No. 10-778C
(Judge Christine O.C. Miller)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

RICHARD COLLINS, individually
and on behalf of a class of all those
similarly situated,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

DEFENDANT'S MOTION TO DISMISS

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May 10, 2011

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RICHARD COLLINS, individually and on behalf of a class of all those similarly situated,	)	
Plaintiff,	)	No. 10-778C
	)	(Judge Christine O.C. Miller)
v.	)	
THE UNITED STATES,	)	
Defendant.	)	

DEFENDANT'S MOTION TO DISMISS

Pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of the United States Court of Federal Claims, defendant, the United States, respectfully requests that the Court dismiss the complaint of plaintiff, Richard Collins, for lack of subject matter jurisdiction or, in the alternative, for failure to state a claim.[1] As explained below, because Mr. Collins' complaint is founded upon a statute and regulation that are not money-mandating, the Court does not possess jurisdiction to entertain his complaint. In addition, Mr. Collins' claim is not justiciable because the decision to award separation pay is committed to the discretion of the Secretary of Defense. Moreover, even under the theory set forth in the complaint – that is, that the Court should strike allegedly unconstitutional provisions of the separation pay instruction – Mr. Collins' claim still fails because he cannot meet the conditions required for full separation pay. Thus, the complaint fails

[1] The United States makes this motion to dismiss for lack of jurisdiction because jurisdiction is a threshold issue to be resolved prior to the merits of the case. *Deponte Invs. v. United States*, 54 Fed. Cl. 112, 114 (2002) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998)). Further, for purposes of this motion, we assume that all of the facts in Mr. Collins' complaint are true. However, should the Court deny our motion, the United States reserves the right to challenge any of the facts alleged by Mr. Collins in his complaint, to assert other applicable defenses, and to move for judgment upon the administrative record.

as a matter of law.

STATEMENT OF THE ISSUES

1. Whether Mr. Collins' complaint should be dismissed for lack of subject matter jurisdiction because his claim is not founded upon a money-mandating statute or regulation.

2. In the alternative, whether Mr. Collins' claim is justiciable given that the decision to award separation pay rests upon the Secretary's discretion.

3. In the further alternative, whether Mr. Collins fails to state a claim upon which relief can be granted because, under 10 U.S.C. § 1174 and the implementing instructions, he is not entitled to full separation pay.

STATEMENT OF THE CASE

I. Legal Background

It is well-settled that "[a] soldier's entitlement to pay is dependent upon statutory right," *Bell v. United States*, 366 U.S. 393, 401 (1961), and that accordingly, the rights of the affected service members must be determined by reference to the statutes and regulations governing the pay sought – that is, the statute governing separation pay. Accordingly, we briefly set forth the statutory and regulatory basis for the separation pay Mr. Collins seeks.

Prior to 1991, regular enlisted military personnel were not eligible for separation pay. H.R. Rep. No. 101-665, at 135 (1990), *reprinted in* 1990 U.S.C.C.A.N. 2931, 2995. The 1991 National Defense Authorization Act, Pub. L. No. 101-510, § 501(a)-(d), 104 Stat. 1485, 1549-1550 (1990), made regular enlisted personnel with six or more but less than 20 years of active service eligible for separation pay. *Id.* The amendments to the separation pay program were adopted in response to Congress' perception that there would be substantial reductions in

force in the ensuing years. *Id.*

Thus, Section 1174 of title 10, United States Code, provides that regular officers, enlisted members and other members of the military may be entitled to separation pay if certain requirements are met. The statute provides that an enlisted service member like Mr. Collins "is entitled to separation pay . . . unless the Secretary determines that the conditions under which the member is discharged do not warrant payment of such pay." 10 U.S.C. § 1174(b), attached as Exhibit A. The statute further provides that "the amount of separation pay which may be paid to a member under this section is – (1) 10 percent of the product of (A) the member's years of service and (B) 12 times the monthly basic pay to which the service member was entitled at the time of discharge; or (2) one-half that amount. 10 U.S.C. § 1174(d). Under the statute, half separation pay may be provided "under criteria prescribed by the Secretary of Defense." *Id.* at § 1174(a)(2), (b)(2). The statute places no limitation upon the Secretary's discretion to prescribe such criteria.[2] *Id.*

