Golden Gate University Law Review

Volume 13
Issue 1 *Ninth Circuit Survey*

Article 12

January 1983

Federal Practice and Procedure

Craig A. Burnett

Susan Shors

Richard B. Shikman

FEDERAL PRACTICE AND PROCEDURE

JUDICIAL REVIEW OF INTERNAL MILITARY DECISIONS: THE NINTH CIRCUIT ADOPTS *MINDES* AND *ECONOMOU*

A. INTRODUCTION

In *Wallace v. Chappell*,[1] the Ninth Circuit adopted the *Mindes*[2] standard for judicial reviewability of internal administrative military decisions. The court held that violations of military personnel's "recognized"[3] constitutional rights, arising from internal military decisions, entitles them to a district court determination of whether such claims can be judicially reviewed. Once found reviewable, the military official charged will generally[4] enjoy qualified immunity for acts performed in good faith. Before seeking judicial review, plaintiffs must also demonstrate exhaustion of available intraservice remedies.[5]

This action originated when five black enlisted men charged their superior officers with racial discrimination. The complaint alleged that the defendants had assigned plaintiffs to the least desirable duties, had excluded them from training programs, had given them low performance evaluations, and had excessively punished them for minor transgressions. Plaintiffs claimed viola-

---

1. 661 F.2d 729 (9th Cir. 1981) (per Fletcher, J.; the other panel members were Goodwin, J., and Hug, J.), *cert. granted*, 103 S. Ct. 486 (1982).

2. Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971).

3. "Recognized", as a qualification upon the *Mindes* test was established in Calhoun v. United States, 475 F. Supp. 1 (S.D. Cal. 1977), *aff'd*, 604 F.2d 647 (9th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980). The *Calhoun* court used this term because many so-called "constitutional violations" are nothing more than ordinary torts to which state tort law or the Federal Tort Claims Act applies. 475 F. Supp. at 5. *See, e.g.*, Paul v. Davis, 424 U.S. 693 (1976); Feres v. United States, 340 U.S. 135 (1950).

4. The term "generally" is used here because, as the court observed, the possibility of absolute immunity exists if the official charged can demonstrate performance of "special functions". 661 F.2d at 735. *See* Butz v. Economou, 438 U.S. 478, 508 (1978). *See also* text accompanying notes 65-71 *infra*.

5. 661 F.2d at 738.

tions of both the equal protection component of the fifth amendment due process clause[6] and 42 U.S.C. section 1985(3).[7]

The district court held that internal military decisions are nonreviewable; that defendants' absolute immunity protected them from liability even if reviewable; and, that plaintiffs had failed to exhaust administrative remedies. The Ninth Circuit reversed, distinguishing the two basic substantive issues presented: judicial reviewability of internal military decisions, and official immunity if found reviewable.[8] The court observed that if the military decision involved is found nonreviewable, the immunity issue is moot.[9] If the military decision is found reviewable, however, the immunity question arises only when an individual officer is, as here, sued for money damages.[10] After determining that the instant action satisfied both substantive questions, the case was remanded to the district court for reconsideration to determine whether plaintiffs' claims satisfied the *Mindes* standard.

---

6. *Id.* at 730 n.1. Technically, the constitutional violation for which the officers were charged was fifth amendment due process. The reason plaintiffs did not sue under the fourteenth amendment was that, heretofor in damage suits, only alleged violations of the fourth and fifth amendments have been recognized. *See supra* note 3, *infra* note 10.

7. 42 U.S.C. § 1985(3) (1981) provides in pertinent part:

> If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory, the equal protection of the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

8. 661 F.2d at 731.

9. *Id.* at 734.

10. The question arises whether the type of injury sustained by plaintiffs is normally compensable in damages. *See* Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), in which the Supreme Court held that an aggrieved party may bring a damages action against federal officials based directly on violations of the fourth amendment. *Bivens* was extended to fifth amendment equal protection claims in Davis v. Passman, 442 U.S. 228 (1979).

Because of the Ninth Circuit's holding, the court did not rule on the exhaustion issue, but stated that upon remand, plaintiffs must demonstrate that they had exhausted available intraservice remedies before trial could proceed.[11]

B. BACKGROUND

Reviewability

The starting point for considering the question of judicial reviewability of administrative decisions is *Orloff v. Willoughby*,[12] where the Supreme Court held that it had no power to review a military determination regarding duty assignments.[13] The *Willoughby* opinion expressed the basic policy concerns behind the doctrine of nonreviewability. In a frequently quoted passage, the Court stated:

> [J]udges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. . . . Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.[14]

The *Willoughby* rule[15] illustrates two widely held policy concerns present in the nineteenth and first half of the twentieth centuries. Primarily, the rule represents the principle of sep-

---

11. 661 F.2d at 738.

12. 345 U.S. 83 (1953). The *Willoughby* case arose out of the doctor shortage during the Korean War. Orloff, a doctor who had been inducted under the Doctor's Draft Law, Universal Military Training and Service Act, 50 U.S.C. App. § 454(i) (1981), brought a habeas corpus action to require assignment to medical duties which the Army refused because of Orloff's unwillingness to answer questions regarding his previous affiliation with the Communist Party.

13. 345 U.S. at 91. The Court's decision was stated in absolute terms: "[I]t is not within the power of this Court by habeas corpus to determine whether specific assignments to duty fall within the basic classification of petitioner . . . . [W]e have found no case where this Court has assumed to revise duty orders as to one lawfully in the service." *Id.* at 93-94.

14. *Id.*

15. The doctrine of nonreviewability for administrative military decisions will hereinafter be referred to as the "*Willoughby* rule". For an excellent discussion on the pre-*Mindes* doctrine of nonreviewability, see Montgomery, *God, The Army and Judicial Review: The In-service Conscientious Objector*, 56 CALIF. L. REV. 379 (1968).

aration of powers. In 1857, in *Dynes v. Hoover*,[16] the Supreme Court held that under Articles I and II of the Constitution,[17] military courts were agencies of the Executive and Legislative branches, not the Judiciary.[18]

The second underlying policy concern was the necessity of military autonomy to maintain internal discipline and order. In the 1840 case of *Decatur v. Paulding*,[19] the Supreme Court stated: "The interference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief . . . ."[20]

Considering the well established "hands off" attitude of the federal judiciary, it becomes easier to understand why the courts have been reluctant to review military decisions. This attitude was crystallized in the *Willoughby* decision.

Since *Willoughby* however, this crystallization has steadily eroded, and the courts have become more willing to review military decisions. In *Harmon v. Brucker*,[21] the Supreme Court dramatically departed from the *Willoughby* rule. The *Harmon* Court held that the federal courts do have jurisdiction to review administrative discharge actions to determine whether the Secretary of the Army has acted in excess of his statutory authority.[22] The Court stated: "Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers."[23] Although

---

16. 61 U.S. (20 How.) 65 (1857).

17. U.S. CONST. art. II, § 2 provides: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual Service of the United States . . . ." U.S. CONST. art. I, § 8 empowers the Congress "To declare War . . . ; To raise and support Armies . . . ; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces . . . ."

18. "[C]ivil courts have nothing to do [with military courts], nor are they in any way alterable by them." 61 U.S. (20 How.) at 82. For a more detailed discussion of this concept, see Barker, *Military Law—A Separate System of Jurisprudence*, 36 U. CIN. L. REV. 223 (1967).

19. 39 U.S. (14 Pet.) 497 (1840).

20. *Id.* at 515. *See also* United States v. Eliason, 41 U.S. (16 Pet.) 291 (1842), in which the Supreme Court unanimously held that it is not the prerogative of the federal courts to review the validity of Army regulations.

21. 355 U.S. 579 (1958).

22. *Id.* at 582.

23. *Id.* at 581-82. The Court relied on American School of Magnetic Healing v.

this decision involved a discharge action, it opened the door to judicial intervention, thereby enlarging the court's scope of reviewability of military actions.

But before judicial intervention in non-discharge administrative actions could be justified, review of discharge actions required greater development. The link between discharge and non-discharge determinations was provided in *Hammond v. Lenfest*,[24] in which the Second Circuit held that a serviceman is entitled to a federal court review of a military administrative decision concerning a request for discharge.[25] Even though this holding was restricted to its facts, it has been applied by analogy in at least one non-discharge case, *Smith v. Resor*.[26] In that case, the court held that plaintiff was entitled to review of unsatisfactory attendance ratings.[27]

With regard to military decisions concerning orders, duty assignments, personnel status and other non-discharge administrative determinations however, the *Willoughby* rule was still closely followed. It was not until *Mindes v. Seaman*[28] that there came a true break with the tradition of *Willoughby*.

The two-part *Mindes* test provides a standard by which a trial court may consider the relevant factors to determine whether the particular claim warrants judicial review. Initially, a military decision is nonreviewable unless plaintiff alleges: (1) a violation of a constitutional right, applicable statute, or military regulation, and, (2) the exhaustion of available intraservice remedies.[29]

McAnnulty, 187 U.S. 94 (1902). The *McAnnulty* decision—a major departure from *Dynes* and *Decatur*—held that, in the absence of statutory prohibition, an administrative determination is reviewable. *Id.* at 108. *See supra* text accompanying notes 16-20.

24. 398 F.2d 705 (2d Cir. 1968). Hammond, a Navy reservist, filed for a conscientious objector discharge which was denied. He then applied for a writ of habeas corpus in the district court which was also denied, the court claiming lack of jurisdiction. The Second Circuit reversed.

25. *Id.* at 715.

26. 406 F.2d 141 (2d Cir. 1969).

27. *Id.* at 146-47.

28. 453 F.2d 197 (5th Cir. 1971). Mindes, an Air Force captain, received an unfavorable and erroneous Officer Effectiveness Report which resulted in his separation from active duty. After exhausting available intraservice remedies, ending in denial of relief, he sought correction in the district court. *Id.* at 198.

29. *Id.* at 201; *Wallace*, 661 F.2d at 732.

The second step requires that the trial court weigh four factors to determine whether review should be granted:

(1) The nature and strength of plaintiff's claim. As the *Mindes* Court recognized, constitutional claims generally carry greater weight than statutory or regulatory claims. But even constitutional claims can vary widely, and tenuous constitutional challenges should be weighed against review.[30]
(2) The potential injury to plaintiff if review is refused.[31]
(3) The extent of interference with military functions. Some degree of interference will always exist, but this fact alone should not bar review. If however, the extent of interference should seriously impede the ability of the military to perform its functions, then review should be denied.[32]
(4) The extent to which military expertise or discretion is involved. In such matters as promotions and orders directly related to military functions, deference should be given to the superior knowledge of the military.[33]

The *Mindes* test had been applied although not expressly adopted by the Ninth Circuit prior to *Wallace*. In *Schlanger v. United States*,[34] the Ninth Circuit affirmed a district court decision which, after applying the *Mindes* test, denied review and dismissed the complaint on other grounds. In *Glines v. Wade*,[35] the court recognized that the test had been considered in *Schlanger*, and that if it was controlling, plaintiff would satisfy it.

Immunity

An issue separate from reviewability is that of official immunity. The Ninth Circuit in *Wallace* was careful to distinguish

30. 453 F.2d at 201.
31. *Id.*
32. *Id.*
33. *Id.* at 201-02.
34. 586 F.2d 667 (9th Cir. 1978), *cert. denied*, 441 U.S. 943 (1979). The Ninth Circuit recognized the potential applicability of *Mindes* in *Schlanger*, but rejected the test because the same result could be reached by denying review of all military decisions involving duty assignments. *See* 661 F.2d at 733 n.4; *Cf.* Arnheifer v. Chafee, 435 F.2d 691 (9th Cir. 1970).
35. 586 F.2d 675 n.4. (9th Cir. 1978), *rev'd on other grounds sub nom.* Brown v. Glines, 444 U.S. 348 (1980).

between the two issues since the immunity issue becomes relevant only after the action has been found reviewable.[36] The question of official immunity has arisen in various contexts,[37] thus it was often difficult for the courts to ascertain whether greater immunity protected one but perhaps not another official. This question has been largely answered by the Supreme Court decision of *Butz v. Economou*,[38] which held that federal officials exercising discretion enjoy only qualified immunity from liability for constitutional violations.[39]

To appreciate better the *Economou* decision however, a discussion of the history preceding it is necessary. The Supreme Court's first opportunity to consider the question of sovereign immunity[40] came in 1896 in *Spalding v. Vilas*.[41] The traditional rationale behind sovereign immunity was that the authority empowered with making the law should not, without its consent, be subject to the legal rights created by it.[42] The Court granted to the Postmaster General absolute immunity while acting within the scope of his authority.[43]

The notion of sovereign immunity became further engraved into the common law in *Feres v. United States*.[44] This case

36. 661 F.2d at 734.

37. *See, e.g.*, Gibson v. Reynolds, 172 F.2d 95 (8th Cir.), *cert. denied*, 337 U.S. 925 (1949) (state Director of Selective Service and local Draft Board members immune); Laughlin v. Rosenman, 163 F.2d 838 (D.C. Cir. 1947) (Special Counsel to President and Special Assistant to the Attorney General immune from malicious prosecution); Glass v. Ickes, 117 F.2d 273 (D.C. Cir. 1940), *cert. denied*, 311 U.S. 718 (1941) (Secretary of Interior immune from defamation suit); Lang v. Wood, 92 F.2d 211 (D.C. Cir. 1937) (Attorney General, parole board, warden and director of prison immune from liability for denial of hearing by entire parole board and plaintiff's subsequent imprisonment because of parole revocation).

