

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. BRAUN, RICHARD T. BRAZZEAL, GEORGE O. BRIDEWELL, KENNETH L. BRIGGS, PHILLIP L. BRILLANTE, CHARLES L. BRINKLEY, ROBERT F. BRISSON, JR., DENTON R. BROWN, DOUGLAS J. BROWN, DOUGLAS K. BROWN, DOUGLAS M. BROWN, LESLIE D. BROWN, RICHARD A. BROWN, ROBERT H. BROWN, WILLIAM N. BROWN, THOMAS A. BROZ, JAMES A. BRUECKMAN, ROGER L. BRULEY, CLAUDE G. BRYAN, ROBERT V. BRYANT, WILLIAM R. BUCHANAN, MICHAEL A. BURCHETT, JOSEPH M. BURKE, FREDERICK J. BURKETT, JONATHAN K. BURNS, DONALD M. BYERS, JOHN D. CAIN, DAVID G. CALLAWAY, NICHOLAS J. CAMERA, CHARLES J. CAMPBELL, LOUIS P. CANTOLUPO, JOHN C. CARLEY, LINDSAY E. CARPEN, JOHN C. CARSON, ROGER G. CARTER, THOMAS W. CARTER, JOHN J. CARUSO, ROGER W. CASALENGO, WILLIAM H. CASSIDY, JR., SAMUEL Q. CASTLE, JR., CRESTON M. CATHCART, FRANCIS P. CAVANAUGH, JOSEPH D. CERONE, JAMES D. CHAMBERS, WILLIAM W. CHAMBERS, EDWARD S. CHAMBERS, JR., CHARLES D. CHANCELLOR, III, ALAN R. CHANDLER, ALVIN S. CHANDLER, KENNETH W. CHELF, STEPHEN CHRIST, MICHAEL R. CHRISTENSEN, WILLIAM P. CHRISTIAN, ROGER CIRILLO, JAMES C. CLARKE, JAMES E.

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SPRAGUE, JAMES H. SPRINGFIELD, GARY L. SPUNAUGLE, WALTON D.

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JOHN J. ZEPKO, RANDY C. ZITTEL, DAVID L. ZOELLE,  
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

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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, II, et al.,

Plaintiffs-Appellees,

v.

UNITED STATES,

Defendant-Appellant.

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ON APPEAL FROM THE UNITED STATES COURT  
OF FEDERAL CLAIMS

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OPENING BRIEF FOR APPELLANT

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**STATEMENT OF RELATED CASES**

Pursuant to Federal Circuit Rules 28(a)(4) and 47.5, appellant states that this case has not previously been before this Court or any other appellate court. There are several similar class actions that are currently pending in the Court of Federal Claims that may be implicated by this Court's ruling in the present case. See Alvin v. United States, No. 99-1011C (Ct. Fed. Cl.) (which has been stayed pending the outcome of this appeal); Christensen v. United States, No. 00-355C

(Ct. Fed. Cl.) (which has been stayed pending the outcome of this appeal); and Ricks v. United States, No. 00-427C (Ct. Fed. Cl.) (which has been stayed pending the outcome of this appeal).

### **STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION**

The Court of Federal Claims had jurisdiction over plaintiffs' complaint under 28 U.S.C. § 1491. On June 5, 2000, the court ruled the Army had violated plaintiffs' equal protection rights. On July 10, 2001, the court issued a second opinion, addressing the issue of injury to the class members. On May 30, 2002, the court certified the case for appeal under 28 U.S.C. § 1292(d)(2) and stayed the case pending the outcome of the appeal. On August 2, 2002, this Court granted the government's petition for interlocutory review under 28 U.S. C. § 1292(d)(2). JA 855.

### **STATEMENT OF THE ISSUE**

Whether a white male military officer can prevail on a claim of discrimination and receive full back pay and benefits, based on a claim that the instructions used by the military retention board impermissibly favored women and minorities, if that military officer would not have been retained even absent the allegedly biased instructions.

## STATEMENT OF THE CASE

### A. Course Of Proceedings And Disposition Below.

This is a class action brought on behalf of white males who claim that they were improperly required to retire as a result of the decisions of the 1992 Army Lieutenant Colonel Selective Early Retirement Board. They claim that the 1992 Board used instructions that impermissibly favored women and minorities. The Court of Federal Claims agreed that the instructions impermissibly favored women and minorities. See Christian v. United States, 46 Fed. Cl. 793 (2000). Then in a separate ruling regarding the question of injury, the court ruled that a “harmless error” analysis could not be applied in this context. See Christian v. United States, 49 Fed. Cl. 720 (2001). At the government’s request, the court then certified the case for interlocutory review, and, thereafter, this Court granted the government's petition for interlocutory review under 28 U.S. C. § 1292(d)(2).

### B. Statement Of The Facts.

1. By statute, the Army and the other military services are permitted to convene selection boards to recommend officers for early retirement. See 10 U.S.C. §§ 611, 638. See also 10 U.S.C. § 638a. In January 1992, the Secretary of the Army appointed the Fiscal Year 1992 Lieutenant Colonel Selective Early Retirement Board (“1992 Board”). JA 87, 388. The Secretary issued a “Memorandum of Instruction”

to the 1992 Board containing selection goals and requirements for different career fields and skills. JA 91, 404. The instructions established 1,353, and 1,128, respectively, as the optimum and minimum number of officers to be recommended for early retirement. JA 111. In addition, the instructions contained procedures designed to meet the Army's equal opportunity (“EO”) goals. JA 96.

In accordance with the Secretary's instructions, the 1992 Board convened to recommend officers for early retirement. JA 392. The Board used a four-phase procedure in selecting the candidates for early retirement, only two of which are relevant here. JA 466-470, 590-592.