In accordance with the statute, the Secretary of Defense set forth criteria for separation pay in Department of Defense Instruction ("DoDI") 1332.29, published in 1991, prior to the passage of the "Don't Ask, Don't Tell" ("DADT") policy, 10 U.S.C. § 654. The DoDI is attached as Exhibit B. Under DoDI 1332.29, members who may be entitled to half separation pay include those "not fully qualified for retention" due to "Homosexuality" (3.2.3.1.4). Further, DoDI 1332.29 instructed the Service Secretaries to develop implementing instructions. *Id.* at

[2] Congress did establish a specific "condition" for receiving separation pay, which is that any person who receives separation pay in any amount "shall be required to enter into a written agreement with the Secretary concerned to serve in the Ready Reserve of a reserve component for a period of not less than three years following the person's discharge or release from active duty." 10 U.S.C. § 1174(e)(1)(A).

4.3.2.

The Air Force implemented the guidance provided in DoDI 1332.29 in its own instruction, Air Force Instruction ("AFI") 36-3208, Administrative Separation of Airmen, which was updated after the passage of DADT. Chapter 9 of the AFI, entitled "Separation Pay," is attached as Exhibit C. To be eligible for full separation pay, the service member must not only be eligible for retention in the military, but must also meet certain other conditions. AFI, at 9.2. Specifically, to be eligible for full separation pay, the service member must either be denied reenlistment or continuation of active duty under an early release/date of separation rollback program or under a High Year of Tenure Policy or be involuntarily separated under a reduction in force program. *Id.* Mr. Collins failed to satisfy these conditions and received half separation pay pursuant to the AFI. Compl. ¶¶ 29, 36.

II. Factual And Procedural Background

On November 10, 2010, Mr. Collins, on behalf of himself and a class of allegedly similarly-situated individuals, filed suit in this Court. In his complaint, Mr. Collins alleges that the military provided half separation pay to him "solely because he is a gay man." Compl. ¶ 3. Mr. Collins asserts that, while he is not challenging the constitutionality of DADT, he is challenging the separation-pay instruction. Compl. ¶ 3. He alleges that this instruction violates the Constitution's guarantee of equal protection and substantive due process. Compl. ¶ 5. He asserts that, when the unconstitutional portions of the separation-pay instruction are severed from the administrative scheme, he and the class he represents would be entitled to full separation pay. Compl. ¶¶ 49, 57. Although Mr. Collins' complaint references both the DoD separation pay instruction and the AFI, he was discharged and granted half separation pay pursuant to the AFI

that implements the DoDI. Compl. ¶ 29. Mr. Collins asserts that this Court possesses jurisdiction to entertain his claims under 28 U.S.C. § 1491 (the Tucker Act), 10 U.S.C. § 1174 (the Separation Pay Act), and the DoD Instruction. Compl. ¶ 7.

ARGUMENT

I. Standard Of Review

"'Jurisdiction is a threshold issue and a court must satisfy itself that it has jurisdiction to hear and decide a case before proceeding to the merits.'" *Ultra-Precision Mfg., Ltd. v. Ford Motor Co.*, 338 F.3d 1353, 1356 (Fed. Cir. 2003) (quoting *PIN/NIP, Inc. v. Platte Chem. Co.*, 304 F.3d 1235, 1241 (Fed. Cir. 2002)). The plaintiff bears the burden of establishing jurisdiction by a preponderance of the evidence. *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936); *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988). "Determination of jurisdiction starts with the complaint, which must be well-pleaded in that it must state the necessary elements of the plaintiff's claim, independent of any defense that may be interposed." *Holley v. United States*, 124 F.3d 1462, 1465 (Fed. Cir. 1997).