38. 438 U.S. 478 (1978).

39. *Id.* at 500-01.

40. Sovereign immunity is a common law principle which protects governmental entities from suit without their consent. It is absolute and defeats a suit at its inception for lack of jurisdiction. *See, e.g.*, High-Grade Oil Co. v. Sommer, 295 N.W.2d 736, 737, 739 (1980).

41. 161 U.S. 483 (1896). The Postmaster General was sued for defamation for maliciously distributing a circular to injure plaintiff's business. The Court found that the circular was factually accurate and was issued within the scope of the official's authority. *Id.* at 499.

42. *See, e.g.*, Kawanannakoa v. Polyblank, 205 U.S. 349 (1907) (sovereign is exempt from suit because there can be no legal right as against the authority that makes the law on which the right depends).

43. *Spalding*, 161 U.S. at 499.

44. 340 U.S. 135 (1950).

arose after the passage of the Federal Tort Claims Act,[45] which allowed private citizens to seek relief from the United States for torts committed against them by government officials. The *Feres* Court recognized that the purpose of the Act was to help "mitigate unjust consequences of sovereign immunity from suit."[46] But the Court found that the Act was not intended to extend to military personnel for torts committed against them by their superiors,[47] thereby creating a military exception to liability.

The *Feres* Court offered several justifications for its rule of absolute immunity. Primarily, it believed that a comprehensive system of relief already existed which adequately provided for wrongs committed against military and naval personnel.[48] The Court observed further that while acting in the line of duty, a military official should not be held accountable for injuries which might occur incident to service.[49] Finally, the Court found persuasive the fact that states generally do not permit members of the state militia to maintain tort actions for injuries suffered incident to service.[50]

Courts have approached the question of immunity for federal officials exercising discretionary functions[51] with great trepidation. The fundamental theory of erring on the side of providing too much protection rather than not enough has evidenced itself repeatedly in federal court decisions. The Supreme Court decision of *Barr v. Matteo*[52] is no exception. One important aspect evidencing the embryonic trend away from absolute immunity lies in the fact that the *Barr* decision was reached by a plurality, rather than a majority. Nevertheless, the Court granted

45. Federal Tort Claims Act, 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671, 2672, 2674-80 (1976 & Supp. 1982).

46. 340 U.S. at 139.

47. *Id.* at 140.

48. *Id.*

49. *Id.* at 144.

50. *Id.* at 142.

51. A discretionary function generally is one involving judgment, planning or policy decisions. *See, e.g.*, Jackson v. Kelly, 557 F.2d 735, 737 (10th Cir. 1977); Estrada v. Hills, 401 F. Supp. 429, 436 (N.D. Ill. 1975). *See also* Ove Gustavson Contracting Co. v. Floete, 299 F.2d 655, 659 (2d Cir. 1962) in which the Second Circuit stated that the test for discretion is: "was the act complained of the result of a judgment or decision which it is necessary that the governmental official be free to make without fear or threat of vexatious or fictitious suits and alleged personal liability?"

52. 360 U.S. 564 (1959).

absolute immunity from suit to a lower echelon federal executive official exercising discretion, for defamation committed while acting within the outer perimeter of his authority, and with malicious motives.[53]

Absolute immunity for common law torts was extended to military officials as well in *Barr*'s companion case, *Howard v. Lyons*.[54] In that case, the Supreme Court granted absolute immunity to a Navy captain exercising discretionary functions, because his actions were performed in the "discharge of [his] . . . official duties."[55]

Although absolute immunity was granted to federal officials for alleged common law torts, the same was not necessarily true for alleged constitutional violations. In *Dinsman v. Wilkes*,[56] the Supreme Court allowed only qualified immunity from liability in connection with an internal military decision. In this century, the landmark case concerning alleged constitutional violations by federal officials is *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.[57] In *Bivens*, the Supreme Court held that the FBI's violation of a person's fourth amendment rights could be compensated with damages.[58] A cause of action therefore exists against federal officials for deprivation of constitutional rights. Although the Supreme Court did not rule on the immunity question, on remand the Second Circuit held that the agents were entitled only to a qualified immunity when acting in good faith and with a reasonable belief in the legality

---

53. *Id.* at 572-75. In *Barr*, the acting Director of the Federal Office of Rent Stabilization was sued by its employees for defamatory statements. In a strong dissent, Justice Brennan criticized the majority for its lack of justification on this ruling which deprived private citizens of any opportunity to seek redress. *Id.* at 586-91.

54. 360 U.S. 593 (1959).

55. *Id.* at 598. The defendant in *Howard*, the commander of the Boston Naval Shipyard, circulated a letter claiming dissatisfaction with the Federal Employees Veterans Association. Civilian members of the Association sued for defamation, claiming that circulating the letter to parties outside the Navy was an abusive act of his official duties. The Supreme Court disagreed, granting defendant absolute immunity from suit.

56. 53 U.S. (12 How.) 390 (1851). In *Dinsman*, a marine brought suit against his commanding officer for "punishment inflicted upon him for refusing to do his duty." *Id.* at 402. The Court held that acts motivated "by an upright intention to maintain the discipline of command" are not actionable. *Id.* at 404. Therefore, qualified immunity applied to a defendant acting in good faith, i.e., with an "upright intention."

57. 403 U.S. 388 (1971).

58. *Id.* at 397. *See supra* note 10.

of the arrest.[59]

Qualified immunity for state executive officials became the standard after *Scheuer v. Rhodes*.[60] Qualified immunity affords less protection than absolute immunity in that, while still a complete defense, it is only granted if the official charged can prove that he acted reasonably and in good faith under the totality of the circumstances as they appeared at the time of the act. The official must also prove that he performed the actions in the course of his official conduct.[61] Absolute immunity, on the other hand, protects an official after a showing that he acted within the scope of his authority. The Court in *Scheuer* established a standard of qualified immunity to be applied to state executive officials. The Court explained:

> [I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based.[62]

The *Bivens/Scheuer* line of cases provide a model for determining the level of immunity to be granted to federal executive officials who violate constitutional rights, but no *per se* rule was created. When the question arose in *Economou*, the Supreme Court responded by establishing a standard of qualified immunity for alleged constitutional violations.[63] Adopting the same rationale as *Scheuer*, the Court approved qualified immunity as the rule rather than the exception, making consistent the level of immunity to be applied to both state and federal executive officials.[64]

---

59. 456 F.2d 1339, 1341 (2d Cir. 1972).

60. 416 U.S. 232 (1974).

61. *Id.* at 247-48.

62. *Id.* at 247.

63. 438 U.S. 478, 507. The decision did not go unchallenged. Justice Rehnquist vehemently dissented, claiming that the Court's distinction between constitutional violations and common law torts was of questionable logic. He believed the fundamental issue was not that distinction, rather it was the basic policy justifications for official immunity, allowing Federal officials to perform their duties with diligence, unhindered. *Id.* at 519-21. Justice Rehnquist was joined by Chief Justice Burger, Justice Stewart and Justice Stevens. *Id.* at 517-30.

64. *Id.* at 507-08.

While fixing the standard of official immunity at qualified, the Court recognized that such a standard could not be applied to all cases. Therefore, an exception was created, relying on a functional approach.[65] The *Economou* "special functions" exception affords absolute immunity to federal officials in certain cases where it is "essential for the conduct of public business."[66] The exception grants absolute immunity to certain federal officials such as judges, prosecutors, and their administrative counterparts.[67]

One final step was required to establish precedent to apply the *Economou* rule to military officials. This was provided by the Eighth Circuit decision of *Tigue v. Swaim*.[68] That court held that the military officer's immunity was subject to the same qualified immunity standard of *Economou*, rejecting the argument that military officials automatically fall within the "special functions" exception of *Economou*.[69] Rather, the court looked at the particular functions of each officer, his or her immunity at common law, and the interests sought to be protected.[70] After applying this analysis, the Eighth Circuit determined that the defendant was indeed performing a special function, and was therefore granted absolute immunity.[71] Thus, qualified immunity has become the standard for alleged constitutional violations by federal military officials exercising discretionary functions.

---

65. *Id.* at 508-17.

66. *Id.* at 507-10. A finding of a "special function" requires an inquiry into the particular function of the defendant and the level of immunity historically accorded the individual at common law. *Id.*

67. *Id.* at 508-17.

68. 585 F.2d 909 (8th Cir. 1978). Tigue, an Air Force captain, sued his superior officer for libel and false imprisonment. The action stemmed from plaintiff's removal from a program involving access to nuclear weapons. Defendant, the Base Hospital Commander and Medical Staff Advisor, was responsible for Tigue's evaluation and subsequent exclusion from the program.

69. *Id.* at 914.

70. *Id.*

71. *Id.* at 914-15. For an informative discussion of *Economou* and its effect on the immunity of military officials, see Burgess, *Official Immunity and Civil Liability For Constitutional Torts Committed by Military Commanders After* Butz v. Economou, 89 MIL. L. REV. 25 (1980).

C. THE COURT'S ANALYSIS

Reviewability

The Ninth Circuit in *Wallace* began its analysis with the question: which military decisions are reviewable, and which are not?[72] The court recognized that this issue involves many conflicting policy considerations and that any test adopted for determining reviewability must reflect a careful balancing of those considerations.[73] The primary consideration, the court observed, is when constitutional violations are involved. Both the individual and society as a whole have a deep interest in deterring the unconstitutional conduct of a federal official.[74]

When the plaintiff is in the military however, there are other policy factors to consider. The principal factor which must be taken into account is that of military autonomy, or separation of powers.[75] The basic concern of the courts in the past has been that judicial review might usurp the military in the performance of its functions. Consequently, the military is an area that the courts have traditionally been reluctant to enter.[76]

Courts have justified this reluctance on several grounds. Civil litigation can be disruptive to military operations.[77] Service personnel often lack time, money, and means of procuring witnesses.[78] Maintaining discipline can be difficult if litigation is permitted.[79] And finally, as noted by the Supreme Court, "judges are not given the task of running the Army."[80]

---

72. 661 F.2d at 731-32.

73. *Id. See supra* text accompanying notes 14-23.

74. *Id.*

75. *Id. See also* Mindes v. Seaman, 453 F.2d 197, 199 (5th Cir. 1971).

76. 661 F.2d at 732; Mindes v. Seaman, 453 F.2d at 199; Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953).

77. 661 F.2d at 732. *See also* United States v. Brown, 348 U.S. 110, 112 (1954) (granting relief under the Federal Tort Claims Act to a discharged veteran for negligent hospital treatment).

78. 661 F.2d at 732. *See* Feres v. United States, 340 U.S. 135, 145 (1950).

79. 661 F.2d at 732. *See, e.g.*, Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 671-72 (1977) (United States immune from third party indemnity actions for damages); United States v. Brown, 348 U.S. at 112; Calhoun v. United States, *supra* note 3, at 3.

80. Orloff v. Willoughby, 345 U.S. at 93. *See supra* text accompanying note 15. *But see* Vance v. United States, 434 F. Supp. 826, 833 (N.D. Texas 1977) ("The desire of the judiciary to avoid entanglement in military administration is strong, but no court today can avoid reasoned analysis of a serious constitutional claim under the catchphrase that

Given the conflict of the various policy considerations, the Ninth Circuit adopted the *Mindes*[81] approach "when constitutional claims are asserted."[82] The *Mindes* test, the Ninth Circuit observed, provides an adequate basis for determining when a military decision should be reviewed. It also fairly regards those policy considerations militating against review.[83] The court declined to rule on whether the *Mindes* test should also apply to nonconstitutional claims however,[84] in favor of restricting a potentially overbroad ruling.

One restriction the court placed on its decision was a qualification upon the nature of the constitutional claim alleged. The Ninth Circuit held that only "recognized" constitutional claims will receive consideration under its test.[85] "Recognized", as used by the court, means not only those claims accepted by the courts as constitutional, but also claims which amount to more than a traditional state law claim.[86] The court stressed the importance of the qualification because of the need to alleviate the potential problem of transforming a simple state tort action into one of constitutional dimension through clever pleading.[87] The court was satisfied that the qualification fairly restricts litigation so that only legitimate claims will come to suit.

Another restriction on litigation is the exhaustion requirement. Exhaustion of intraservice remedies, the court observed, allows a plaintiff to seek relief without the necessity of civil litigation. If this process proves unavailing, the reviewing court will have the benefit of the views and fact-finding of the military au-

---

judges do not run the army.").

81. 453 F.2d 197, 201-02. *See supra* text accompanying notes 29-33.

82. *Wallace*, 661 F.2d at 733.

83. *Id.* at 734.

84. *Id.* at 733 n.5.

85. *See supra* note 3.

86. 661 F.2d at 734.