During Phase I, the Board members reviewed and scored all of the candidates' records, establishing a comprehensive order of merit. JA 104. In performing that task, the Board members were instructed that there was a “goal” to “achieve a percent of minority and female officers recommended for early retirement not greater than the rate for all officers in the zone of consideration.” JA 96. The members were also instructed, when evaluating the records “of minority and female officers” that they should “consider that past personal and institutional discrimination may have disadvantaged minority and female officers.” Ibid. The instructions explained that such “discrimination may include, but certainly is not limited to, disproportionately lower evaluation reports, assignments of lesser importance or responsibility, and lack

of opportunity to attend career building military schools.” Ibid. If the goals set for minority and female retention were not met, the Board members were required to provide written explanations. JA 96.

During Phase II, the Board selected the “optimum number” of officers for early retirement, and applied it to the list created during Phase I. JA 104. After the 1992 Board completed this phase, the retention rates for blacks, Hispanics, and Native American officers were lower than the goal retention rates. JA 503. The applicable instructions, required the Board to reevaluate the records of minority and female officers if there were adverse deviations in the selection rates of these groups from the overall selection rates. JA 104, 369, 503-504. The instructions also mandated that the Board revote the ratings on the records of an officer if the Board members determined that the record evidenced past discrimination against the officer. The Board employed the reevaluation/revote process, and obtained new results. JA 4, 369, 504-505, 598, 604-605.

Based upon these procedures, the 1992 Board ultimately recommended the retirement of 1,052 non-minority (“white”) lieutenant colonels, and 3,067 white lieutenant colonels were retained. JA 371. Eighty one black lieutenant colonels were selected for early retirement, and 186 were retained. Sixteen Hispanic lieutenant colonels were selected for early retirement, and forty four were retained. JA 371.

Eight Asian/Pacific Islander lieutenant colonels were selected for early retirement, and thirty three were retained. Five American Indian lieutenant colonels were selected for early retirement, and five were retained. Finally, twenty one female officers were selected for early retirement, and seventy three were retained.<sup>1</sup> Ibid.

2. Plaintiff, Lieutenant Colonel Robert F. Christian, II, is a white male, who was selected for mandatory early retirement by the 1992 Board. He brought this class action in the Court of Federal Claims challenging the constitutionality of the equal opportunity process employed in the 1992 Board. JA 55. The court certified the class, and upon cross motions for summary judgment held that the instructions used by the 1992 Board impermissibly favored minorities. See Christian v. United States, 46 Fed. Cl. 793 (2000); JA 31.

The court held that the guidelines used by the Board created a racial classification, and that the guidelines were, therefore, subject to strict scrutiny. The court also concluded that the interests advanced by the Army were insufficient to justify a racial classification. JA 11-14. The court recognized that in some cases there may be a compelling interest in remedying actual past discrimination. The court concluded, however, that the government had not established that its remedy was

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<sup>1</sup> There likely is some overlap and redundancy between the number of female officers and the numbers of the minority officers listed above.

required to address the present effects of past institutional discrimination. Finally, even assuming a compelling reason, the court concluded that the instructions used by the Board were not narrowly tailored. JA 14-26.

3. On July 10, 2001, the court issued a second opinion, addressing the issue of injury to the class members. JA 31. The government had requested that the case be remanded to the Secretary of the Army for a determination (by a newly constituted, and properly instructed selection board) of which class members actually were harmed by the constitutional violation and which, despite the violation, would have been selected for early retirement – in essence, a harmless error determination. The court rejected the government's argument. 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 back pay from the date they were improperly separated and other constructive service remedies until the date they are properly separated. JA 33-39; Christian v. United States, 49 Fed. Cl. 720, 726-27 (2001).

In holding that a harmless error analysis could not be employed, as a matter of law, the court relied primarily on Doyle v. United States, 599 F.2d 984, as amended, 609 F.2d 990 (Ct. Cl. 1979), cert. denied, 446 U.S. 982 (1980), and Dilley v.

Alexander, 603 F.2d 914 (D.C. Cir. 1979), as clarified, 627 F.2d 407 (D.C. Cir. 1980), both of which involved an unlawfully constituted promotion board. The court read Doyle and Dilley as establishing a rule that unlawfully separated military officers are “entitled to their position, rank, and pay until they were terminated from active duty under proper authority.” JA 34.

The court stated, if a harmless error analysis was allowed, “[h]ypothetically, the Secretary [could discharge] \* \* \* all Catholics because they approximate the percentage of the force slated for reduction,” and the discharged Catholics' remedy would be limited to 'a remand for a reconstituted board.’” JA 35-36. The court concluded that this would be tantamount “to a grant of authority to temporarily cut off careers and endanger the livelihoods of all the Catholics in the Army.” JA 35-36.

The court also held that a revote before a reconstituted board could not be an appropriate remedy because “[p]ersonnel evaluations in the military operate on a whole-man concept.” JA 36. The court reasoned that the process “cannot be reduced to a mere list of credentials requirements which is the typical approach in civilian employment or educational admissions.” Ibid. Thus, the court concluded that the government’s remand proposal “does not demonstrate that the error was harmless nor render the original error harmless as to those officers passed over by the new procedure.” JA 36 (quoting Doyle 599 F.2d at 996).

The court rejected the government's argument that Texas v. Lesage, 528 U.S. 18 (1999), supported the application of a harmless error analysis. JA 36-37. The court stated, “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 \* \* \*. 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.” JA 37.

Finally, the court suggested that Lesage was not controlling because the Supreme Court in Lesage “did not even mention the line of Supreme Court precedent cited in Doyle concerning fundamental procedural violations. See Doyle, 200 Ct. Cl. at 302 (citing Harrington v. California, 395 U.S. 250 (1969), Chapman v. California, 386 U.S. 18 (1967), and Whitus v. Georgia, 385 U.S. 545 (1967)).” JA 37. “Therefore,” the court concluded, “Lesage in no way repudiates the teaching of Doyle that fundamental procedural errors are inherently prejudicial.” Ibid.