When deciding a motion to dismiss based upon either lack of subject matter jurisdiction or failure to state a claim, this Court must assume that all undisputed facts alleged in the complaint are true and must draw all reasonable inferences in the plaintiff's favor. *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995). If a defendant challenges the jurisdiction of the Court, however, the plaintiff cannot rely merely upon allegations in the complaint, but must instead bring forth relevant, competent proof to establish jurisdiction. *McNutt*, 298 U.S. at 189.

The central provision granting consent to suit in this Court is the Tucker Act, 28 U.S.C. § 1491, which provides in relevant part that "[t]he United States Court of Federal Claims shall

have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any act of Congress or any regulation of an executive department[.]" 28 U.S.C. § 1491(a)(1). It is well established, however, that the Tucker Act does not create any substantive right enforceable against the United States for money damages. *United States v. Testan*, 424 U.S. 392, 398 (1976). "To invoke jurisdiction under the Tucker Act, a plaintiff must point to a substantive right to money damages against the United States." *James v. Caldera*, 159 F. 3d 573, 580 (Fed. Cir. 1998) (citing *Hamlet v. United States*, 63 F.3d 1097, 1101 (Fed. Cir. 1995)). In short, a Tucker Act plaintiff must assert a claim under a separate money-mandating provision that supports a claim for damages. *James*, 159 F.3d at 580. Absent a money-mandating statute or regulation (or a contract, which Mr. Collins does not allege), this Court lacks the power to grant relief, *Sanford v. United States*, 32 Fed. Cl. 363, 365 (1994), and the action must be dismissed pursuant to RCFC 12(b)(1) for lack of subject-matter jurisdiction.

A motion to dismiss pursuant to RCFC 12(b)(6) for failure to state a claim upon which relief can be granted is appropriate when the plaintiff's alleged facts do not entitle him to a remedy. *Godwin v. United States*, 338 F.3d 1374, 1377 (Fed. Cir. 2003). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted).

Finally, the military is entitled to significant deference in crafting and implementing its policies. *Murphy v. United States*, 993 F.2d 871, 873 (Fed. Cir. 1993) (recognizing that personnel decisions made by the military are entitled to deference). As the Supreme Court has

recognized, "judges are not given the task of running the Army." *Orloff v. Willoughby*, 345 U.S. 83, 93 (1953). Indeed, this Court is not established to rewrite military regulations so that one may then have a claim for presently due money. *See Nat'l Air Traffic Controllers Ass'n v. United States*, 160 F.3d 714 (Fed. Cir. 1998) ("It is not every claim involving or invoking the Constitution, a federal statute, or regulation which is cognizable here. The claim must, of course, be for money.") (quotations omitted). Rather, the money claimed must be presently due and payable. *United States v. King*, 395 U.S. 1, 3 (1969). Further, "[j]udicial deference must be 'at its apogee' in matters pertaining to the military and national defense." *Voge v. United States*, 844 F.2d 776, 779 (Fed. Cir. 1988). As the Supreme Court has explained, "[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments . . . ," and "[t]he ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973).

II. The Separation Pay Statute And Implementing Instructions Are Not Money Mandating

As an initial matter, the Court does not possess jurisdiction to entertain Mr. Collins' case because he has not identified a money-mandating statute or regulation. The statute at issue, 10 U.S.C. § 1174, is not money-mandating. Rather, it bestows broad authority upon the Secretary of Defense to determine the circumstances in which separation pay should be granted and the amount of any payment. Specifically, the statute provides that, for regular enlisted members who otherwise are eligible for separation pay, the service member is entitled to full separation pay "unless the Secretary concerned determines that the conditions under which the member is discharged do not warrant payment of such pay." 10 U.S.C. § 1174(b)(1). The statute further

provides that the service member shall be entitled to full separation pay, except "in the case of a member who is discharged under criteria prescribed by the Secretary of Defense." *Id.* § 1174(b)(2). Finally, the statute provides that "the amount of separation pay which *may* be paid" is either full separation pay or half separation pay. *Id.* § 1174(d) (emphasis added). Thus, by its express terms, the statute is not money-mandating but, rather, leaves to the Secretary the discretion whether to award any separation pay, the conditions under which such an award may be made, and, if such an award is made, whether the award should be full separation pay or half separation pay.