87. *Id. See, e.g.*, Everett v. United States, 492 F. Supp. 318, 322 (S.D. Ohio 1980) (upholding *Feres* in a wrongful death action when claims seeking relief "directly under the United States Constitution" are in effect actions in tort); Schmid v. Rumsfeld, 481 F. Supp. 19, 21 (N.D. Cal. 1979) (denying relief under *Feres* to military informant for injuries sustained "incident to service"); Misko v. United States, 453 F. Supp. 513, 515 (D.D.C. 1978) (intramilitary indemnity cannot be avoided by pleading a cause of action as arising directly under the fifth amendment when the allegation is already barred by the *Feres* doctrine). See also *Calhoun, supra* note 3, at 5.

thorities.[88] Thus, the exhaustion requirement "helps to minimize the objections to reviewability based on judicial usurpation of military discretion and the need for military expertise."[89]

Immunity

As the Ninth Circuit observed, the question of immunity arises only after a finding that the military decision is reviewable, and only if the plaintiff seeks to recover money damages.[90] Because of the doctrine of sovereign immunity, the government, in suits without its consent, is absolutely immune from liability. To circumvent this obstacle, the plaintiff generally will sue the officer as an individual, rather than as a representative of the United States. A determination must be made by the reviewing court of whether the suit is essentially one against the government itself and therefore barred by sovereign immunity.

The Ninth Circuit observed that *Economou* held federal officers exercising discretion possess only qualified immunity from liability in *Bivens*-type actions. However, the *Economou* Court also created an exception to the general rule of qualified immunity, recognizing the need for absolute immunity when officials engage in "the conduct of public business." Therefore, if the official charged was performing a "special function", absolute immunity applies.[91]

In determining whether a military officer's activities fall within the "special function" exception, the court distinguished *Feres*, where absolute immunity applies to federal officials for alleged torts incident to military service. The *Wallace* court found that when the actionable conduct is a constitutional violation, *Feres* has no application.[92] As the court recognized, both the aggrieved individual and society have an interest in deterring unconstitutional conduct. This deterrence, while aided by injunctive or declaratory relief, is best effectuated by the possi-

88. 661 F.2d at 734. The court noted that it need not delineate which intraservice remedies must be exhausted in all cases since "[t]he availability and usefulness of a particular remedy will vary with the branch of the armed forces involved and with the nature of the grievance." *Id.* at 734 n.6.

89. *Id.* at 734.

90. *Id.*

91. Butz v. Economou, 438 U.S. 478, 507 (1978).

92. 661 F.2d at 735.

bility of personal liability for money damages. When this avenue of redress is cut off by absolute immunity, neither the interests of the aggrieved party nor society are served.

The court also observed that counterveiling policy considerations exist which favor absolute immunity. In the military context especially, the policies of separation of powers, military autonomy, the need to maintain discipline and to avoid disruptive litigation, militate toward applying absolute immunity. However, after examining the traditional areas where absolute immunity applies, the court determined that most activities of the military "have no precise analogue" to these traditional areas.[93]

The court compared the military context to the absolute standard long afforded judicial immunity. The adjudication function requires insulation from personal liability so that impartiality may be preserved, and while this rationale can be easily analogized to the functions of a military judge, it is inapplicable to a commanding officer whose function it is to give orders and duty assignments. Likewise, "judges' insulation from political influence, their use of precedent in resolving disputes, and the availability of appellate review . . . reduce the need for private damage actions."[94] Again, these rationales do not apply to most routine military decisions made during peacetime.

The court recognized that the difficulty of defending suit and the threat to military discipline favor imposing absolute immunity. However, the court believed these possibilities should not tip the scale in favor of absolute immunity. Moreover, imposing absolute immunity in such instances, instead of qualified immunity, would only marginally benefit an officer.[95]

Because of the conflicting policy considerations peculiar to the military context, the court was careful to adopt an intermediate course to enable trial courts to weigh these concerns before making a determination. The Ninth Circuit recognized that a *per se* rule of absolute immunity could potentially be abused by military officials and lead to unredressable wrongs. Conversely, too assertive a judicial role could be disruptive to military opera-

93. *Id.* at 736.
94. *Id.*
95. *Id.*

tions, especially in an area where the courts lack expertise. The Ninth Circuit chose to adopt a standard of qualified immunity while recognizing that the "special functions" exception would still afford absolute immunity when appropriate.[96]

D. SIGNIFICANCE

The *Wallace* decision is significant for several reasons. Primarily, the decision establishes a test for judicial reviewability of internal military decisions. Rather than a *per se* rule, the test articulated by the court approaches the reviewability question on the merits of the challenge by considering individual circumstances militating either in favor of or against review. The decision is also notable because it reflects the trend away from absolute immunity for federal officials and toward protection of the constitutional rights of military personnel.

On the issue of reviewability, the *Wallace* decision sets up a framework which allows a trial judge to balance several conflicting policy concerns. No determination can be reached without careful consideration of all relevant factors. The restrictions on the *Wallace* rule—limiting review to recognized constitutional claims and only after exhaustion of administrative remedies—distill further the candidates for *Mindes*-type analysis.

The *Mindes* test recognizes that occasionally policy considerations exist which favor denial of review, but that such occurrences are extreme. In addition, these occurrences can be avoided by the use of summary judgment. An absolute rule barring review "would shield from responsibility even an officer who knowingly and in bad faith violates an individual's constitutional rights."[97]

As with reviewability, a *per se* rule of absolute liability provides too much protection for military officials and comes dangerously close to inviting unconstitutional conduct. Even the general standard of qualified immunity in most instances shields an officer from liability. The *Economou* rule does not increase the burden on the defendant to the extent that some would argue. True, the requisite showing to invoke absolute immu-

96. *Id.*
97. *Id.* at 737.

nity—acts within the scope of one's authority—is not a high standard. But it cannot be said that the qualified immunity requirement is an extraordinarily difficult one to meet. As a result of *Economou*, a defendant official can be protected in two ways: either by an adequate showing of performing a special function, or the standard of good faith and reasonableness.

The court also left open the question of whether other circumstances may arise which favor an exception to the general rule of qualified immunity.[98] If, for example, the grievance arises in a combat setting, future courts are free to create such an exception. The Ninth Circuit established a case-by-case approach which allows an examination of individual concerns. By constructing a framework for analysis rather than a *per se* rule, trial courts are better equipped to reach a decision in this often delicate area of law.

*Craig A. Burnett**

APPEALABILITY OF ORDERS DENYING A MOTION FOR APPOINTED COUNSEL IN A TITLE VII SUIT

A. INTRODUCTION

In *Bradshaw v. Zoological Society of San Diego*,[1] the Ninth Circuit held that an order denying counsel to a plaintiff in a Title VII[2] action is appealable before the final resolution of the suit.

The plaintiff filed suit under Title VII alleging employment discrimination based on gender and marital status.[3] Title VII provides that at the court's discretion, an indigent plaintiff may

98. *Id.* at 736.

* Second year student, Golden Gate University School of Law.

1. 662 F.2d 1301 (9th Cir. 1981) (per Reinhardt, J.; the other panel members were Skopil, J., and Wallace, J., dissenting).

2. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1976).

3. Plaintiff alleged that the defendant had denied her application for the position of education director at the Zoological Society's Zoo. 662 F.2d at 1303. *See also* Bradshaw v. Zoological Society of San Diego, 569 F.2d 1066, 1067 (9th Cir. 1978).

be entitled to appointment of counsel.[4] The plaintiff filed a motion for appointment of counsel and for leave to proceed *in forma pauperis*. The district court denied the motion for appointment of counsel, but granted leave to proceed *in forma pauperis*.[5] The plaintiff filed a motion for reconsideration of the order denying appointed counsel; this motion was also denied. The plaintiff then requested that the court certify the order for interlocutory appeal,[6] but the court declined to do so. The plaintiff filed a timely notice of appeal under 28 U.S.C. section 1291,[7] the final judgment rule.

The Ninth Circuit found it had jurisdiction to review an order denying appointed counsel to a Title VII plaintiff before a final judgment has been entered.[8] In so doing, the Ninth Circuit is in accord with the majority of circuits that have considered the issue.[9] However, the *Bradshaw* opinion is the first to fully analyze why an order denying appointed counsel to a Title VII plaintiff should be immediately appealable. This decision significantly strengthens the position of indigent Title VII plaintiffs who, without appointed counsel, might be forced to abandon

---

4. The pertinent section provides: "Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security." 42 U.S.C. § 2000e-5(f)(1)(B) (1976).

5. 662 F.2d at 1302. This decision was questionable since a motion to proceed *in forma pauperis* and a motion for appointment of counsel share identical determining factors: both require a finding of indigency and a finding that the cause of action has merit. *See* 662 F.2d at 1308.

6. 28 U.S.C. § 1292(b) (1976) provides that a district court may cerfify an otherwise unappealable order for appellate review.

7. 28 U.S.C. § 1291 (1976) states in part: "The court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . except where a direct review may be had in the Supreme Court."

8. 662 F.2d at 1320. Although this holding is similar to that reached by several circuits when considering the appealability of an order denying appointed counsel to a plaintiff proceeding *in forma pauperis* (28 U.S.C. § 1915(d) (1966)), the fact that a Title VII plaintiff faces predictably complex litigation concerning important legislatively mandated rights places the appealability of an order denying counsel to a Title VII plaintiff more firmly within the *Cohen* doctrine. *See infra* notes 16-24 and accompanying text. *See also* 662 F.2d at 1305 n.11 for a list of § 1915 appealability cases.

9. For those circuits finding *Cohen* applicable, see Hudak v. Curators of the Univ. of Missouri, 586 F.2d 105 (8th Cir. 1978) (per curiam), *cert. denied*, 440 U.S. 985 (1979); Caston v. Sears, Roebuck & Co., 556 F.2d 1305 (5th Cir. 1977); Spanos v. Penn. Cent. Transp. Co., 470 F.2d 806 (3d Cir. 1972). Each of these opinions contains only a cursory analysis of the appealability issue. *See* 662 F.2d at 1305 n.11. In Randle v. Victor Welding Supply Co., 664 F.2d 1064 (7th Cir. 1981), the court denied appealability, reversing its earlier decision in Jones v. WFYR Radio/RKO Gen., 626 F.2d 576 (7th Cir. 1980).

meritorious claims.

B. BACKGROUND

The Final Judgment Rule and the Cohen *Doctrine*

The purposes of the final judgment rule are to restrict the appellate caseload, prevent judicial waste, and preserve lower court independence.[10] The Supreme Court has also seen the rule as a barrier to appeals brought to harass opponents.[11] Paradoxically, strict adherence to the final judgment rule can cause judicial waste. Prohibiting immediate review is not economical if an early determination of the issue prevents a reversal after final judgment and an order for a new trial.[12] To correct this problem, the courts and legislature have created narrow exceptions to the final judgment rule.[13]

Apart from the problem of judicial waste, strict compliance with the final judgment rule can cause the permanent loss of a litigant's rights. The Supreme Court has therefore stated that the rule should be given a "practical rather than a technical construction"[14] when review after final judgment would have "a final and irreparable effect on the rights of the parties."[15]

In *Cohen v. Beneficial Loan Corp.*,[16] the Court set forth guidelines for determining from which orders appeals should be

---

10. See Note, *Appealability of Orders Denying Attorney Disqualification Motions in* Armstrong v. McAlpin, DET. C.L. REV. 151, 153-61 (1981) for a discussion of the history and development of these policies. *See also* Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351 (1961).

11. Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby it avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment.

Cobbledick v. United States, 309 U.S. 323, 325 (1939).

12. *See, e.g.*, 662 F.2d at 1315.

13. See 28 U.S.C. § 1292 (1976) which lists appealable interlocutory orders and allows certification of otherwise unappealable orders.

14. Cohen v. Beneficial Loan Corp., 337 U.S. 541, 546 (1948).

15. *Id.* at 545.

16. 337 U.S. 541 (1948). *Cohen* allowed the appeal of an order denying a defendant's motion to require plaintiff to post security for costs in a shareholder's derivative suit.

taken before a final judgment.[17] First, the order must be a final determination by the lower court.[18] This initial inquiry recognizes that the relationship between trial and appellate courts entails review, not supervision. Thus, if a lower court order is tentative, it would be improper interference for the appellate court to consider the issue.[19]

The second *Cohen* requirement, separability,[20] is also based on the importance of lower court independence. To be appealable, the order must not share issues of law and fact in common with the still-unresolved suit in the lower court. A prior determination of these issues by an appellate court would constitute unwarranted interference with the lower court proceedings.[21]

The third prong of the *Cohen* test is that the order cannot be effectively reviewed after final judgment.[22] Whether effective review is possible is measured by the type and degree of harm to be suffered by the person seeking early review.[23] *Cohen* emphasized that some rights are more "important" than others, and thus should not be denied immediate review.[24] A more recent Supreme Court case, *Firestone Tire & Rubber v. Risjord*,[25] requires a showing of concrete, irreparable harm which could be avoided only by immediate appeal.[26] This requirement operates to check appeals brought to purposely delay trials or harass opponents by giving the court discretion as to the relative importance of the appeal.[27]

Although the relativism of the *Cohen* doctrine leaves room for judicial discretion, language such as "too important to be de-

---

17. *Id.* at 546.

18. *Id.*

19. "Permitting piecemeal appeals would undermine the independence of the district judge . . . ." Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981).

20. 337 U.S. at 546-47.

21. 449 U.S. at 374.

22. 337 U.S. at 546.