4. After it issued its ruling on the issue of injury, the court asked the parties to postpone the consideration of an interlocutory appeal until class notification was

complete. After that notification and opt-in process<sup>2</sup> was completed, the government asked the court to certify its July 10, 2001 ruling for appeal. In an order entered on May 30, 2002, the court certified the case for appeal under 28 U.S.C. 1292(d)(2) and stayed the case pending the outcome of the appeal. JA 42.

5. On August 2, 2002, this Court granted the government's petition for interlocutory review under 28 U.S. C. § 1292(d)(2). JA 855.

### **SUMMARY OF ARGUMENT**

A. The Court of Federal Claims erred in refusing to apply a harmless error analysis and in allowing the, at least, seventy percent of the class who were not in fact injured by the 1992 EO instructions to recover full back pay and benefits. The Supreme Court has repeatedly held that a harmless error analysis should be applied to such constitutional claims of discrimination. Even when a plaintiff in a wrongful discharge case claims that the government unconstitutionally considered impermissible factors, as here, the government employer must be afforded the opportunity to show “by a preponderance of the evidence that it would have reached the same decision” even absent the alleged unconstitutional considerations. Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 286-287 (1977). Recently,

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<sup>2</sup> Of the approximately 1,030 non-minority male lieutenant colonels who were forced to retire, 882 officers “opted-in” and joined the class.

the Supreme Court reaffirmed this principle. In Texas v. Lesage, 528 U.S. 18 (1999), the Court squarely held that, “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.” Id. at 20-21.

Consistent with this precedent, the Court of Claims and the Court of Federal Claims have applied a “harmlessness” analysis to military pay cases where the officer or service member has claimed some procedural or record error. There is a limited exception recognized for cases where a board is illegally constituted. Otherwise, however, the rule has long been established that a plaintiff cannot prevail if the government can demonstrate that, notwithstanding the alleged error, the plaintiff would not have been granted the promotion. See Lindsay v. United States, 295 F.3d 1252, 1261 (Fed. Cir. 2002); Engels v. United States, 678 F.2d 173 (Ct. Cl. 1982); Hary v. United States, 618 F.2d 704 (Ct. Cl. 1980);

B. The facts of this case demonstrate that harmless error exists with regard to a sizeable majority of the class. Plaintiffs are the class of approximately 1,030 non-minority male officers who were not retained as a result of the 1992 Board. There were, however, at most only 341 minorities and women retained. Thus, at most, 341 white males were displaced. Here, by conducting a new Board review on remand,

examining the records (as they existed in 1992) and ranking them by merit, a harmless error analysis could, at a minimum, tell us which plaintiffs could not possibly have been retained even if all of the 341 minorities and women were excluded from consideration. It is indisputable that at least 669 members of the plaintiff class would have been forced to retire in any event. To rule in their favor and to grant them full relief is to grant them a pure windfall – a windfall costing the American taxpayer an estimated \$100 million in this case alone.

C. 1. Contrary to the Court of Federal Claims' ruling, Doyle v. United States, 599 F.2d 984, as amended, 609 F.2d 990 (Ct. Cl. 1979), cert. denied, 446 U.S. 982 (1980), and Dilley v. Alexander, 603 F.2d 914 (D.C. Cir. 1979), as clarified, 627 F.2d 407 (D.C. Cir. 1980), do not preclude the use of the harmless error analysis in this case. In Dilley and Doyle, the promotion boards were unlawfully constituted because they did not contain the statutorily-required minimum number of reserve officers. In those cases, because the separations were conducted by a body without statutory authority, it was as if the separations had never occurred. In contrast, here, there is no question of the Board's proper makeup or authority. Instead, the alleged error is procedural -- the consideration of unconstitutional factors -- and goes to the correctness of the Board's decision, not its legal authority to issue the decision. Because the error here stems from the EO instructions, the Board's actions were not

“void ab initio.” Rather, they were, as in Texas v. Lesage, merely “voidable” as to those persons who were in fact injured by the instructions.

Notably, the Supreme Court has repeatedly held that the provision of an erroneous instruction to a jury, or a judge's mistake in applying the law to the facts, is subject to harmless error review in both criminal cases and civil cases. If a harmless error analysis can be used to determine whether a criminal defendant would have been convicted notwithstanding an alleged constitutional error, then, a fortiori, such an analysis can be employed in the present context to determine whether the plaintiffs would have been discharged or not absent the EO instructions.

2. The Court of Federal Claims also erred in assuming that the harmless error inquiry is limited to cases where there is objective numerical proof of which candidates for a job or school admission ranked higher. Courts routinely examine subjective evidence in rendering a harmless error/injury ruling.

3. In a typical case, the trier of fact would rank the candidates and render a harmless error analysis itself. In this context, however, a remand for the agency to conduct a reconstituted 1992 Board using proper instructions is the proper remedy.

The Court of Federal Claims in this case is in essence reviewing the decision of an administrative body -- the 1992 Board. It is well established that a court “should remand a case to an agency for decision of a matter that statutes place primarily in

agency hands.” INS v. Ventura, 123 S.Ct. 353, 355 (2002). In this context, it is wholly appropriate to defer to the military expertise in these matters and to permit a reconstituted Board to rank the candidates using the 1992 instructions (or the current equivalent), without the allegedly discriminatory EO portion thereof.

The new Board will establish, whether the plaintiff class members were in fact injured by the use of the EO instructions at issue. If they were not, it is clear legal error to rule in their favor and to place them in a better position than if the EO instruction had never been used. Law, logic and equity all compel the result that these plaintiff class members not be allowed to recover.

#### **STANDARD OF REVIEW**

The question presented on appeal -- whether a harmless error analysis is allowed to determine injury in military discrimination cases -- presents a pure question of law. Questions of law are subject to de novo review. See Vanguard Research, Inc. v. Peat, Inc., 304 F.3d 1249, 1254 (Fed. Cir. 2002).