Similarly, the implementing Air Force Instruction does not mandate payment to Mr. Collins. Rather, it provides: "9.2. Full Separation Pay (Nondisability). Members involuntarily separated from [active duty] *may* be entitled to full separation pay . . . if they meet the criteria in paragraph 9.1 and the following conditions. . . ." AFI 36-3208, 9.2 (emphasis added). *See Doe v. United States*, 463 F.3d 1314, 1324 (Fed. Cir. 2006) ("There is a presumption that the use of the word 'may' in a statute creates discretion"). The AFI also provides that, in extraordinary cases, the Secretary may direct "that the member does not warrant separation pay." AFI 36-3208, 9.6.2. Thus, the AFI does not mandate the payment of any money to Mr. Collins, even if he were to fall within the category of service members who would be eligible to receive full separation pay (which, as explained below, he does not). The same is true of the DoDI. *See* DoDI 3.1 (stating that full separation pay "is authorized" for certain service members); *id.* 3.4.12 (stating that, in extraordinary cases, the Secretary may decide not to grant any separation pay).

Moreover, Mr. Collins' assertion that the statute and implementing instructions are money-mandating, as the Supreme Court has observed in a similar context, "would 'render

superfluous' 'many of the federal statutes – such as the Back Pay Act – that expressly provide money damages as a remedy against the United States in carefully limited circumstances.'" *Army & Air Force Exch. Serv. v. Sheehan*, 456 U.S. 728, 740 (1982) (quoting *Testan*, 424 U.S. at 404); *see also Smith v. Sec'y of Army,* 384 F.3d 1288, 1295 (explaining that Military Pay Act, 37 U.S.C. § 204, is money mandating in certain instances, because it "confers on an officer the right to pay of the rank he was appointed to up until he is properly separated from the service.").

Further, the money claimed must be presently due and payable. *King*, 395 U.S. at 3. This is not the case here because, as explained below, Mr. Collins asks the Court to make law and rewrite regulations, not interpret them. By doing so, Mr. Collins asks the Court to authorize the payment of money where Congress has not done so. The Court may not perform these legislative functions. *See Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 426 (1990) (holding that the Appropriations Clause of the Constitution prohibited the judiciary and executive branches from granting a money remedy that Congress has not authorized).

We recognize that this Court has held that 10 U.S.C. § 1174 is money mandating. *Siemietkowski v. United States*, 86 Fed. Cl. 193, 197 (2009); *Toon v. United States*, 96 Fed. Cl. 288, 300 (2010) (citing *Siemietkowski* for the proposition that "[s]ection 1174, which authorizes separation pay in specified cases, is a money-mandating statute."). *But see Young v. United States*, 92 Fed. Cl. 425, 436 n.10 (2010) (declining to reach issue whether 10 U.S.C. § 1174 is money-mandating). We respectfully disagree. As non-binding precedent, these cases are only as persuasive as their reasoning. Neither *Siemietkowski* or *Toon* provided analysis of whether the statute is money-mandating. Further, these cases did not involve a situation where the service member alleged that he or she received half separation pay, but should have received full

separation pay.

Further, in *Samish Indian Nation v. United States*, 419 F.3d 1355, 1364 (Fed. Cir. 2005), the Court of Appeals for the Federal Circuit held that "certain discretionary schemes also support claims within the Court of Federal Claims jurisdiction." "These include statutes: (1) that provide 'clear standards for paying' money to recipients; (2) that state the 'precise amounts' that must be paid; or (3) as interpreted, compel payment on satisfaction of certain conditions." *Id.* By its plain language, the statute at issue does not provide any standard for payment of money but, rather, leaves that decision to the Secretary; does not state the precise amount that must be paid but, again, leaves to the Secretary the determination of whether separation pay should be paid and, if so, the amount of such pay; and does not compel payment based upon certain conditions but, instead, specifically leaves to the Secretary the decision regarding the conditions upon which payment may be made. 10 U.S.C. § 1174.