23. 449 U.S. at 376; Mathews v. Eldridge, 424 U.S. 319, 331 n.11 (1975).

24. 337 U.S. at 546.

25. 449 U.S. 368 (1981).

26. *Id.* at 376.

27. 662 F.2d 1301, 1315. "Civil rights litigants simply do not appeal an order denying them appointed counsel in order to obstruct 'just claims,' but rather do so in an attempt to vindicate their rights." *Id.*

nied review"[28] makes the doctrine difficult to apply to a general class of orders. The language of *Cohen* gives rise to questions of equity more easily answered by the facts of each individual case. In *Roberts v. United States District Court,*[29] the Supreme Court held that a denial of leave to proceed *in forma pauperis* is immediately appealable under *Cohen.* The Court did not further analyze the issue.[30] In *Firestone,* the Court held that a denial of an attorney disqualification motion is not appealable under *Cohen* because no irreparable harm would be caused by review after final judgment.[31] The propriety of the lower court's decision to refuse disqualification of counsel would be "difficult to assess until its impact on the underlying litigation may be evaluated, which is normally only after final judgment."[32]

As the Ninth Circuit's opinion in *Bradshaw* demonstrates, a motion for appointment of counsel under Title VII is more closely related to a motion to proceed *in forma pauperis* than it is to a request for disqualification of counsel.[33] One who is denied appointed counsel in a Title VII suit is unlikely to be able to proceed with the complex litigation,[34] much as the plaintiff denied permission to proceed *in forma pauperis* is stopped from pursuing his or her claim. The litigant denied a motion for disqualification of counsel, however, may still participate in the suit, even while watching for signs of prejudice. This distinction applies as well to the question of effective review after final judgment. The plaintiff requesting leave to proceed *in forma pauperis* or to have counsel appointed may be forced to abandon the claim before final judgment if either motion is denied.[35] This would naturally preclude appeal after final judgment and the plaintiff's claim would be lost without having had the chance for appellate review. By contrast, the litigant denied a motion to disqualify an attorney is usually capable of continuing the suit and making an appeal.

In the unlikely event that a Title VII plaintiff had the

28. 337 U.S. at 546.
29. 339 U.S. 844 (1949).
30. The Court did not offer any reasons to support its holding. *Id.* at 844-45.
31. 449 U.S. at 378.
32. *Id.* at 377.
33. 662 F.2d at 1308-10.
34. *Id.* at 1310.
35. *Id.* at 1312.

means to litigate the claim through final judgment and appeal, it is doubtful that the harm suffered in the first trial could be remedied by a new trial with appointed counsel.[36] If the uncounseled plaintiff is considered to have had the opportunity to cross-examine witnesses, for example, the testimony given at the first trial may be admitted as evidence in the new trial and the plaintiff would be bound by any errors made in obtaining that testimony.[37] As the *Bradshaw* court points out, an uncounseled litigant would probably be unaware of making prejudicial errors and would be unable to prove that errors had been made.[38]

Some of the issues raised by delays of criminal trials are also applicable to the instant question. The Ninth Circuit estimated that if appeal of the appointment of counsel question were delayed until after the final judgment and the appeal resulted in a new trial, the claim brought by the plaintiff might not be resolved until seventeen years after it arose.[39] When years of delay are involved, evidence can be lost, memories may dim, witnesses may be influenced and the entire cultural context of the suit may have changed.[40]

The Nature of Title VII Rights

The resolution of the question presented in *Bradshaw* turned upon the nature of the rights created by Title VII since *Cohen* and its progeny require that immediate appeal be allowed only for "important" rights that would be irreparably lost if appeal were delayed.[41]

Title VII was enacted to create a legal remedy for victims of discrimination in employment. Congress recognized that administrative agencies alone could not remedy employment discrimination: "[T]he private right of action . . . provides the aggrieved party a means by which he may be able to escape from the ad-

36. *Id.* at 1312-14.

37. 4 H. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 804-19 (1981).

38. 662 F.2d at 1313-14.

39. *Id.* at 1314 n.25.

40. *See generally* Brief for Appellant, United States v. MacDonald, 435 U.S. 850 (1978). This last factor may have an especially significant effect on the outcome of a civil rights suit, since, for example, a jury may have viewed racial discrimination as a more important problem in 1968 when the issue received much public attention, than it would have a decade later when such attention diminished.

41. 662 F.2d at 1306.

ministrative quagmire . . . ."[42] However, the drafters feared that since a Title VII plaintiff would most likely belong to a disadvantaged class, "the maintenance of a suit may impose a great burden on a poor individual complainant."[43] Therefore, provision was made for counsel to be appointed at the discretion of the district court.[44] Since Title VII does not provide guidelines for appointment of counsel,[45] the courts have conditioned appointment upon a finding that the plaintiff is indigent, has made reasonable efforts to retain counsel, and is presenting a meritorious claim.[46]

C. THE *Bradshaw* DECISION

The Majority

In *Bradshaw,* the Ninth Circuit held that an order denying appointed counsel to a Title VII plaintiff meets the criteria for appealability under *Cohen.*[47] To be appealable, "the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action and be effectively unreviewable on appeal from a final judgment."[48]

The majority found that the order denying appointed counsel was a final decision of the district court.[49] The first prong of the *Cohen* test was satisfied as the district court judge had denied a motion to reconsider the order and there was no indication in the record that the order was tentative.[50]

The Ninth Circuit found that the issue of appointment of

---

42. 110 CONG. REC. 12,721 (1964), *reprinted in* E.E.O.C. LEGISLATIVE HISTORY OF TITLES VII AND XI OF THE CIVIL RIGHTS ACT OF 1964, 3004 (1968).

43. *Id.*

44. 42 U.S.C. 2000e-5(f)(1)(B) (1976). *See supra* note 4.

45. There is some indication that the section containing the provision for appointed counsel was hastily included in Title VII. See 118 CONG. REC. 954 (1972) which describes the removal from the bill of a cease and desist authority. The provision for appointed counsel was inadvertently weakened by the removal and was quickly amended by a voice vote. This may explain why the drafters did not foresee certain problems in the statute's application. If, for example, a Title VII plaintiff loses the suit, appointed counsel may receive no compensation. As pointed out by the *Bradshaw* dissent, the drafters could have also made a provision for appealability. 662 F.2d at 1322.

46. *See, e.g.,* Caston v. Sears, Roebuck & Co., 556 F.2d at 1305, 1309 (5th Cir. 1977).

47. 662 F.2d at 1306.

48. Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978).

49. 662 F.2d at 1306.

50. *Id.*

counsel is separate from the merits of the Title VII suit, thus satisfying the second *Cohen* requirement.[51] Since the purpose of the separability requirement is to protect the independent determinations of the lower court, the Ninth Circuit looked at the extent to which appellate courts would become "enmeshed" in issues of law and fact as yet undetermined by the lower court.[52]

The test used by the courts to determine if counsel should be appointed is the same as that used to consider a motion to proceed *in forma pauperis:* a finding of plaintiff's indigency and a finding that the underlying claim has merit.[53] The Supreme Court has held that the denial of a motion to proceed *in forma pauperis* is appealable before final judgment under *Cohen.*[54] Since the determination is the same for both motions, the Ninth Circuit found that the separability requirement was met in *Bradshaw.*[55] This finding was further supported by an earlier Ninth Circuit decision holding that an order denying appointment of counsel to revervation Indians was appealable under *Cohen.*[56]

The third requirement of the *Cohen* doctrine is that review

---

51. *Id.* at 1310.

52. *Id.* at 1307.

53. *Id.* at 1308.

54. Roberts v. United States District Court, *supra* note 29.

55. 662 F.2d at 1308. The court also suggested that the determination of merit could be made from a favorable Equal Employment Opportunity Commission "reasonable cause" finding. Before filing suit under Title VII, the plaintiff must submit the facts surrounding the alleged discrimination to the EEOC. If the EEOC finds reasonable cause to believe the complaint has merit, the plaintiff is so notified. The procedure is designed to assure federal jurisdiction for the suit. *Id.* at 1309.

The court then suggested that a favorable EEOC determination may be used by an appeals court when deciding an appointment of counsel issue. An unfavorable EEOC statement, on the other hand, should not be used because if erroneous, the plaintiff's rights may be abridged. Use of the EEOC determination is not *necessary* since the court may use the same limited investigation required for a motion to proceed *in forma pauperis* when determining appointment of counsel. *Id.* at n.20. *See also Caston, supra* note 9, at 1309.

56. *Id.* at 1310, citing Rincon Band of Mission Indians v. Escondido Mutual Water Co., 459 F.2d 1082 (9th Cir. 1972). *See also* Ivey v. Board of Regents, 673 F.2d 266 (9th Cir. 1981). In *Ivey,* the Ninth Circuit considered the appeal of an order denying appointed counsel to a Title VII plaintiff. In determining that the plaintiff's Title VII claim was not meritorious, the court looked at the plaintiff's criminal record. The plaintiff had been convicted of twenty-six felony counts for acts done in the course of his employment; the Ninth Circuit held that the suit based on racial discrimination in firing the plaintiff lacked merit. The order denying appointed counsel was affirmed. *Id.* at 269.

of the order after final judgment would be ineffective.[57] The *Bradshaw* court distinguished between the effectiveness of a new trial as the remedy for erroneous denial of a motion to appoint counsel and the remedy for an order denying disqualification of counsel.[58] In *Firestone,* the Supreme Court had found that upon reversal of a denial of disqualification of counsel, a new trial would sufficiently remedy the harm suffered by the appellant in the first trial.[59] The Ninth Circuit distinguished *Firestone* on two grounds: the likelihood of resulting injury and the homogeneous nature of Title VII appointment of counsel claims.[60]

The Supreme Court denied interlocutory appeal in *Firestone* because the appellant had not shown a "single concrete example" of prejudice which would result from appeal after final judgment.[61] Because an order denying disqualification of counsel does not always cause harm to the appellant, specific examples of harm must be shown.[62] The *Bradshaw* court pointed out that the likelihood of injury to one denied appointed counsel was great and that prejudice was inherent in proceeding to trial without counsel.[63]

The second reason appealability was not found in *Firestone* was that the question of disqualification of counsel arises in diverse legal contexts; since the amount and degree of harm can not be predicted for this type of order, allowing early appeal would be less efficient than waiting until final judgment to assess the harm done.[64] The Ninth Circuit reasoned that the same is not true of orders denying appointed counsel to a Title VII plaintiff. Since Title VII litigation is so complex, an uncounseled plaintiff with a meritorious suit would predictably lose the right to proceed with the claim or be bound by prejudicial errors made at the first trial.[65] Therefore, it is not necessary for the Title VII plaintiff to show that actual harm was suffered in order to appeal an order denying appointed counsel; the *Cohen*

57. 662 F.2d at 1310.
58. *Id.* at 1312-13.
59. 449 U.S. 368, 378 (1981).
60. 662 F.2d at 1312-13.
61. 449 U.S. at 376.
62. *Id.*
63. 662 F.2d at 1312.
64. 449 U.S. at 377-78.
65. 662 F.2d at 1313.

requirement is satisfied by a presumption of irreparable harm.[66]

The *Bradshaw* court found its holding to be supported by the policies underlying both the final judgment rule and Title VII. Allowing the early appeal of an order denying appointed counsel to a Title VII plaintiff would not result in interference with the lower court's determinations if the order was final.[67] It is unlikely that a plaintiff would seek to delay trial by making the appeal, since without counsel the suit may never be resolved. Judicial waste would actually be avoided by allowing the appeal, since reversible error could be avoided during the first trial, or a plaintiff who was properly denied counsel may be encouraged to abandon the suit at an early stage.[68] The court found it unlikely that an appropriate refusal of appointed counsel would result in the case following "the normal course to trial."[69]

The Ninth Circuit found that allowing early appeal of the order was also supported by the congressional intent underlying Title VII.[70] Since the provision for appointed counsel was characterized by Congress as an "important" right, the presumption that a Title VII plaintiff could not effectively litigate a claim without counsel was warranted.[71]

The Dissent

The dissent based its opinion on the view that the *Cohen* doctrine is extremely narrow and should not be invoked for the sole reason of avoiding injustice.[72] Rejecting the presumption reached by the majority that uncounseled Title VII litigation is ineffective, the dissent concluded that Congress must have anticipated some plaintiffs proceeding *in propria persona.* Con-

66. *Id.* at 1313-14.
67. *Id.* at 1314.
68. *Id.* at 1315-16.
69. *Id.* at 1316.
70. *Id.* at 1316-17.
71. *Id.* at 1317. The *Bradshaw* court, finding that it had jurisdiction of the appeal under *Cohen,* then turned to the merits of the appeal. The appellate court found that the lower court order granting the plaintiff permission to proceed *in forma pauperis* was sufficient to support a finding of indigency. The second requirement, that the plaintiff use reasonable efforts to obtain counsel, was satisfied by affidavits filed with the court. To satisfy the requirement of meritoriousness, the Ninth Circuit used the favorable EEOC determination obtained by the plaintiff prior to the suit. The order denying appointed counsel was reversed and the case remanded to district court. *Id.* at 1319-20.
72. *Id.* at 1320-21.

gress could have provided for interlocutory appeal within Title VII, but did not.[73]

Although agreeing that the finality requirement of *Cohen* was satisfied in *Bradshaw,* the dissent argued that an order denying appointed counsel could not be considered apart from the Title VII cause of action.[74] The determination necessary for appointment of counsel requires a deeper investigation into the facts comprising the plaintiff's cause of action than would a decision concerning leave to proceed *in forma pauperis* since counsel should not be appointed to a losing case.[75] Since Title VII does not provide for an attorney's compensation in the event the case is lost, the dissent reasoned that the hardship to counsel must be balanced against the benefit to the plaintiff. This would entail more than a finding that the suit was "non-frivolous."[76]

The dissent found that an order denying appointed counsel could be effectively reviewed after final judgment.[77] Two lines of cases illustrate the difference between a right that would be destroyed without immediate appeal and an erroneous order which would merely "taint" the first trial.[78] The dissent concluded that an erroneous order denying appointed counsel would only taint the proceedings as does the non-appealable denial of a motion to disqualify an attorney.[79] Denial of appointed counsel does not destroy a right as would wrongful denial of bail to a criminal defendant.[80]

The *Bradshaw* plaintiff would not suffer loss of rights, the

---

73. *Id.* at 1321.