## ARGUMENT

**THE COURT OF FEDERAL CLAIMS ERRED IN HOLDING THAT THE 70 PERCENT OF THE CLASS WHO WERE NOT IN FACT INJURED BY THE OBJECTIONABLE 1992 INSTRUCTIONS CANNOT NEVERTHELESS RECOVER FULL BACK PAY AND BENEFITS.**

**A. A Harmless Error Analysis Can And Should Be Applied To Constitutional Claims Of Employment Discrimination.**

1. Although this case arises in the military context it is, at bottom, a case involving a claim of unconstitutional employment discrimination. Outside of the military context, the Supreme Court has repeatedly held that a harmless error analysis can and should be applied to such constitutional claims of discrimination, including claims of an unconstitutional employment discharge, similar to the one asserted in the present case. See, e.g., Texas v. Lesage, 528 U.S. 18 (1999); Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977).<sup>3</sup>

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<sup>3</sup> Consistent with Title VII's objective "to make persons whole for injuries suffered on account of unlawful employment discrimination," Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975), the harmless error approach is similarly applied in Title VII employment discrimination cases. See, e.g., United States v. City of Miami, 195 F.3d 1292, 1299 (11th Cir. 1999), cert. denied, 531 U.S. 815 (2000). See also Arnold v. U.S. Dept. of Interior, 213 F.3d 193, 198 (5th Cir. 2000) ("the plain language of § 2000-e5(g)(2)(B)(ii) forbids an award of compensatory damages to a job applicant who, despite unlawful discrimination, still would not have received the job"), cert. denied, 531 U.S. 1144 (2001); Gibson v. Mohawk Rubber Co., 695 F.2d 1093, 1097 (8th Cir. 1982) (a court should implement the Age Discrimination in Employment (continued...))

In Mt. Healthy, the plaintiff claimed that unconstitutional considerations (her employer's alleged objections to her constitutionally protected speech) led the government not to renew her employment contract. The district court and court of appeals ruled in favor of the plaintiff and ordered reinstatement with backpay. The Supreme Court vacated the judgment in her favor. The Court held that, even if the plaintiff's protected First Amendment conduct “played a 'substantial part' in the actual decision not to renew,” it would not “necessarily amount to a constitutional violation justifying remedial action.” Mt. Healthy, 429 U.S. at 285. The Court explained, “[a] rule of causation which focuses solely on whether protected conduct played a part, 'substantial' or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing.” Ibid. The Court ruled that the “constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct.” Id. at 285-286. In so holding, the Court embraced for employment/improper discharge cases the “test of causation” used in other areas of constitutional law, “which distinguishes

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<sup>3</sup> (...continued)  
Act's purpose “of recreating the circumstances that would have existed but for the illegal discrimination”).

between a result caused by a constitutional violation and one not so caused.” Id. at 286. Thus, the Court ordered the district court on remand “to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.” Id. at 287.

After Mt. Healthy, it was therefore established that a plaintiff cannot recover on a constitutional claim if the defendant can show, by a preponderance of the evidence, that the same decision would have been reached even absent the constitutional wrong. Nonetheless, some courts continued to have some confusion about whether the Mt. Healthy “harmless error” analysis could properly be employed where the government uses discriminatory standards in evaluating candidates for employment or school admission. In Texas v. Lesage, the Supreme Court put such concerns to rest, and squarely held that the same type of harmless error/injury analysis was equally applicable in such contexts.

In Texas v. Lesage, the plaintiff had been denied admission to the University of Texas doctoral program. The plaintiff claimed that the University officials impermissibly relied on race as a selection criterion by providing preferred status to black and Hispanic applicants. See Lesage v. State of Texas, 158 F.3d 213, 222 (5th Cir. 1998), rev'd, 528 U.S. 18 (1999). The court of appeals found a constitutional

violation, and in so ruling held that it was irrelevant whether or not the school would have rejected the plaintiff in any event under a color-blind admissions process. See Texas v. Lesage, 528 U.S. at 20. The court of appeals explained, “we must [assume] \* \* \* that the state did indeed employ a racially discriminatory counseling psychology admissions program as alleged, those applicants who had not yet been eliminated from consideration at the time racially preferential criteria were applied have suffered an implied injury -- even if their applications ultimately would not have resulted in admission under a nondiscriminatory admissions regime.” Lesage v. State of Texas, 158 F.3d at 222.

On review, the Supreme Court repudiated the court of appeals' refusal to apply the Mt. Healthy harmless error analysis. The Supreme Court explained, that the court of appeals' refusal to apply a harmless error analysis was “inconsistent with this Court's well-established framework for analyzing such claims.” Texas v. Lesage, 528 U.S. at 20. The Court held that, “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.” Id. at 20-21. The Court explained the underlying constitutional principle in plain terms: “The government can avoid liability by proving that it would have made the same decision without the

impermissible motive.” Id. at 21. Thus, “where there is no allegation of an ongoing or imminent constitutional violation to support a claim for forward-looking relief, the government's conclusive demonstration that it would have made the same decision absent the alleged discrimination precludes any finding of liability.” Ibid.

2. Consistent with these precedents, a harmless error analysis has been applied by the Court of Claims and the Court of Federal Claims to military pay cases where the officer or service member has claimed some procedural or record error. See, e.g., Lindsay v. United States, 295 F.3d 1252, 1261 (Fed. Cir. 2002); Engels v. United States, 678 F.2d 173 (Ct. Cl. 1982); Hary v. United States, 618 F.2d 704 (Ct. Cl. 1980); Cunningham v. United States, 39 Fed. Cl. 688 (1998). As we shall discuss further below (pp. 25-27), there is a limited exception recognized for cases where a promotion or selection board is illegally constituted. See Engels v. United States, 678 F.2d at 175 n.6 (“Where the error goes, not to the [Officer Effectiveness Reports] or the record, but to the composition of the selection board \* \* \*, the court has held the causal nexus (or, conversely, the 'harmless error') principle to be inapplicable”). But otherwise the rule has long been that, to prevail in a military back pay case, the former service member bears the initial burden of establishing: (1) “a material legal error or injustice”; and (2) “a 'causal nexus' or 'substantial connection' between the error and the [adverse personnel decision].” Cunningham, 39 Fed. Cl. at 692 (quoting