Accordingly, this Court does not possess jurisdiction to entertain Mr. Collins' claim.

III. Mr. Collins' Claim Is Not Justiciable

"Even if a court possesses jurisdiction to hear a claim, when that claim presents a nonjusticiable controversy, the court may nevertheless be prevented from asserting its jurisdiction." *Roth v. United States*, 378 F.3d 1371, 1385 (Fed. Cir. 2004). A claim is justiciable where "the duty asserted can be judicially identified and its breach judicially determined, and . . . protection for the right can be judicially molded." *Baker v. Carr*, 369 U.S. 186, 198 (1962). In other words, "judicial review is only appropriate where the Secretary's discretion is limited, and Congress has established 'tests and standards' against which the court can measure his conduct." *Murphy*, 993 F.2d at 873 (citing *Sargisson v. United States*, 913 F.2d 918, 922 (Fed. Cir. 1990)).

A determination of justiciability is also dependent upon the court's "ability to supply relief." *Adkins v. United States*, 68 F. 3d 1317, 1322 (Fed. Cir. 1995) (quoting *Murphy*, 993 F.2d at 872).

Even if the Court possessed jurisdiction to entertain this case, it cannot assert that jurisdiction here because this case is not justiciable. Neither the statute or the AFI contain "tests and standards" against which the Court may weigh the Secretary's conduct. *Murphy*, 993 F.2d at 873. Rather, as explained above, they leave to the Secretary's discretion whether to grant separation pay and, if so, how much pay. *See Roth*, 378 F.3d at 1385 (emphasizing that the Court should be particularly cautious of finding that a case is justiciable "because of the admonition against court interference with military matters."). This case is simply another of the "thousands of [ ] routine personnel decisions regularly made by the services which are variously held nonjusticiable or beyond the competence or the jurisdiction of courts to wrestle with." *Murphy*, 993 F.2d at 873 (quoting *Voge*, 844 F.2d at 780).

IV. Mr. Collins Has Not Stated A Claim Because He Is Not Entitled To Full Separation Pay

In the alternative, Mr. Collins' complaint should be dismissed because he has failed to state a claim upon which relief can be granted. Mr. Collins does not fall within the category of service members eligible for full separation pay, even under the theory set forth in his complaint. *See Fisher v. United States*, 402 F.3d 1167, 1175-76 (Fed. Cir. 2005) (*en banc*) (holding that where the Court of Federal Claims found jurisdiction because the plaintiff identified a money-mandating source for his claim, "the consequence of a ruling by the court on the merits, that plaintiff's case does not fit within the scope of the source, is simply this: plaintiff loses on the merits for failing to state a claim on which relief can be granted").

As an initial matter, there can be no dispute that, under the statute, AFI, and DoDI as

written, Mr. Collins is not eligible for full separation pay. Rather, he falls within the category of service members who could receive half separation pay.[3] In an effort to avoid this, Mr. Collins alleges that, if certain portions of the separation-pay instruction are unconstitutional, and if those portions are severed from the administrative scheme, he would be entitled to full separation pay. *See* Compl. ¶ 57 ("Once the unconstitutional portions of the separation-pay policy have been severed from the administrative scheme, 10 U.S.C. § 1174 and the remainder of DoD Instruction No. 1332.29 entitle Plaintiff and the Class to a monetary award of full separation pay.").

Mr. Collins is simply incorrect as both a factual and legal matter. As noted above, the Court cannot award a money judgment that varies from the conditions set forth by Congress. *See Richmond*, 496 U.S. at 426 (holding that the Appropriations Clause of the Constitution prohibited the judiciary and executive branches from granting a money remedy that Congress has not authorized). Accordingly, the Court may not strike portions of the statute or regulation.

Further, with respect to the statute, there is nothing to strike or sever that would entitle him to full separation pay, because the statute leaves the decision of whether to award separation pay to the Secretary of Defense. 10 U.S.C. § 1174.

