross motions for judgment on the administrative record (JA 2) which are

treated as motions for summary judgment (JA 6). The government was obligated to raise its affirmative defenses in response to Appellees' motion:

...an affirmative defense must be raised in response to a summary judgment motion, or it is waived. See, e.g., *United Coal Miners Workers of America 1974 Pension v. Pittston Co.*, 299 U.S. App. D.C. 339, 984 F.2d 469, 478 (D.C. Cir. 1993); cf. *Nossen v. United States*, 189 Ct. Cl. 1, 416 F.2d 1362, 1371 (Ct. Cl. 1969). *Diversey Lever, Inc. v. Ecolab, Inc.*, 191 F.3d 1350, 1353 (Fed Cir. 1999).

The same decision defense as recognized in *Mt. Healthy* is an affirmative defense against liability:

Under *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977), even if the government has considered an impermissible criterion in making a decision adverse to the plaintiff, it can nonetheless defeat **liability** by demonstrating that it would have made the same decision absent the forbidden consideration.

*Texas v. Lesage*, 528 U.S. 18, 20-21 (1999)(emphasis added). The record as a whole in this case makes it abundantly clear that the government consciously decided not to pursue a same decision defense in the course of the liability phase.<sup>2</sup> See, e.g., Transcript of Oral Argument Conducted April

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<sup>2</sup> Amici suggest that a major reason the government did not timely seek to assert the defense is the fact that the government had no intention or ability to present evidence competent to establish the defense. As described in *Texas v. Lesage*, such evidence must be sufficient to establish

1, 1999 at 13-14. Later, however, it sought to inject the same decision defense into the remedy proceedings. The government cannot properly here assert that the Court of Federal Claims did not apply an affirmative defense which the government waived when it failed to timely raise it in response to the plaintiffs' cross motion for judgment on the administrative record.

#### **IV. This Appeal Concerns the Identification of Appropriate Remedies for a Cause of Action Arising under the Due Process Clause of the Fifth Amendment in a Military Personnel Case Based upon Tucker Act Jurisdiction**

This litigation arose under the jurisdiction of the Court of Federal Claims to consider claims of military personnel for moneys allegedly unlawfully withheld from them. JA 56. The Court of Federal Claims entered summary judgment for the plaintiffs based upon the violations of the Due Process Clause of the Fifth Amendment set forth in Count IV of the Complaint. JA 26. This is not a case brought under the provisions of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e, et seq., or other statutory causes of action. Nor could it be as Title VII is inapplicable to military personnel matters. *Gonzalez v. Department of the Army*, 718 F.2d

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“...the government's **conclusive** demonstration that it would have made the same decision absent the alleged discrimination precludes any finding of

926, 928 (9th Cir. 1983); *Hodge v. Dalton*, 107 F.3d 705, 708 (9th Cir. 1997). Accordingly, the government’s multiple citations to cases interpreting Title VII are not authority for deviation from the well established applicable precedents of this jurisdiction including *Doyle v. United States*, 599 F.2d 984 (Ct. Cl.), *modified*, 609 F.2d 990 (Ct. Cl. 1979), *cert. denied* 446 U.S. 982 (1980).

**V. Appellant Erroneously Asserts That the Remedy in Future Cases Would Be Limited to a Relook Board**

Although the government correctly asserts that newly enacted 10 U.S.C. § 1558 is inapplicable to this litigation, it incorrectly relies upon that statute as authority for the assertion “...if this case arose today plaintiffs would be essentially limited to a relook board remedy.” Appellant’s Brief, p. 37. Because this statement reflects a misunderstanding of both Section 1558 and the law applicable to this case, we believe comment is warranted.

Title 10 U.S.C. § 1558 creates a specialized exhaustion of administrative remedies requirement for individuals challenging, inter alia,

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liability.” *Texas v. Lesage*, 528 U.S. at 21 (emphasis added).

selective early retirement board proceedings.<sup>3</sup>

The “special boards” it authorizes function in the same fashion as the “special selection boards” authorized by 10 U.S.C. § 628 that address promotion board problems. The judicial review provisions of these statutes are functionally identical. *Compare* 10 U.S.C. §1558(f) *with* 10 U.S.C. § 628(g).

At least two reported cases have had occasion to comment on the government’s position that such statutes “limit relief to a relook board” and neither support it. This Court considered the relationship of Section 628 special selection board (SSB) proceedings to harmless error in the context of a defective records promotion case in *Porter v. United States*, 163 F.3d

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3 The limited nature of the change accomplished by Section 1558 is emphasized in the relevant legislative history. Section 503 of Public Law 107-107 created 10 U.S.C. § 1558. The legislative history of that Section includes the following in the Conference Report:

The conferees do not intend, by this provision, to change the existing authority of the federal courts to determine the validity of any statute, regulation or policy relating to selection boards in any applicable form of action, including, when authorized by law or by the rules of the court, a class action.

H.R. Conf. Rep. No.333, 107<sup>th</sup> Cong., 1<sup>st</sup> Sess. 652 (2001).

1304 (Fed. Cir. 1998). The Court accepted the government’s position that SSB consideration was appropriate in defective record cases. The Court, however, expressly noted likely limits:

Without deciding, we might speculate that other kinds of error would qualify for an Air Board conclusion that the demonstrated error vitiates the initial passovers. Matters such as impermissible consideration of race, sex or religion, or instances of an illegally composed selection board (one thus incapable of producing a legal result) come to mind.

*Porter v. United States*, 163 F.3d at 1321.<sup>4</sup>

Commenting on this statement Judge Smith stated “...constitutional adjudications are the duty of the courts, *see Christian [v. United States]*, 46 *Fed. Cl.*[793] at 802 [(2000)], and that includes the remedial as well as the liability determinations.” *Christian v. United States*, 49 *Fed. Cl.* at 725.

In *Saunders v. White*, 191 F. Supp. 2d 95 (D. D.C. 2002) an officer challenged the Army’s use of its affirmative action instructions by

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4 The government asserts that “This dicta manifested the same erroneous assumption that the Supreme Court reversed and repudiated (one year after *Porter*) in *Texas v. Lesage*...” Appellants’ Brief, p. 21 (emphasis in original). With all due respect, the actual erroneous assumption at issue is the government’s assumption that a service secretary’s personal imposition of unconstitutional consideration of race, sex or religion on secret military selection board proceedings would not constitute fundamental error.

promotion boards. The government sought to moot the case by convening an SSB. Judge Lamberth rejected this argument stating, inter alia,

...the convening of a SSB, which reconsidered the plaintiff's application using a changed affirmative action policy and subsequently re-denied him a promotion, says nothing about what decision the original selection board would have made. That is, the fact that a different board using different criteria failed to recommend Saunders for promotion does not demonstrate that the original selection board, using race and gender neutral criteria, would have failed to recommend Saunders for promotion. As noted above, the defendant has not presented any evidence that demonstrates that the original boards would have reached the same conclusion using a race and gender neutral standard.

*Saunders v. White*, 191 F. Supp. 2d at 116.

As both *Porter* and *Saunders* make clear, specialized military boards may serve a critical role in bringing military expertise to bear on military questions but the judiciary remains responsible to correct fundamental errors of law, particularly violations of constitutional protections. *See, Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992).

## CONCLUSION

For the foregoing reasons and those set forth in the Appellees' Brief the Opinion and Order of the Court of Federal Claims should be affirmed.

OF  
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