Engels, 678 F.2d at 175; citing Hary, 618 F.2d at 707; Sanders v. United States, 219 Ct. Cl. 285, 310-311, 594 F.2d 804, 818 (1979) (en banc)). See also Porter v. United States, 163 F.3d 1304, 1318 (Fed. Cir. 1998) (“the quintessential military promotion question” is “whether it 'is unlikely that he \* \* \* would have been promoted in any event'”)(quoting Engel, 678 F.2d at 175), cert. denied, 528 U.S. 809 (1999). If the requisite error and nexus are shown, “the end-burden of persuasion shifts to the [Government] to show the 'harmlessness' of the error, that is, 'despite the plaintiff's prima facie case, there was no substantial nexus or connection.’” Cunningham, 39 Fed. Cl. at 693 (quoting Engels, 678 F.2d at 175); accord Bockoven v. Marsh, 727 F.2d 1558, 1563 (Fed. Cir.), cert. denied, 469 U.S. 880 (1984). As this Court recently explained, “[t]he ultimate determination of prejudicial error requires prediction about how an officer's record would appear to a promotion board in the absence of the errors, and a conclusion about whether the officer would have been promoted if his record was free of error.” Lindsay, 295 F.3d at 1261.

Thus, as a general matter, a service member or officer can not prevail upon a claim challenging a discharge after non-selection for promotion if the government can demonstrate that, notwithstanding the alleged error, he or she would not have been granted the promotion .

In Porter v. United States, *supra*, this Court, in *dicta*, “speculate[d],” “[w]ithout deciding,” that a harmless error analysis could not be used where a board decision involves “impermissible consideration of race, sex or religion.” Porter, 163 F.3d at 1321. This *dicta* manifested the same erroneous assumption that the Supreme Court reversed and repudiated (one year *after Porter*) in Texas v. Lesage – the assumption that procedural errors or policies that involved unconstitutional discrimination could not be subject to a causation/harmless error analysis. As explained by the Supreme Court, that assumption is patently “inconsistent with established precedent.” Texas v. Lesage, 528 U.S. at 20. Accordingly, the *dicta*/speculation from Porter should be rejected here.

**B. The Constitutional Test Of Causation Is Equally Applicable Here.**

1. The constitutional “test of causation” endorsed by the Court in Mt. Healthy and Texas v. Lesage is equally applicable to the present case. The facts of this case demonstrate that harmless error does exist with regard to a sizeable majority of the class plaintiffs.

Plaintiffs are the class of approximately 1,030 non-minority male officers who were not retained as a result of the decision of the 1992 Board. Like the plaintiff in Texas v. Lesage, plaintiffs here claim that the 1992 Board used instructions that

avored minorities and women. Like the lower court in Texas v. Lesage, they too argue that it is irrelevant whether or not the government would have rejected any or all of these 1,000 white male officers in a color and sex-blind process. Just as in Texas v. Lesage, however, “even if the government has considered an impermissible criterion in making a decision adverse to the[se plaintiffs], 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. at 20-21. Thus, the government must be permitted to “avoid liability by proving that it would have made the same decision without the impermissible” instruction. Id. at 21.

2. It is undisputed that, at most, only 341 women and minorities were retained by the 1992 Board. It is quite literally impossible that the entire class of 1,000 non-minority male officers were harmed by the allegedly unconstitutional procedures used by the 1992 Board. Even if all of the 341 slots that were given to women and minorities would have been given instead to the white-male candidates absent the challenged instructions, the Army still would have retained only 34 percent of the plaintiff class. Thus, even if this improbable worst case scenario is assumed,<sup>4</sup> it

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<sup>4</sup> This improbable outcome would assume that the file of each and every woman and minority considered by the 1992 Board was so inferior that each and every one of them would have been selected for early retirement. Or put another way, not one minority or female considered by the 1992 Board was worthy of retention.

(continued...)

would still remain true that 669 of the plaintiff class (approximately 65 percent of the class) would, nevertheless, have been selected for early retirement.

Under the Court of Federal Claims' rationale, even if one female or minority was retained as a result of the 1992 Board instructions, then all 1,030 white men who were not retained have the right to full back pay and benefits. That result is plainly untenable and cannot be squared with Texas v. Lesage. The proper course under controlling Supreme Court precedent for this hypothetical would be to identify the one white male who was most qualified, examine whether he was in fact more qualified than the one minority or woman selected, and, if he is, grant the relief to him. See, e.g., Pollard v. Grinstead, 741 F.2d 73, 76 (4th Cir. 1984). The same course should be followed here to identify which of the class members were in fact injured by the instructions at issue. Under Texas v. Lesage, it is legal error to rule in favor of the entire class here, if the government could show “that it would have made the same decision without the impermissible” instruction. See Texas v. Lesage, 528 U.S. at 21.

3. The intent of the harmless error rule is to allow the employer to avoid liability when it would have made the same decision, absent the constitutional

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<sup>4</sup> (...continued)

violation, and to avoid an undue windfall to a plaintiff who did not in fact suffer any injury from the alleged discriminatory conduct. Here, by conducting a new Board review on remand, examining the records (as they existed in 1992) of the white male officers in the pool and ranking them by merit, a harmless error analysis could, at a minimum, tell us which plaintiffs could not possibly have been retained even if all of the 341 minorities and women (the maximum number of persons who could have possibly benefitted from the instructions) were excluded from consideration. At most, an additional 341 white men would have been retained. There is no basis in law or equity for granting a windfall – a windfall costing the American taxpayer an estimated \$100 million – to the 669 remaining members of plaintiff class.