Mr. Collins fares no better with respect to the administrative scheme under which he was discharged and received half separation pay. Put simply, even if the Court were to strike or sever the allegedly unconstitutional portions of the AFI or DoDI, Mr. Collins would still not be entitled

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[3] On December 22, 2010, the President signed legislation providing for the repeal of DADT, effective 60 days after the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff certify that the government has made the preparations necessary for that repeal. *See* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010) (Repeal Act). DADT was the law at the time Mr. Collins was awarded half separation pay, and Mr. Collins was, therefore, ineligible for full separation pay.

to full separation pay. Mr. Collins appears to focus on the requirement that service members receiving full separation pay be "fully qualified for retention." Compl. ¶¶ 37-38. Specifically, he targets the provision that allegedly disqualifies service members "because of [h]omosexuality." Compl. ¶ 37. Mr. Collins, however, fails to recognize the further complexity of the administrative scheme.

The AFI provides that, to be eligible for full separation pay, the service member must meet the following conditions:

> 9.2. Full Separation Pay (Nondisability). Members involuntarily separated from [active duty] may be entitled to full separation pay . . . if they meet the criteria in **paragraph 9.1** and the following conditions:
>
> > 9.2.1. The member's characterization of service is "honorable" and the member [is] fully qualified for retention, but is being involuntarily separated by denial of reenlistment or continuation on [active duty] under one of the following specific conditions:
> >
> > > 9.2.1.1. Member is denied reenlistment under an Early Release/Date of Separation rollback program.
> > >
> > > 9.2.1.2. Member is denied reenlistment under High Year of Tenure (HYT) policy. This applies only to the E-4 HYT program since members have 20 years or more of service in all other HYT programs.
> > >
> > > 9.2.1.3 Member is being involuntarily separated under a reduction in force program.

AFI 36-3208, 9.2.

Similarly, to be eligible for full separation pay under the DoDI, Mr. Collins must (among other conditions) meet the following:

> 3.1.3. The Service member is being involuntarily separated by the Military Service concerned through either the denial of reenlistment or the denial of continuation on AD or full-time National Guard duty, under one of the

following specific conditions:

> 3.1.3.1. The member is fully qualified for retention, but is denied reenlistment or continuation by the Military Service concerned. This includes a Service member who is eligible for promotion as established by the Secretary of the Military Department concerned, but is denied reenlistment or continuation on AD by the Military Service concerned under established promotion or high year of tenure policies.
>
> 3.1.3.2. The member is fully qualified for retention and is being involuntarily separated under a reduction in force by authority designated by the Secretary of the Military Department concerned as authorized under 10 U.S.C (reference (d)).
>
> 3.1.3.3. The member is a Regular officer, commissioned or warrant, who is being separated under Chapter 36 or Section 564, 1165, or 6383 of reference (d); a Reserve commissioned officer, other than a commissioned warrant officer, separated or transferred to the Retired Reserve under Chapters 361, 363, 573, 861, or 863 of reference (d); or a Reserve commissioned officer on the AD list or a Reserve warrant officer who is separated for similar reasons under Service policies.
>
> 3.1.3.4. The member, having been denied reenlistment or continuation on AD or full-time National Guard duty by the Military Service concerned under subparagraphs 3.1.3.1. through 3.1.3.3., above, accepts an earlier separation from AD.

Thus, even under the theory set forth in his complaint, Mr. Collins would not be entitled to full separation pay unless the portions of the AFI and DoDI that require that the service member be "fully qualified for retention" were stricken. Yet even this would be insufficient because, not only is Mr. Collins not fully qualified for retention, he also does not fall within the remainder of the AFI or DoDI. That is, he was not denied reenlistment under an early release/date of separation rollback program; he was not denied reenlistment under established

promotion or high year of tenure policies;[4] and he was not involuntarily separated under a reduction in force program. Mr. Collins was also not a Regular officer or a Reserve commissioned officer (*see* DoDI 3.1.3.3), and he did not accept an earlier separation from active duty (*see* DoDI 3.1.3.4).