74. *Id.* at 1321-22.

75. *Id.* at 1322.

76. *Id.* The dissent also disagreed with the majority's suggestion that an EEOC reasonable cause determination could be used to decide if the plaintiff's case had merit. The dissent believed that an EEOC statement can only be used for jurisdictional purposes. The dissent also objected to the disparate treatment given favorable and unfavorable EEOC findings. *Id.* at 1322-23. The basis for this objection is unclear since only the plaintiff's rights would be at stake and no one else would be affected by the use of only favorable findings.

77. *Id.* at 1323.

78. *Id.* at 1323-24. *Compare* Stack v. Boyle, 342 U.S. 1 (1951) (rights in danger of harm because bail was denied), *with* Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981) (rights are not endangered by an appeal after final judgment of an order denying disqualification of counsel).

79. 662 F.2d at 1324.

80. *Id.*

dissent explained, since she could continue with her suit, obtaining a new trial after final judgment if the denial of counsel was erroneous.[81] An order denying appointed counsel is distinguishable on this point from an order denying leave to proceed *in forma pauperis* since denial of the latter prevents the plaintiff from proceeding at all. The dissent saw no "inherent prejudice" in prosecuting a Title VII claim without benefit of counsel since the plaintiff is as likely to win the suit as she would be likely to commit prejudicial tactical errors.[82] Since the outcome of the suit is speculative, the *Cohen* doctrine should be inapplicable. Some concrete irreparable harm must be shown before an early appeal should be allowed. The dissent also recommended use of a writ of mandamus as an appropriate avenue for relief.[83]

Last, the dissent argued that allowing interlocutory appeal of orders denying appointed counsel would not serve the goal of judicial economy.[84] The final judgment rule requires that all appeals from a suit be heard at once so that only one retrial may be necessary. Interlocutory appeals result in delay of the proceedings in the lower courts.[85] Since the losing side always has an interest in appealing orders, allowing interlocutory appeal only serves the interests of that side. The dissent feared that the ability to delay trial with early appeals would result in forcing the settlement of strike suits.[86]

D. SIGNIFICANCE

While the *Bradshaw* decision is in accord with the majority of circuits that have considered the issue,[87] it is the first to consider the issue after *Firestone*. It is also the first to have thoroughly analyzed the appealability of an order denying appointed counsel to a Title VII plaintiff.

---

81. *Id.*

82. *Id.*

83. *Id. But see Roberts, supra* note 29, which rejected the use of mandamus to appeal a denial to proceed *in forma pauperis*.

84. 662 F.2d at 1325.

85. *Id.*

86. *Id.* at 1320. Since the dissent found that the Ninth Circuit should not have jurisdiction to hear the *Bradshaw* appeal, the opinion did not contain discussion of the merits of that appeal.

87. *See supra* note 9.

Three basic questions divided the *Bradshaw* court. First, the dissent disagreed that an appellate court could decide the appointment of counsel issue without interfering with the lower court's independent findings of law and fact.[88] Since the case law requires only that the court find that the plaintiff's case has merit and does not define merit in terms of who will win or lose the suit, the dissent's objection is unfounded. It is unfortunate that Title VII contains no provision for compensation of appointed counsel when the plaintiff loses the case, but this is an issue beyond the scope of appealability. The actual basis for the disagreement between the majority and the dissent in *Bradshaw* is the question of whether an uncounseled plaintiff can effectively litigate a Title VII suit. If refusal to appoint an attorney effectively prevents continuance of the suit, a judge considering the probable outcome of the suit as a basis for appointing counsel is actually determining the plaintiff's right to sue. Congress provided the victim of employment discrimination with the right to sue; this is not a matter for the court's discretion.

Without statistical data, it may be impossible to determine if an uncounseled plaintiff can effectively litigate a Title VII suit. The dissent pointed out that the plaintiff in *Bradshaw* had thus far been able to pursue her claim in court,[89] but the dissent neglected to note that the plaintiff had been receiving assistance from the Equal Employment Opportunity Commission in her effort to receive appointed counsel.[90] The EEOC does not have sufficient resources to assist every needy Title VII plaintiff.[91] Title VII is a complex piece of legislation and the litigation arising from it is much more complicated than the type of suit a layperson can successfully pursue without counsel. The majority's presumption that an uncounseled plaintiff may be forced to abandon a Title VII cause of action is a reasonable one. The courts, therefore, should look to the merit of the plaintiff's claim to determine if counsel should be appointed since basing a decision on the eventual outcome of the suit could result in an unjust

88. 662 F.2d at 1321-22.

89. *Id.* at 1322 n.4.

90. *Id.* at 1311 n.24.

91. The EEOC's burdensome caseload has led to "lengthy delays in the administrative process and has frequently frustrated the remedial role of the agency." H.R. REP. No. 238, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2137, 2147.

deprivation of the plaintiff's right to sue.

The second point of contention within the *Bradshaw* court concerned the availability of effective review after final judgment. Once again, the basis of the disagreement is the plaintiff's ability to successfully litigate a Title VII claim without benefit of counsel. The majority held that an uncounseled plaintiff would suffer irreparable harm if forced to proceed through the first trial without opportunity to appeal the denial of appointment of counsel.[92] There are several types of errors to which the plaintiff would be bound in the event of a new trial. The dissent refused to assume that an uncounseled plaintiff would make prejudicial errors and would require a showing of actual harm before allowing an appeal.[93] The problem with this position is that the only way an uncounseled plaintiff could show that prejudicial errors had been committed would be to proceed through the lower court trial. However, by the time actual errors could be shown, the irreparable harm that the *Cohen* doctrine is designed to prevent would already have occurred. The plaintiff should not be put in such an anomalous position. If the presumption that an uncounseled plaintiff cannot effectively pursue a Title VII suit is reasonable, then an early appeal of the appointment of counsel issue is the only means to prevent irreparable harm to the plaintiff.

The third area of divergence between the *Bradshaw* majority and dissent was over the effect of the court's holding on judicial economy. The dissent feared that an exception to the final judgment rule would create uneconomical delays in the lower courts and increase the number of appeals.[94] The majority stated that an early appeal of the appointment of counsel issue would prevent the need for reversal and grant of a new trial.[95] Again, this disagreement is based upon the uncounseled plaintiff's ability to pursue effective Title VII litigation. If an uncounseled plaintiff is unable to pursue a Title VII claim, it is likely that refusal to appoint counsel will be reversible error. If reversible error is more likely than not, then judicial economy is better served by an early appeal and avoidance of retrial. This question

92. 662 F.2d at 1312.
93. *Id.* at 1324.
94. *Id.* at 1325.
95. *Id.* at 1315-16.

should be resolved on the side of allowing interlocutory appeal, since the courts' duty to protect legislatively created rights must outweigh concern for burgeoning caseloads.[96]

Although the Ninth Circuit has expressed a reluctance to enlarge the class of appealable orders,[97] the *Bradshaw* opinion shows that the court recognizes a need to provide effective review of orders wholly dependent on the trial judge's discretion. Since the appointment of counsel depends upon the court's discretion, it would be unlikely that a lower court judge would recognize the possibility of abuse of that discretion by certifying the order as appealable. In addition, appellate courts should give particular attention to those rights dependent wholly on judicial discretion to insure that effective review of decisions affecting those rights is available.

By expressly recognizing that an uncounseled Title VII plaintiff cannot effectively litigate a civil rights suit,[98] the Ninth Circuit has helped to secure the only remedy afforded by Title VII. It is to be hoped that the district courts will be less hesitant to appoint counsel for an indigent plaintiff presenting a meritorious Title VII claim.

*Susan Shors**

96. *See Cohen*, 337 U.S. 541, 546 (1948). *See also* Note, *Appealability of Orders Denying Attorney Disqualification Motions in* Armstrong v. McAlpin, DET. C.L. REV. 151, 165 (1981), discussing the harm done to the entire judicial system when litigants' rights are subordinated to the desire to "maintain moderate work loads."

97. *See* Cord v. Smith, 338 F.2d 516, 521 (9th Cir. 1964) in which the court stated that the certified appeal allowed by 28 U.S.C. § 1292(b) (1976) removed any incentive to enlarge the class of appealable orders.

98. 662 F.2d at 1312, 1314.

* Second year student, Golden Gate University School of Law.

DIVERGENT APPLICATION OF *COHEN* DOCTRINE TO GRANT OF MOTIONS DISQUALIFYING COUNSEL IN CRIMINAL AND CIVIL CASES

A. INTRODUCTION

In *United States v. Greger*,[1] the Ninth Circuit held that a district court order disqualifying a criminal defendant's counsel *is not* appealable prior to a final judgment under 28 U.S.C. section 1291.[2] The district court had disqualified the defendant's counsel from further representation in the case because of a conflict of interest.[3] The defendant sought an immediate appeal of the ruling or, alternatively, that the court treat the request for review as a petition for a writ of mandamus. The court refused to issue the writ because the applicable guidelines were not met.[4]

In the case *In Re Coordinated Pretrial Proceedings (Petroleum Products)*,[5] the Ninth Circuit held that an order disqualifying counsel in a civil case *is* immediately appealable under section 1291. *Petroleum Products* was a consolidated multi-district antitrust case in which defense counsel was disqualified from representing defendant's former and present employees in connection with discovery dispositions. By allowing both the defendants and the deponents to appeal the decision, the court extended the right to an immediate appeal to any party involved in a civil suit whose counsel has been disqualified.

---

1. 657 F.2d 1109 (9th Cir. 1981) (per Duniway, J.; the other panel members were Norris, J. and Hanson D.J., sitting by designation), *petition for cert. filed*, 50 U.S.L.W. 3607 (U.S. Jan. 19, 1982)(No. 81-1357).

2. 28 U.S.C. § 1291 (1976) provides: "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . except where direct review may be had in the Supreme Court."

3. Defendant's counsel and his firm had represented witnesses before the grand jury in connection with the same investigation which led to defendant's indictment, 657 F.2d at 1114.

4. A writ of mandamus is provided for by Title 28 U.S.C. § 1651(a) (1976), which states: "The Supreme Court and all courts established by an act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." The Supreme Court in Kerr v. United States, 426 U.S. 394 (1976) explained that the remedy of a writ of mandamus is a drastic one and should be employed only in extraordinary circumstances.

5. 658 F.2d 1355 (9th Cir. 1981) (per Goodwin, J.; the other penal members were Nelson, J. and Price, D.J., sitting by designation), *cert. denied*, 102 S. Ct. 1615 (1982). The Ninth Circuit, in Gough v. Perkowski, 694 F.2d 1140 (9th Cir. 1982), affirmed its decision in *Petroleum Products*.

The appellants in both cases sought appellate jurisdiction under *Cohen v. Beneficial Loan Corp.*[6] As a result of the two Ninth Circuit decisions, *Cohen* is applicable to attorney disqualifications in civil suits but not in criminal prosecutions. This casenote will analyze this distinction and explore appellate jurisdiction under *Cohen* in the two different legal contexts.[7]

B. Background

The Cohen *Doctrine*

Appellate jurisdiction in the federal courts is based on Title 28 U.S.C. section 1291.[8] This statute codified the common law "final judgment rule" which mandates that appellate review of lower court rulings await the termination of the litigation in the trial court.[9]

In the landmark case of *Cohen v. Beneficial Loan Corp.*,[10] the Supreme Court acknowledged that there are some interlocutory decisions which Congress intended to be appealable within the meaning of section 1291. The Court defined these decisions as a "small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause

---

6. 337 U.S. 541 (1949). The issue presented in *Cohen* was whether defendants in a stockholders derivative action had the right to require that plaintiffs post security for costs.

7. The Ninth Circuit has become increasingly sensitive to the proliferation of interlocutory appeals. In *Greger* the jurisdictional issue was argued only after the court solicited supplemental briefs on the issue. In a previous case which dealt with the same issue as that presented by *Petroleum Products*, the court overlooked the jurisdictional issue. Gas-A-Tron of Arizona v. Union Oil Co. of California, 534 F.2d 1322 (9th Cir.), *cert. denied*, 429 U.S. 861 (1976).

8. *See supra* note 2.