**C. The Court Of Federal Claim Erred In Holding That A Harmless Error Analysis Can Not Be Employed In The Military Employment Context.**

In holding that the harmless error doctrine does not apply in this context, the Court of Federal Claims relied primarily on Doyle v. United States, 599 F.2d 984, as amended, 609 F.2d 990 (Ct. Cl. 1979), cert. denied, 446 U.S. 982 (1980), and Dilley v. Alexander, 603 F.2d 914 (D.C. Cir. 1979), as clarified, 627 F.2d 407 (D.C. Cir. 1980). These cases, however, are distinguishable and do not preclude the use of the harmless error analysis in this context. Even if they could be read to support that position, however, they would be inconsistent with Texas v. Lesage and should be

reconsidered by this Court. See Texas American Oil Corp. v. U.S. Dept. of Energy, 44 F.3d 1557, 1561 (Fed. Cir. 1995) (en banc) (“This court applies the rule that earlier decisions prevail unless overruled by the court en banc, or by other controlling authority such as intervening statutory change or Supreme Court decision”).

1. In Dilley and Doyle, reserve officers successfully challenged their non-selections by promotions boards, and the resulting involuntary separations from the military. The plaintiffs in Dilley and Doyle contended, and the courts agreed, that the board was unlawfully constituted because it did not contain the statutorily-required minimum number of reserve officers serving as voting members. In addressing the issue of the remedy, the Court of Claims and the D.C. Circuit both ruled that because the selection boards were illegally composed, all of their promotion non-selections and resulting separations were void ab initio. Dilley, 627 F.2d at 411; 603 F.2d at 920-26; Doyle, 599 F.2d at 993-1001, 1004. The courts rejected the use of the relook boards and the application of the harmless error doctrine, and ruled that every claimant was entitled to retroactive reinstatement to active duty and back pay and related constructive service benefits. Dilley, 603 F.2d at 924-26; 627 F.2d at 409; Doyle, 599 F.2d at 998, 1001-1004. The courts explained that for some errors, such

as the improper composition of a jury or the bias of a judge, application of a harmless error test is not appropriate. Doyle at 995.<sup>5</sup>

The Court of Federal Claims erred in relying on Dilley and Doyle in this case. In those cases, the military review boards were illegally constituted, i.e., the boards did not contain the statutorily required number of officers. In such circumstances, the courts of appeals concluded that the separations were void ab initio rather than merely voidable. Because the separations were conducted by a body without statutory authority, the courts held, it was as if the separations had never occurred. See Dilley, 627 F.2d at 411 (“Appellants have never been lawfully discharged, so in the eyes of the law, they remain in service.”). See also Doyle, 500 F.2d at 993-1001. Because there was a “fundamental error \* \* \* affecting the composition of the deciding body,” the courts in Dilley and Doyle held that the errors “are not susceptible to review under the harmless error test.” Porter v. United States, 163 F.3d 1304, 1319 (Fed. Cir. 1998). See also Engels v. United States, 678 F.2d 173, 175 n.6 (1982) (“Where the error goes, not to the [Officer Effectiveness Reports] or the record, but to the

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<sup>5</sup> We note that the Doyle and Dilley decisions conflict with Jones v. Alexander, 609 F.2d 778 (5th Cir.), cert. denied, 449 U.S. 832 (1980). In Jones, the Fifth Circuit approved of the use of “relook” boards to determine which officers were in fact prejudiced by the same improperly constituted boards at issue in Dilley and Doyle.

composition of the selection board \* \* \*, the court has held the causal nexus (or, conversely, the 'harmless error') principle to be inapplicable”).

In contrast, here, unlike in Dilley and Doyle, there is no question of the Board’s proper makeup. The error regarding the instructions to the Board did not go to the composition of the Board, i.e., there was no question that the Board constituted a lawful entity empowered to retire individual officers. See Wolfe v. Marsh, 835 F.2d 354, 359 (D.C. Cir. 1987) (distinguishing Dilley where it was “undisputed that the proper individual officer made the final decision,” and noting that “[t]hus, this is not a challenge to the legal authority of the final decisionmaker qua final decisionmaker, as was the claim in Dilley”), cert. denied, 488 U.S. 942 (1988). Instead, the alleged error is procedural -- the consideration of unconstitutional factors -- and goes to the correctness of the Board's decision, not its legal authority to issue the decision. Even the Dilley and Doyle courts specifically noted the applicability of a harmless error analysis where the challenge lies in the legality of the procedures employed by a legally constituted military selection board, as is the case here. Dilley, 603 F.2d at 921-22 & n.16; Doyle, 599 F.2d at 995. Because the error here stems from the instructions, the Board's actions were not “void ab initio.” They were, as in Texas v. Lesage, merely “voidable” as to those persons who were in fact injured by the alleged illegality.

For example, if the individual who presides over a trial turns out not to be a judge at all but an imposter, the resulting judgment or conviction would have to be set aside without reference to harmlessness. Only judges may preside over trials; otherwise, it is not really a trial at all. Where the composition of a jury is at issue, the error may similarly defy harmless error analysis. But the Supreme Court has repeatedly held that the provision of an erroneous instruction to a jury, or a judge's mistake in applying the law to the facts, is subject to harmless error review in both criminal cases (even death penalty cases) and civil cases. *See, e.g., Clemons v. Mississippi*, 494 U.S. 738, 752-754 (1990) (unconstitutionally overbroad jury instructions at the sentencing stage of a capital case); *Satterwhite v. Texas*, 486 U.S. 249, (1988) (admission of evidence at the sentencing stage of a capital case in violation of the Sixth Amendment Counsel Clause); *Carella v. California*, 491 U.S. 263, 266 (1989) (jury instruction containing an erroneous conclusive presumption); *Pope v. Illinois*, 481 U.S. 497, 501-504 (1987) (jury instruction misstating an element of the offense); *Rose v. Clark*, 478 U.S. 570 (1986) (jury instruction containing an erroneous rebuttable presumption); *Crane v. Kentucky*, 476 U.S. 683, 691 (1986) (erroneous exclusion of defendant's testimony regarding the circumstances of his confession); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986) (restriction on a defendant's right to cross-examine a witness for bias in violation of the Sixth