Put simply, even if the provision requiring that he be fully qualified for retention were removed, Mr. Collins still would not be entitled to full separation pay. What Mr. Collins really asks is that the Court entirely rewrite the Air Force's instruction (and the DoDI) so that he would fall within the group of service members who are entitled to full separation pay.

Even if the Court were not precluded from striking portions of the statute or regulation to provide for a monetary payment to Mr. Collins, other caselaw (which predates *Richmond*, 496 U.S. at 426) offers no support for a wholesale revision of a military instruction and makes clear that Mr. Collins' claim should be dismissed. In *Gentry v. United States*, 546 F.2d 343 (Ct. Cl. 1976), this Court's predecessor, the United States Court of Claims, held that it possessed jurisdiction to strike out an unconstitutional provision of a statute if the statute would, after the unconstitutional provision is removed, be money-mandating. The Court explained that "[i]n the present case, plaintiff asks us to do no more than [prior precedent states] we could and must do – read the relevant statute and award whatever payment it grants, omitting from our interpretation of its effect any constitutionally void provision contained in it." *Id.* at 346. The Court went on to explain, however, that the Court's role was limited – that is, while the Court could sever the unconstitutional portions of the statute, the Court would not rewrite the statute to provide for

[4] The AFI reasonably has interpreted the language in DoDI 3.1.3.1 to mean that the service member must be denied reenlistment or continuation on active duty under high year of tenure policies. *See* AFI 9.2.1.2.

payment to plaintiff. "Obviously, for plaintiff's claim to succeed, the remaining provisions must be able to stand, giving rise to plaintiff's entitlement to benefits. . . If the [unconstitutional] requirement is not separable from the other language of the statute, this court has no jurisdiction to grant recovery to plaintiff, whether the requirement is constitutional or not." *Id.* at 347. Though the Court in *Gentry* struck an offending provision from a money-mandating statute, to extend this power to permit the revision of military instructions would run afoul of the deference afforded to the military in crafting and implementing its policies. *See Murphy,* 993 F.2d at 873. Moreover, even if *Gentry* did provide the authority to strike provisions from military instructions, it makes clear that the Court may not sever the "fully qualified for retention" requirement and rewrite the remainder of the AFI.[5] Put simply, Mr. Collins still would not qualify for full separation pay even if one were to sever the "fully qualified for retention" requirement.

Finally, as noted in his complaint, Mr. Collins was discharged under DADT for engaging in homosexual conduct. In his complaint, he specifically states that he is not challenging the DADT statute. Accordingly, he is plainly ineligible for retention in the military and, therefore, would not qualify for full separation pay.[6] Indeed the AFI does not limit half separation pay simply to those who engage in "Homosexual Conduct," but, rather, provides that half separation pay may be awarded to service members who are discharged in the interests of national security;

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[5] *Gentry* held that the Court does not possess jurisdiction to consider such a claim. More recent precedent from the Court of Appeals indicates that, if the plaintiff does not fall within the class of individuals who would be entitled to payment, the complaint should be dismissed for failure to state a claim. *See Fisher*, 402 F.3d at 1175-76 ("the consequence of a ruling by the court on the merits, that plaintiff's case does not fit within the scope of the source, is simply this: plaintiff loses on the merits for failing to state a claim on which relief can be granted").

[6] If the Court denies this motion to dismiss, we reserve the right to argue that Mr. Collins waived any right to challenge the decision to award him half separation pay.

members discharged for "Drug Abuse Treatment Failure;" members discharged for "Alcohol Abuse Treatment Failure;" and "Involuntary Convenience of the Government Separations" (such as service members with parental responsibilities that interfere with service). AFI, at 9.3.

In sum, under the theory set forth in his complaint, Mr. Collins is not entitled to full separation pay under the statute or implementing instructions. His complaint should be dismissed.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court grant our motion to dismiss and dismiss plaintiff's complaint with prejudice.

Respectfully submitted,

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May 10, 2011

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CERTIFICATE OF FILING

I hereby certify under penalty of perjury that on the 10th day of May, 2011, a copy of the foregoing "Defendant's Motion to Dismiss" was filed electronically. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/L. Misha Preheim