9. In Cobbledick v. United States, 309 U.S. 323 (1935), the Court explained the reasons for the final judgment rule in these terms:

> Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first judiciary act and has been departed from only when observance of it would practically defeat the right to any review at all. Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration.

Id. at 324.

10. 337 U.S. at 541.

itself to require that appellate consideration be deferred until the whole case is adjudicated."[11] The Court also emphasized that the statute should be given a "practical rather than a technical construction."[12]

Cohen's *Application in the Criminal Context*

The first application of the *Cohen* doctrine by the Supreme Court in the criminal context was in *Stack v. Boyle*,[13] where the Court found that the denial of a defendant's motion to reduce bail can be immediately appealed. More recently, in *Abney v. United States*,[14] the Supreme Court held that a motion to dismiss an indictment on the ground that it violates the prohibition against double jeopardy is also immediately appealable under *Cohen*. In finding the *Cohen* rationale applicable, the *Abney* Court reasoned that the constitutional protection against double jeopardy would be irretrievably lost if the defendant must undergo a trial for the same offense twice before litigating his claim on appeal.[15] Despite its holding, the Court nevertheless emphasized that the *Cohen* doctrine would have less applicability in criminal prosecutions than in civil suits.[16]

Cases subsequent to *Abney* demonstrate the limited extent to which the Supreme Court is willing to extend the *Cohen* doctrine in criminal cases. In *United States v. MacDonald*,[17] the Court held that a denial of a motion to dismiss an indictment on the ground that a defendant's right to a speedy trial has been violated is not an appealable order under *Cohen*. In distinguishing the speedy trial claim from the double jeopardy claim in *Abney*, the Court insisted that the right to a speedy trial is not a "right not to be tried" but rather a right to be free from convic-

---

11. *Id.* at 546.

12. *Id.*

13. 342 U.S. 1 (1951). Writing separately in *Stack*, Justice Jackson, the author of *Cohen*, explained that "an order fixing bail can be reviewed without halting the main trial—its issues are entirely independent of the issues to be tried—and unless it can be reviewed before sentence, it can never be reviewed at all." *Id.* at 12.

14. 431 U.S. 651 (1977).

15. *Id.* at 661.

16. "Adherence to this rule of finality has been particularly stringent in criminal prosecutions because 'the delays and disruptions attendant upon intermediate appeal,' which the rule is designed to avoid 'are specially inimical to the effective and fair administration of the criminal law.' " Abney v. United States, 431 U.S. at 657, quoting Dibella v. United States, 369 U.S. 121, 124 (1962).

17. 435 U.S. 850 (1978).

tion if the right is violated.[18] The defendant can seek a dismissal of the conviction on appeal if he proves his speedy trial claim. Interlocutory review under *Cohen* is therefore unnecessary to safeguard the right.

In *United States v. Layton*, the Ninth Circuit examined the application of the *Cohen* doctrine in criminal cases, reasoning that "a challenge to the 'very authority of the prosecution to hail the defendant into the court in the first place' has been the basis of each of the claims in the criminal context which have been held by the Supreme Court or this court to be immediately appealable under *Cohen*."[19] Thus, the *Layton* court held that the denial of a motion to dismiss for lack of subject matter jurisdiction is not appealable before a final judgment.[20] In *United States v. Garner*,[21] the Ninth Circuit found that an order denying a motion to dismiss based on grand jury irregularities is also not an immediately appealable order. Just as *MacDonald* rejected the claim that the right to a speedy trial would be irreparably lost if reviewed only after conviction, the Ninth Circuit found that the right to a grand jury indictment before trial would not be defeated if claims of grand jury irregularities were not subject to immediate review.[22]

The Ninth Circuit, however, has been willing to extend its reasoning in *Layton* beyond the limits set forth by the Supreme Court. In *United States v. Wilson*,[23] denials of motions to dismiss on the ground of selective prosecution were held to be immediately appealable. Likewise in *United States v. Yellow Freight System*,[24] the court found that a refusal to dismiss prosecution for lack of an indictment is appealable under the *Cohen*

18. *Id.* at 861. One of the underlying reasons of the speedy trial clause is the prevention of prejudice to the defense due to the passage of time. The Court reasoned that an assessment of possible prejudice could not be made until the evidence was presented at trial. Thus, the Court concluded the order was not totally collateral to the merits, preventing the application of *Cohen*. *Id.* at 859.

19. 645 F.2d 681, 683 (9th Cir. 1981), quoting United States v. Griffin, 617 F.2d 1342, 1346 (9th Cir.), *cert. denied*, 449 U.S. 863 (1980).

20. 645 F.2d at 684.

21. 632 F.2d 758, 766 (9th Cir. 1980).

22. *Id.* at 765.

23. 639 F.2d 500 (9th Cir. 1981). For an analysis of the *Wilson* case, see Note, *Selective Prosecution of Tax Protestors: Did the Ninth Circuit Go Too Far*, 12 GOLDEN GATE UNIV. L. REV. 325 (1981).

24. 637 F.2d 1248, 1251 (9th Cir.), *cert. denied*, 454 U.S. 815 (1981).

doctrine.

In its most recent opinion dealing with this issue in a criminal context, *United States v. Hollywood Motor Car Co.*,[25] the Supreme Court held *Cohen* inapplicable to a denial of a motion to dismiss an indictment due to vindictive prosecution. Relying on *MacDonald*, the Court reasoned that the right to be free from vindictive prosecution could be safeguarded on appeal by a dismissal of the convictions on the disputed charges.[26]

Cohen *in the Civil Context*

The scope of *Cohen*'s applicability in the civil context has not been as clearly defined as it has been in the criminal context. In criminal cases the applicability of *Cohen* is dependent upon whether the order implicates a right which would be lost irretrievably if appeal was deferred until after conviction and sentencing. This right is not at issue in a civil suit. Thus the Supreme Court, in *Gillespie v. United States Steel Corp.*,[27] advocated a practical approach to the question of finality in civil cases. The Court stated:

> Our cases long have recognized that whether a ruling is 'final' within the meaning of § 1291 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and that it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the 'twilight zone' of finality.[28]

As a result of this difficulty, the Court has urged that the requirement of finality be given a "practical rather than a technical construction."[29] In giving it a practical construction, the Court has urged a balancing between "the inconvenience and

---

25. 102 S. Ct. 3081 (1982).

26. *Id.* at 3085. *Hollywood* overturned the Ninth Circuit decision in United States v. Griffin, 617 F.2d 1342 (9th Cir.), *cert. denied*, 449 U.S. 863 (1980). The *Griffin* court reasoned that a claim of vindictive prosecution raised a right to be free from the prosecution itself, and thus would be lost irreparably if *Cohen* did not apply. *Id.* at 1345.

27. 379 U.S. 148 (1964).

28. *Id.* at 152. In *Gillespie*, the petitioner sued for damages under various theories on behalf of several beneficiaries. The district court struck portions of the complaint relating to one of the plaintiff's theories of liability as well as parts relating to recovery for persons other than the plaintiff. *Id.* at 156.

29. 337 U.S. 541, 546. *See supra* note 12.

costs of piecemeal review on the one hand and the danger of denying justice by delay on the other."[30]

This kind of balancing was demonstrated in *Norman v. McKee*,[31] where the Ninth Circuit held that *Cohen* was applicable to a district court's disapproval of a class action settlement under Rule 23(e) of the Federal Rules of Civil Procedure.[32] The court reasoned that because of the inherent length and complexity of class action suits, the inconvenience of piecemeal review of an order disapproving a settlement is outweighed by the danger of denying justice to each member of the represented class.[33]

In an effort to clarify the scope of the *Cohen* doctrine, the Supreme Court, in *Coopers & Lybrand v. Livesay*,[34] listed three requirements an order must meet to be immediately appealable under *Cohen*. The order must: (1) conclusively determine the disputed question; (2) resolve an important issue completely separable from the merits of the action; and, (3) be effectively unreviewable on appeal from a final judgment.[35]

In *Firestone Tire & Rubber Co. v. Risjord*,[36] the Court's most recent decision dealing with *Cohen* in a civil context, an

---

30. 379 U.S. at 152-53, quoting Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950). The *Gillespie* Court reasoned that in this case any delay in reviewing the rights of persons referred to by the stricken portions of the complaint would be so unjust as to outweigh the inconvenience and cost of piecemeal review. 379 U.S. at 153.

31. 431 F.2d 769 (9th Cir. 1970).

32. FED. R. CIV. P. 23(e) states: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

33. 431 F.2d at 474.

34. 437 U.S. 463, 468 (1978).

35. The Court ruled that the *Cohen* doctrine does not apply to a prejudgment order denying class certification because such an order is subject to revision in the district court under FED. R. CIV. P. 23(c)(1); involves considerations that are "enmeshed in the factual and legal issues comprising the plaintiff's cause of action," (quoting Mercantile National Bank v. Langdeau, 371 U.S. 555, 558 (1963)); and is subject to effective review after final judgment at the behest of the named plaintiffs or intervening class members. *See also* United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977).

36. 449 U.S. 368 (1981). In *Firestone*, defendant liability insurer moved to disqualify lead counsel for the plaintiff because of an alleged conflict of interest arising from the fact that defendant was also an occasional client of the lead counsel's law firm. Defendant argued that this association between plaintiff's lead counsel and defendant's insurer would give him an incentive to structure plaintiff's claims for relief so as to enable the insured to avoid liability, thus increasing defendant's own potential liability. *Id.* at 370-71.

order denying a motion to disqualify opposing party's counsel was adjudged not immediately appealable. The Court relied on the three-prong test established in *Coopers* and reasoned that the third-prong—requiring the order to be effectively unreviewable on appeal—was not satisfied.[37] The possibility of a new trial is wholly adequate to remedy an erroneous refusal to disqualify counsel.[38] However, the Court expressly left open the question of whether its reasoning would extend to orders granting disqualification of counsel.[39]

United States v. Greger is the first circuit decision to address the issue of appealability of a grant of counsel disqualification in a criminal case. Those cases which have addressed this issue in a civil context have found the *Cohen* doctrine to be applicable.

In *Armstrong v. McAlpin*,[40] the Second Circuit upheld appealability, reasoning that a disqualification order is effectively unreviewable on appeal from a final judgment because gaining reversal of the lower court's judgment would subject the party to the difficult if not insurmountable task of proving the case was lost because he was improperly forced to change counsel.[41] The District of Columbia Circuit in *Community Broadcasting of Boston, Inc. v. FCC* reached the same result by comparing the difference between orders granting disqualification and those denying disqualification to orders granting and orders denying summary judgment.[42] "[W]hile the affirmative grant of the requested relief is final and appealable, a mere refusal to act is necessarily less conclusive and ought not to be reviewed by this court."[43]

---

37. *Id.* at 376.

38. *Id.* at 378. The Court reasoned that the potential harm that might be caused by an erroneous denial of a disqualification motion would not differ significantly from the harm caused by erroneous denials of other nonappealable interlocutory orders such as those denying discovery or for recusal of the trial judge. *Id.*

39. *Id.* at 372 n.8.

40. 625 F.2d 433 (2d Cir. 1980).

41. *Id.* at 440-41.

42. 546 F.2d 1022, 1025, 1025 n.13 (D.C. Cir. 1976).

43. *Id.* at 1025 n.13, quoting Fleischer v. Phillips, 264 F.2d 515, 517 (2d Cir.), *cert. denied*, 359 U.S. 1002 (1959), *rev'd per curiam*, Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 496 F.2d 800 (2d Cir. 1974).

C. THE *Greger* DECISION

In holding *Cohen* inapplicable to motions denying disqualification of defense counsel,[44] the *Greger* panel was significantly influenced by the Supreme Court's opinion in *Firestone*. Adopting the reasoning of *Firestone*, the court did not distinguish between the civil context presented in *Firestone* and the criminal context in *Greger*. Rather, the court noted that historically the *Cohen* doctrine has been applied more sparingly in the criminal context.[45]

In addition, the *Greger* panel reasoned that the difference between a denial of a motion to disqualify counsel and a grant of such a motion is not of decisive significance. The court asserted that the disruption of the litigation from an order disqualifying counsel—which creates a sense of finality in a civil case—is absent in a criminal case where the court can appoint substitute counsel.[46] Furthermore, like the order refusing to disqualify counsel, an order granting such a motion in a criminal case is effectively reviewable on appeal from a final judgment because on appeal, prejudicial error is presumed if the order is shown to have been erroneous.[47] A new trial would then be ordered, thereby vindicating the defendant's right to counsel. The court contrasted this remedy with the right against double jeopardy which would be irretrievably lost if not vindicated before trial.[48]

In acknowledging that the remedy subjects the defendant to a second trial, the court pointed out that the individual injustice of enduring a second trial is outweighed by the considerations

---

44. The court specifically noted that it was not considering whether orders disqualifying government counsel are appealable. However, the court pointed out that "[i]n such a case, were the defendant to be found innocent, the government, because of the rule against double jeopardy, would not be able to seek re-trial on the basis that the disqualification order was erroneous." *Greger*, 657 F.2d 1109, 1113 n.1.

45. 657 F.2d at 1112.