Amendment Confrontation Clause); Rushen v. Spain, 464 U.S. 114, 117-118, and n. 2 (1983) (denial of a defendant's right to be present at trial); United States v. Hasting, 461 U.S. 499 (1983) (improper comment on defendant's silence at trial, in violation of the Fifth Amendment Self-Incrimination Clause); Hopper v. Evans, 456 U.S. 605, (1982) (statute improperly forbidding trial court's giving a jury instruction on a lesser included offense in a capital case in violation of the Due Process Clause); Kentucky v. Whorton, 441 U.S. 786, (1979) (failure to instruct the jury on the presumption of innocence); Moore v. Illinois, 434 U.S. 220, 232, (1977) (admission of identification evidence in violation of the Sixth Amendment Counsel Clause); Brown v. United States, 411 U.S. 223, 231-232 (1973) (admission of the out-of-court statement of a nontestifying codefendant in violation of the Sixth Amendment Counsel Clause); Milton v. Wainwright, 407 U.S. 371 (1972) (confession obtained in violation of Massiah v. United States, 377 U.S. 201 (1964)); Chambers v. Maroney, 399 U.S. 42, 52-53 (1970) (admission of evidence obtained in violation of the Fourth Amendment); Coleman v. Alabama, 399 U.S. 1, 10-11 (1970) (denial of counsel at a preliminary hearing in violation of the Sixth Amendment Confrontation Clause).

If a harmless error analysis can be used to determine whether a criminal defendant would have been convicted notwithstanding an allegedly unconstitutional jury instruction, then, a fortiori, such an analysis can be employed in the present context

to determine whether the plaintiffs would have been discharged or not absent the EO instructions (which the Court of Federal Claims found were biased in favor of women and minorities).

3. Contrary to the Court of Federal Claims' view, the fact that this case involves a constitutional claim does not preclude the application of the harmless error doctrine. As Justice Rehnquist has explained, “the [Supreme] Court has applied harmless-error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless.” Arizona v. Fulminante, 499 U.S. 279, 306 (1991). In both, Texas v. Lesage, supra, and Mt. Healthy City Board of Education v. Doyle, supra, the plaintiffs were asserting constitutional claims. The Supreme Court held in unambiguous terms that the governing constitutional principle was that the “government can avoid liability by proving that it would have made the same decision without the impermissible motive.” Texas v. Lesage, 528 U.S. at 21. The Court has also held that this principle applies with equal force to employment discharge claims. As discussed above, the Court in Mt. Healthy expressly embraced for improper discharge cases the “test of causation” applicable in other areas of constitutional law, “which distinguishes between a result caused by a constitutional violation and one not so caused.” Mt. Healthy, 429 U.S. at 286. The Court explained that the “constitutional principle at stake is sufficiently vindicated if such an

employee is placed in no worse a position than if he had not engaged in the conduct.” Id. at 285-286. Thus, the fact that plaintiffs here have raised a claim of sex and race discrimination in the retention process, provides no legal basis for refusing to apply these principles to the present case.

4. The Court of Federal Claims also held that Texas v. Lesage, 528 U.S. 18 (1999), was inapplicable because, “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 \* \* \*.” JA 37.

As an initial matter, the question of “whether the officer would have been promoted” and avoided discharge in the absence of a claimed error, is not without objective criteria. See Lindsay, 295 F.3d at 1261. The answer to this question is not mere speculation. Rather, it is a conclusion reached based “on the facts of the claimant's service record and the fact of the competitive selection process \* \* \*.” Ibid. Thus, as discussed above, this Court and the Court of Claims have long approved the use of a harmless error analysis in military discharge cases. See pp. 19-21, supra.

In any event, the harmless error inquiry is not, however, limited to cases where there is objective numerical proof of which candidates for a job or school admission

ranked higher. Courts routinely examine subjective evidence in rendering a harmless error/injury ruling. As noted above, it is used even in criminal cases to subjectively determine whether a jury instruction error actually caused any injury to the criminal defendant. Moreover, in Texas v. Lesage itself, the Court cited an affidavit of one of two members of the school's admissions committee that provided a negative subjective evaluation of “Lesage's personal statement” and his letters of recommendation (finding them to be “weak”). Texas v. Lesage, 528 U.S. at 19. Thus, subjective evaluations do not preclude the use of the harmless error/injury analysis.

The only limitation on the use of the harmless error/injury analysis is one of the quantum of proof. Where a plaintiff claims that he was fired based upon an unconstitutional policy, defendant must establish “by a preponderance of the evidence” that it would have reached the same decision even absent the policy in question. See Mt. Healthy, 429 U.S. at 287. See also Crawford-El v. Britton, 523 U.S. 574, 593 (1998). As the Court held in Texas v. Lesage, the government must be granted an opportunity to show by a preponderance of the evidence “that it would have made the same decision without the impermissible motive.” Texas v. Lesage, 528 U.S. at 21. Here, the government must be afforded that opportunity.

5. The Court of Federal Claims also tried to avoid application of the harmless error analysis by noting that “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.” JA 37. So, too, here, however, will the records of the plaintiffs as they existed in 1992 be reviewed and ranked by the reconstituted retirement board. This reconstructed process will place plaintiffs in the position as if the alleged discriminatory instructions had never been given. See Campbell v. Tennessee Valley Authority, 613 F.Supp. 611, 615 (E.D. Tenn. 1985) (“[t]he remedy which was afforded plaintiff was to reconduct the selection procedure free of the taint of unlawful employment discrimination. \* \* \* [T]his procedure fully remedied the injury the plaintiff had previously suffered”). This remedy grants the plaintiff class members a fair “opportunity to compete with other employees on an equal footing,” which is all they are “entitled to.” Ibid.

In a typical case, the trier of fact would rank the candidates and render a harmless error analysis to determine whether a plaintiff was injured by an unconstitutional policy or instruction used in a hiring or promotion process. See, e.g., Milburn v. West, 854 F. Supp. 1, 15 (D.D.C. 1994) (Title VII), aff'd, 1995 WL 117983 (D.C. Cir. 1995). In this context, however, a remand for the agency to conduct a reconstituted 1992 Board using proper instructions is the proper remedy.

See Pollard v. Grinstead, 741 F.2d at 76 (remanding a discrimination case to the agency and holding that “[e]valuation of these competing candidates for retroactive promotion and back pay was the agency's function, providing it made the choice without regard to race”). The court in this case is in essence reviewing the decision of an administrative body -- the 1992 Board. It is well established that a court “should remand a case to an agency for decision of a matter that statutes place primarily in agency hands.” INS v. Ventura, 123 S.Ct. 353, 355 (2002). Even in a military discharge case, “[w]hen a court finds error in a finding of an administrative body, this does not lead to automatic reversal. Reversal follows if the court has substantial doubt that the same result would have been reached if the questioned finding had not been made.” Denton v. Secretary of the Air Force, 483 F.2d 21, 28 (9th Cir. 1973), cert. denied, 414 U.S. 1146 (1974).

Congress has entrusted military selection, retention and promotion matters to the Secretaries of the Armed Forces, and has established a system of selection boards to rank the candidates. See 10 U.S.C. §§ 611, 638. See also 10 U.S.C. § 638a. In this context a “judicial judgment cannot be made to do service for an administrative judgment.” SEC v. Chenery Corp., 318 U.S. 80, 88 (1943). Thus, a court should not engage in “de novo inquiry into the matter being reviewed and \* \* \* reach its own conclusions based on such an inquiry.” Florida Power & Light Co. v. Lorion, 470

U.S. 729, 744 (1985). Rather, “the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.” Ibid.

Thus, in this context, it is wholly appropriate to defer to the military expertise in these matters and to permit a reconstituted Board to rank the candidates using the 1992 instructions (or the current equivalent), without the allegedly discriminatory EO portion thereof.

There can be no doubt that employing a reconstituted, properly instructed Board will provide a fair and constitutionally adequate remedy. As an initial matter, plaintiffs conceded below that a reconstituted Board could be used today. JA 833. They argued that the decision of the new Board should only apply to limit damages prospectively. Ibid. Thus, there is no question that a Board can be used to review the 1992 candidates for retention and can rank them to limit damages. The only question is whether the harmless error analysis will just limit damages prospectively, or will be used to determine which of the class members were in fact injured. Under Texas v. Lesage, the answer is clear. It is legal error under Texas v. Lesage to rule in favor of a plaintiff if an evaluation of their 1992 records demonstrates (in comparison with the other candidates) that he would not have been retained and would have been selected for discharge in any event. It is undisputable that at least 70 percent of the class here was not in fact injured by the objectionable 1992 EO instructions. Under

controlling Supreme Court precedent a court must afford the government the opportunity to demonstrate that these plaintiffs were in fact not injured.

Moreover, as the Court of Federal Claims itself noted, there is no dispute that the Secretary has the authority and "power to re-do the [1992] board." JA 813. Notably, Congress recently passed legislation, 10 U.S.C. § 1558, explicitly providing the remedy to be afforded in cases where a service member seeks to challenge an action or recommendation of a selection board. Previously, there have only been specific statutes providing for special selection board procedures for promotion selection boards. See 10 U.S.C. §§ 628, 14502. Under the new legislation, the Secretary may correct a service member's military records in accordance with a recommendation made by a special board. See 10 U.S.C. § 1558(a). The Judicial Review portion of the statute, 10 U.S.C. § 1558(f)(1), provides that a person is not entitled to judicial relief unless the action or recommendation has first been considered by a special board or the Secretary has denied the convening of such a board for such consideration.

The Court of Federal Claims and plaintiffs relied upon the fact that the new selection board statute was not made retroactive and does not apply directly to this

case.<sup>6</sup> We do not contend that the statute directly applies. That statute, however, confirms that a harmless error analysis with a reconstituted board can properly be used in this context. The notion embraced by the Court of Federal Claims -- that such “relook” Boards are inherently incompatible with military personnel policy, and cannot possibly provide a proper remedy for the use of an unconstitutional procedure – cannot be reconciled with the fact that if this case arose today plaintiffs would be essentially limited to a relook board remedy.

The new Board will establish, just as it does under the new statute, whether the plaintiff class members were in fact injured by the use of the EO instructions at issue. If they were not injured, it is clear legal error to rule in their favor and to place them in a better position than if the EO instruction had never been used. Law, logic and equity all compel the result that these plaintiff class members not be allowed to recover. That result is best reached by the use of a reconstituted Board on remand using proper instructions.

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<sup>6</sup> The applicable amendments to the statute “apply with respect to any proceeding pending on or after the date of the enactment of this Act [Dec. 28, 2001] without regard to whether a challenge to an action of a selection board of any of the Armed Forces being considered in the proceeding was initiated before, on, or after that date [Dec. 28, 2001].” Pub. L. No. 107-107, § 503(c).

## CONCLUSION

For the foregoing reasons, this Court should reverse the Court of Federal Claims July 10, 2001 ruling and should remand the matter for further proceedings.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

I hereby certify that, pursuant to Fed. R. App. 32(a)(7)(C) and Federal Circuit Rule 28(a)(14) and 32(b), the attached cross-appeal brief is proportionally spaced, has a typeface of 14 points or more and contains 8,587 words (which does not exceed the applicable 14,000 word limit).

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## **CERTIFICATE OF SERVICE**

I hereby certify that on November 19, 2002, I caused the foregoing “Brief for Appellant” to be served upon the Court by hand-delivery and upon the following counsel by Fed Ex overnight delivery:

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