46. *Id.* at 1113. The court reasoned that the very fact that *Greger* was a criminal case made it analogous to *Firestone* even though *Greger* involved a grant of a disqualification motion and *Firestone* a denial. The effect of a disqualification order in a criminal case, the court reasoned, is minimized by the appointment of substitute counsel thus likening it to the effect of a denial of a disqualification motion in a civil case. *Id.*

47. *Id. See* Slappy v. Morris, 649 F.2d 718, 723 n.4 (9th Cir. 1981), *cert. granted*, 50 U.S.L.W. 3783 (U.S. Mar. 30, 1982) (No. 81-1095). *But see* United States v. Curcio, 694 F.2d 14, 19-20 (2d Cir. 1982); Cooper v. Fitzharris, 586 F.2d 1325, 1332 (9th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 974 (1979).

48. 657 F.2d at 1113.

underlying the final judgment rule. If appealability were recognized on this basis, "a whole host of orders made in the course of a criminal trial would be immediately appealable."[49]

In declining to issue a writ of mandamus ordering the district court to reinstate the disqualified attorney, the *Greger* court noted that as in orders denying motions to disqualify counsel, "the most prudent course is to find such orders unappealable but to retain discretion to permit exceptional cases to be heard before final judgment by means of a petition for writ of mandamus."[50] In deciding whether such a writ should issue, the court examined the guidelines set forth by the Ninth Circuit in *Bauman v. United States*,[51] and held that they had not been met by the defendant.[52]

D. THE *Petroleum Products* DECISION

In *Petroleum Products*, the Ninth Circuit found the three elements comprising a "collateral order" under *Firestone* to be present.[53] The court noted that the first element—requiring the order to be conclusive as to the disputed question—is stronger in the case of a grant of disqualification than in a denial.[54] Unlike a denial, an order granting disqualification is not subject to reconsideration.

Second, the order was a decision on a legal issue that was completely separate from the merits of the antitrust issues being litigated in the case.[55] The order was based on certain canons of ethics regarding when an attorney must be disqualified.[56] No an-

---

49. *Id.*

50. *Id.* at 1114.

51. 557 F.2d 650 (9th Cir. 1977). The five guidelines outlined in *Bauman* are: (1) the party seeking the writ has no other adequate means of relief, such as direct appeal; (2) the petitioner will be damaged or prejudiced in a way not correctable on appeal; (3) the district court's order is clearly erroneous as a matter of law; (4) the district court's order is an oft-repeated error or manifests a persistent disregard of the federal rules; and (5) the district court's order raises new and important problems or issues of first impression. In cases where some guidelines suggest one conclusion and other guidelines suggest another, the court should balance the competing considerations. *Id.* at 654-55.

52. 657 F.2d at 1115.

53. *See supra* text accompanying note 35. A "collateral order" is synonymous with an interlocutory order under the *Cohen* doctrine.

54. 658 F.2d 1355, 1357 (9th Cir. 1981).

55. *Id.*

56. Canon 9 of the A.B.A. Code of Professional Responsibility empowers the district

titrust issues were implicated in the decision.

Finally the court found that the order was effectively unreviewable on appeal from a final judgment. Within this context the court found that without immediate review, a party would suffer a loss of rights which a new trial could not adequately remedy. To illustrate this point, the court contrasted *Greger*, noting that the presumption of prejudice from an erroneous disqualification order in a criminal case does not exist in a civil case. An appellant in a civil case would thus have the difficult burden of showing that the case was lost because of the forced change of counsel in the course of the litigation.[57] In addition, the court noted that in a civil case, the imposition on the rights of the aggrieved party by the disruption of the litigation would not be cured as in a criminal case by the appointment of substitute counsel. Finally, the court noted that the special policies which dictate the need for speed and uninterrupted prosecutions in a criminal case do not carry as much force in a civil suit.[58]

E. Analysis

Greger is the first criminal case in which any circuit court has confronted the disqualification of counsel issue since the *MacDonald* and *Firestone* decisions. The Supreme Court's reasoning in those cases strongly emphasized the policy against piecemeal review. Influenced by this posture, the Ninth Circuit in *Greger* refrained from creating another exception to the final judgment rule.

The rule that a criminal defendant cannot immediately appeal an order disqualifying his counsel is entirely consistent with Ninth Circuit precedent in the application of *Cohen* in criminal cases.[59] These cases establish that the only interlocutory deci-

---

court to disqualify attorneys if their conduct interferes with the integrity of the court or actually produces the appearance of impropriety. Model Code of Professional Responsibility Canon 9 (1979).

57. 658 F.2d at 1358.

58. *Id.*

59. *See* United States v. Layton, 645 F.2d 681 (9th Cir. 1981) (claim of lack of subject matter jurisdiction not immediately appealable); United States v. Wilson, 639 F.2d 500 (9th Cir. 1981) (selective prosecution claim immediately appealable); United States v. Garner, 632 F.2d 759 (9th Cir. 1980) (claim of grand jury irregularities not immediately appealable); United States v. Griffin, 617 F.2d 1342 (9th Cir.), *cert. denied*, 449 U.S. 863 (1980).

sions in a criminal prosecution considered final prior to a final judgment are those which adjudicate the defendant's right to be free from prosecution itself.[60] Unless awaiting final judgment implicates this right, the policy of expeditiously determining the defendant's guilt or innocence militates against interlocutory review of district court orders.

The *Greger* panel chose not to address the broader issue of whether a criminal defendant has a right to continuous representation of counsel throughout his trial.[61] If the court had so concluded, immediate appellate review would arguably be required to preserve this right. However, such a decision may have opened the door for allowing interlocutory appeals of any court order which affects a defendant's right to counsel. In addition, the Ninth Circuit has expressed the concern that the *Cohen* exception not be allowed to swallow up the final judgment rule and abrogate the intent of Congress as expressed in section 1291.[62]

As *Petroleum Products* points out, an order disqualifying counsel in a civil suit operates in a vastly different context than in a criminal prosecution. As a result, the reasoning expressed by courts in dealing with the *Cohen* doctrine in criminal cases is not always relevant to the civil context. Most importantly, the right to be free from prosecution is inapplicable in a civil case. Also absent from consideration in civil cases is the special need in criminal trials for rapid administration of justice.

While both areas of the law strive for the uninterrupted administration of justice, within the civil context, courts have engaged in a balancing process to determine whether allowing interlocutory review would impede or further this goal. For example, in *Armstrong v. McAlpin*[63] the Second Circuit prohib-

60. Whether an order impacts on such a right is not always self-evident. For example, in United States v. Griffin, 617 F.2d 1342, 1345 (9th Cir.), *cert. denied*, 449 U.S. 863 (1980), the Ninth Circuit held that an order denying a defendant's motion to dismiss because of vindictive prosecution did not encompass the right to be free from prosecution itself. However, in United States v. Hollwyood Motor Car Co., 102 S. Ct. 3081 (1982), the Supreme Court disagreed. *See supra* notes 25-26 and accompanying text.

61. The Supreme Court appears ready to decide this issue in Slappy v. Morris, 649 F.2d 718 (9th Cir. 1981), *cert. granted*, 50 U.S.L.W. 3783 (U.S. Mar. 30, 1982)(No. 81-1095).

62. United States v. Garner, 632 F.2d 759, 765 (9th Cir. 1980).

63. 625 F.2d 433, 437 (2d Cir. 1980).

ited interlocutory appeal of orders denying the disqualification of counsel because it found that the motions were often used as a device for delaying trial. The Fifth Circuit in *Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,[64] held that orders disqualifying counsel are immediately appealable, noting that when such motions are granted, the litigation is disrupted by the time and effort required by a party to secure new counsel and familiarize him with the case.

The *Petroleum Products* panel nevertheless felt compelled to deal with the apparent contradictory holding of *Greger*. In determining that the *Cohen* doctrine applies, the court distinguished *Greger* on three grounds. First, in the civil context an order disqualifying counsel is not effectively reviewable on appeal from a final judgment.[65] The same is not true in criminal cases: a presumption of prejudice exists because an erroneous disqualification of a defendant's counsel implicates the sixth amendment right to counsel.[66] A civil litigant faces the almost insurmountable burden of proving the case was lost because he was improperly forced to switch counsel, while a criminal defendant need only convince a reviewing court that the order was improper to win reversal, thus obviating the need for immediate appellate review.

The second difference is the degree of finality the order has in the civil versus the criminal context. The court in *Petroleum Products* argued that in a criminal case, the disruptive effect of a disqualification order is strongly mitigated by the appointment of substitute counsel if the defendant should not be able to afford new counsel. However, this position understates the value of the attorney-client relationship in criminal cases by implying that a criminal defendant's relationship with his particular attorney is of less significance than his civil counterpart.

Finally, *Petroleum Products* noted that public policy militiates against interlocutory review in criminal cases. However, the necessity of a retrial each time a conviction is reversed is arguably inconsistent with the policy of efficiency and expediency in the criminal justice system. The Fifth Circuit in *United*

64. 646 F.2d 1020, 1027 (5th Cir. 1981).
65. 658 F.2d at 1358.
66. 649 F.2d at 723 n.4.

States v. Garcia,[67] allowed a defendant to appeal his attorney's disqualification in order to avoid the waste of scarce resources and duplication of a retrial. In *United States v. Hobson*,[68] the Eleventh Circuit took a novel approach by allowing an interlocutory appeal of a disqualification order, but refusing to stay the trial court proceedings pending appeal. In this manner, the burden of a new trial is avoided if the order is deemed erroneous, and the prosecution in the lower court is not stalled during the appeal.

F. SIGNIFICANCE

The *Greger* decision helps define the contours of a criminal defendant's right to counsel. The decision implies that the right to counsel does not encompass the right to a trial free from interference with the attorney-client relationship.

The *Petroleum Products* decision may have several ramifications. First, trial judges conscious of court congestion may now be less willing to grant a motion to disqualify a party's counsel knowing that denial of the motion cannot be appealed. Instead, a judge may take the approach of issuing protective orders to prevent the same taint that a disqualification order is aimed at eliminating.[69] A second possible effect may be to refine the standards for when motions disqualifying counsel should be granted. The issue may become a legal rather than a discretionary question for the trial judge. Trial court judges will thus have to adhere to the developing legal standards as appeals from the orders are taken.[70] Finally, the court's holding emphasizes the Ninth Circuit's practical approach to the *Cohen* doctrine in civil cases and confirms the narrow treatment this doctrine will re-

67. 517 F.2d 272, 275 (5th Cir. 1975).

68. 672 F.2d 825, 826 (11th Cir. 1982).

69. *See* Armstrong v. McAlpin, 625 F.2d at 438-39.

70. In Woods v. Covington County Bank, 537 F.2d 804 (5th Cir. 1976), the court noted that while disqualification orders are issued within the lower court's discretion, courts have recently expressed "serious reservations" about whether the scope of appellate review is limited to finding an abuse of discretion where only a purely legal question is at issue. The court then decided to examine the applicable ethical principles in deciding the validity of the disqualification in the case. *Id.* at 810. *Cf. In Re* Gopmon, 531 F.2d 262, 266 (5th Cir. 1976) (holding that an order disqualifying counsel could be reversed only upon a showing of abuse of discretion).

ceive in the criminal context.

*Richard B. Shikman**

OTHER DEVELOPMENTS IN FEDERAL PRACTICE & PROCEDURE

A. QUESTIONING THE BASIS OF THE *Feres* DOCTRINE

In *Monaco v. United States*,[1] *Broudy v. United States*,[2] and *Lewis v. United States*,[3] the Ninth Circuit affirmed the *Feres* doctrine[4] which bars government liability under the Federal Tort Claims Act[5] (FTCA) "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."[6]

In *Monaco*, the Ninth Circuit held that the claimant and his daughter could not recover under the FTCA for injuries arising from claimant's in-service exposure to radiation even though the injuries did not manifest themselves until after claimant left the service.

During World War II, the claimant was stationed at the University of Chicago where, as part of a special program, he was required to perform calisthenic exercises in the football field. He alleged that while involved in this program, experiments in atomic reactions were being conducted in a laboratory beneath the stadium in connection with the "Manhattan Pro-

---

* Second year student, Golden Gate University School of Law.

1. 661 F.2d 129 (9th Cir. 1981) (per Nelson, J.; the other panel members were Canby, J. and Battin, D.J., sitting by designation) (rehearing denied, Dec. 14, 1981), *cert. denied*, 102 S. Ct. 2269 (1982).

2. 661 F.2d 125 (9th Cir. 1981) (per Nelson, J.; the other panel members were Skopil and Norris, JJ.) (as amended, Dec. 21, 1981).

3. 663 F.2d 889 (9th Cir. 1981) (per Hug, J.; the other panel members were Schroeder and Nelson, JJ.), *cert. denied*, 102 S. Ct. 2959 (1982).

4. The *Feres* doctrine was established in Feres v. United States, 340 U.S. 135 (1950).

5. 28 U.S.C. §§ 1291, 1346(b) & (c), 1402(b), 1504, 2110, 2401(b), 2402, 2411(b), 2412(c), 2671-2680 (1976 & Supp. 1981).

6. 340 U.S. at 146.

ject", which developed the first atomic weapon.

The claimant was not apprised of his exposure to radiation until 1971, when he was informed that he had cancer of the colon induced by radiation. At the same time, he learned that the radiation had induced a genetic change which caused his daughter to be born with a birth defect resulting in brain hemmorhages, aphasia and other permanent injuries.

The claimant and his daughter brought a consolidated action under the FTCA, which waives traditional sovereign immunity and exposes the government to liability arising from personal injury or property damage caused by the negligence of any government employee "acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[7] The claimant and his daughter alleged that the Army was negligent in permitting his exposure to radiation.

In *Feres v. United States*, the Supreme Court established an exception to the FTCA's waiver of immunity "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."[8] In *Stencel Aero Engineering Corp. v. United States*,[9] the Supreme Court extended the *Feres* exception to bar a third party's indemnity claim for damages paid to cover service-related injuries. The Supreme Court has noted three reasons for the military exception. First, the Court has expressed a concern with the effects of such suits on military discipline, and "the extreme results that might obtain if suits . . . were allowed for negligent orders given or negligent acts in the course of military duty."[10] Second, the FTCA's reliance on the law of the place where the negligent act occurred would lead to inconsistent application of the law.[11] Finally, military personnel

7. 28 U.S.C. § 1346(b) (1976).

8. 340 U.S. 135, 146.

9. 431 U.S. 666 (1977).

10. United States v. Brown, 348 U.S. 100, 112 (1954). The *Monaco* court referred to this concern as "the most convincing explanation for the continued vitality of the *Feres* doctrine." 661 F.2d at 132.

11. In *Feres*, the Supreme Court stated that recovery by military personnel would be "dependent upon geographical considerations over which they have no control and to laws which fluctuate in existence and value." 340 U.S. 135, 143. The Court concluded

can recover under the Veterans' Benefit Act,[12] which provides "no fault" compensation as a substitute for tort liability and limits the extent of governmental liability for service-related injuries.[13]

The claimant in *Monaco* relied on *United States v. Brown*,[14] arguing that since his cancer manifested itself after he left the service, his injury did not arise out of activity incident to service.[15] The court rejected this argument by distinguishing *Brown*, since in that case the negligent act itself occurred post-service. The court found that the proper test is not when the injury occurred, but rather when the negligent act itself took place. Since claimant's injury resulted directly from in-service exposure to radiation, the court concluded that the government's negligence occurred while claimant was in the service, even though the injury did not manifest itself until after discharge.[16]

The claimant's daughter advanced two arguments. First, she claimed that her injury was not the result of an in-service injury because the genetic change in her father that caused her birth defects was no injury. The court reiterated that "the proper focus in applying the *Feres* doctrine is not the time of injury, but the time of the negligent act."[17] The court reasoned that it was immaterial whether the daughter's injury occurred when she was born with the birth defect or when her father suffered genetic change; the allegedly negligent act took place while her father was in the service.

Next, the daughter argued that recovery should not be barred because she was never a member of the armed forces and her claim has no effect on military discipline. The court noted that the Supreme Court had rejected both aspects of this argument in *Stencel*. There, the Court concluded that "the effect of the action upon military discipline is identical whether suit is

---

that this would "hardly be a rational plan." *Id.*

12. 38 U.S.C. §§ 301-1008 (1979 & Supp. 1981).

13. 661 F.2d 129, 131.

14. 348 U.S. 100 (1954). In *Brown*, recovery was allowed to include post-service negligent treatment of an in-service injury.

15. 661 F.2d 129, 132-33.

16. *Id.* at 133.

17. *Id.*

brought by the soldier directly or by a third party."[18] The Ninth Circuit also rejected the daughter's argument that non-military claimants should be entitled to recover because of their inability to collect compensation under the Veterans' Benefit Act. In the court's view, the fact that the daughter sought relief for an injury to herself rather than indemnity for losses due to in-service injury to her father did "not change the substantive analysis."[19]

In *Broudy v. United States*, the Ninth Circuit concluded that the government's failure to warn of, monitor and treat any possible injuries arising from exposure to radiation might constitute an independent, post-service negligent act if the government learned of the danger after discharge. In 1957, while plaintiff's husband served as an officer in the Marine Corps, he was ordered to participate in military exercises in the vicinity of two nuclear tests conducted in Nevada. For several years after his discharge in 1960, plaintiff's husband was treated for various health problems at Marine medical facilities, but was not informed of or warned about the dangers associated with his exposure. In 1976, plaintiff's husband was diagnosed as having a form of cancer that has been related to low-level radiation exposure. One year later, he died from that disease.[20]

The court found that plaintiff was barred by *Feres* and its progeny from bringing a claim for an in-service tort continuing after discharge. However, the court stated that the government's failure to warn plaintiff's husband of and monitor any possible injuries arising from his exposure might constitute an independent, post-service negligent act under *Brown* if the government learned of the danger after plaintiff's husband left the service.[21]

---

18. 431 U.S. 666, 673.

19. 661 F.2d 129, 134.

20. 661 F.2d 125, 126.

21. 661 F.2d at 128-29. *See* Thornwell v. United States, 471 F. Supp. 344 (D.D.C. 1979) (finding independent tort and granting recovery where government deliberately refused to give claimant information on drug experiments performed on him in-service); Schwartz v. United States, 230 F. Supp. 536 (E.D. Pa. 1964) (allowing recovery for failure to warn, where dangerous effects of drug administered during service not discovered until post-service). *But see* Stanley v. CIA, 639 F.2d 1146 (5th Cir. 1981) (alleged failure to monitor effects of chemical warfare an in-service tort, the effects of which simply remained uncorrected following discharge); Henning v. United States, 446 F.2d 774 (3d Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972) (recovery denied for failure to inform claimant of in-service misdiagnosis of tuberculosis); *In re* "Agent Orange" Product Liability Litigation, 506 F. Supp. 762 (E.D.N.Y. 1980) (recovery denied where government

In remanding the case to the district court, the Ninth Circuit noted that plaintiff's allegations concerning the government's knowledge were "somewhat confused" and acknowledged that this confusion may have resulted from an inability to gain the necessary information from the government.[22]

In *Lewis v. United States*, the Ninth Circuit held that the policies supporting the *Feres* doctrine require that courts also bar intentional tort claims asserted against the government by military personnel. The widow of a Marine Corps lieutenant colonel brought a wrongful death action against the government after her husband died in a plane crash. She alleged that the acts or omissions of government employees in maintaining, operating and controlling the aircraft amounted to "sabotage."[23]

The Ninth Circuit declined to pass on the claim which would require it to focus on the actions of the government in the military context. The court noted that the *Feres* language indicated "no limitation" as to the types of injuries involved and that the "critical determination" is the status of the plaintiff not the status or actions of the tortfeasor.[24]

The *Feres* doctrine has been sharply criticized. The *Monaco* court commented that "the basis for the exception has recently become the subject of some confusion" and noted that several cases in the Ninth Circuit have held the military exception applicable "even where there was no command relationship between the claimant and the tortfeasor."[25] The *Monaco* panel was particularly reluctant to apply the doctrine in the daughter's case. The court stated that "[i]n her case, the price of avoiding examination of events long past, and involving her behavior in no respect, appears to be [a] complete denial of recovery."[26]

---

failed to warn military personnel about effects of chemical agent because there was no separate and distinct act of post-discharge negligence).

22. 661 F.2d at 129. At one point in her complaint, the plaintiff alleged that the government learned of the dangers "subsequent to 1955 and prior to 1972"—a span that covered the time period prior to Major Broudy's discharge in 1960. At other points, however, she alleged specifically that the government knew of the harmful effects of radiation prior to her husband's exposure. *Id.*

23. 663 F.2d 889, 890.

24. *Id.* at 891.

25. 661 F.2d at 132. *See* Troglia v. United States, 602 F.2d 1334 (9th Cir. 1979); United States v. Lee, 400 F.2d 558 (9th Cir. 1968), *cert. denied*, 393 U.S. 1053 (1969).

26. 661 F.2d at 134.

The argument for barring the daugher's claim in *Monaco* is attenuated. It is difficult to imagine how military discipline would be jeopardized if claims such as that brought by the daughter were allowed. Her claim was far removed from the command relationship and her harm was belated and unforeseen. Nonetheless, the court felt bound by the "developed doctrine" and its broad prohibition of judicial examination of military activities, even where a third party brings a claim in his or her own interest.[27]

One commentator considers the *Feres* doctrine "unnecessary" and believes "[i]t deprives military personnel of redress for harms in the name of policies that are more than adequately fulfilled by the FTCA's 'discretionary function' exception."[28] The discretionary function exception protects government "planning" activities as opposed to those which are merely "operational".[29] In *Feres*, a serviceman was killed when the barrack in which he was sleeping burned down. Government negligence was alleged in the maintenance of the heating system. Had the Court decided the case under the "discretionary function" ex-

---

27. *Id. See* Van Sickel v. United States, 285 F.2d 87, 90 (9th Cir. 1960) (denying recovery for wrongful death action found to be "original and distinct cause of action granted to the heirs and personal representatives of the decedent to recover damages sustained by them."); *In re* "Agent Orange" Product Liability Litigation, 506 F. Supp. 762 (E.D.N.Y. 1980) (denying recovery to children claiming genetic injuries and birth defects caused by parents' exposure to Agent Orange); Harrison v. United States, 479 F. Supp. 529, 532-35 (D. Conn. 1979), *aff'd without opinion*, 622 F.2d 573 (2d Cir. 1980) (wife's action for loss of consortium barred even though her action was "for damages to her own interest, not a remote consequence of the tortfeasor's injury to the husband.").

28. *See* Note, *From* Feres *to* Stencel: *Should Military Personnel Have Access to FTCA Recovery*? 77 MICH. L. REV. 1099 (1979). 28 U.S.C. § 2680 (1976) provides express exceptions to the application of the FTCA. The "discretionary function" exception includes:

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Id. at § 2680(a).

29. The distinction between "planning" activities as opposed to "operational" activities originated in Dalehite v. United States, 346 U.S. 15 (1953). In *Dalehite*, the Supreme Court barred a claim for damages arising from the explosion of a shipload of fertilizer manufactured in connection with a War Department project for the export of fertilizer to devastated countries following World War II, because the alleged negligence took place "at a planning rather than operational level." *Id.* at 42.

ception, it might have found that the maintenance of the barrack's heating system was a purely operational activity and not a matter of military judgment. Instead, the *Feres* Court dismissed the claim as a service-related injury,[30] thereby denying recovery to the claimant and establishing a broad-based military exception.

The discretionary function exception shields the government from liability for activities which are a matter of military judgment. The exception would more than adequately guard against the possibility that an elimination of the *Feres* doctrine would open a floodgate of litigation against the military. It is doubtful whether those claims presented in *Monaco* and *Broudy* could survive the "discretionary function" exception. The government could argue with probable success that the *Monaco* claimant's injury resulted from a governmental project in the planning phase. The government could buttress its argument by relying on such factors as the need for, and time restrictions on, the research and development of the atomic bomb. In *Broudy*, the government has an even stronger case under the discretionary function exception. The exception would protect decisions to employ potentially dangerous training methods or to experiment with the effects of certain weaponry on combat troops, since these policy decisions in the military context fall squarely within the "discretionary function" exception.

The military could argue another statutory exception to the FTCA which involves intentional tort claims brought against the government.[31] In *Lewis*, the government argued that the plaintiff stated a claim under one of the intentional tort theories excluded by the FTCA since the acts or omissions on the part of government employees were characterized as "sabotage". However, the court found no need to address this issue because of the *Feres* doctrine.

With the *Feres* doctrine left intact, the law prevents military personnel and their family members from bringing suits against the government if the injuries or fatalities are service-

30. 340 U.S. 135, 146.

31. 28 U.S.C. § 2680(h) (1976 & Supp. 1981). The FTCA also excludes claims arising in foreign countries, 28 U.S.C. § 2680(k) (1976), and from combatant activities, 28 U.S.C. § 2680(g) (1976).

related. Recovery may be allowed if the plaintiff can allege and show an independent, post-service negligent act. Injuries arising from exposure to radiation might constitute such an act if the government learned of the danger after discharge. Otherwise, the only other channels of redress available are certain limited legislative remedies.[32] The court in *Monaco* encouraged claimant's daughter to pursue any legislative remedies and expressed the hope that if Congress is made aware of the seriousness of such claims, it will be moved to grant relief, or to change the law to allow such recoveries.[33]

B. Parroting the Requirements of Federal Rule of Civil Procedure 36 May be Considered an Admission

In *Asea v. Southern Pacific Transportation Co.*,[34] the Ninth Circuit held that a response which fails to admit or deny a proper request for admission does not comply with requirements of federal procedural rules if the answering party does not make a "reasonable inquiry,"[35] or if information "readily attainable"[36] is sufficient to enable him to admit or deny the matter. The court also held that the trial court did not abuse its discretion in not requiring the answering party to make an amended response.[37]

In *Asea*, plaintiff sued the defendant for damages and served the defendant with a series of requests for admissions pursuant to rule 36(a) of the Federal Rules of Civil Procedure.[38]

---

32. Prior to the enactment of the FTCA, the only recourse for a citizen injured by the negligence of a government employee was to petition Congress to pass a private bill providing a special grant of relief. *Feres*, 340 U.S. at 139-40.

33. 661 F.2d at 134 n.3. In a footnote concluding its opinion, the court stated:

> Perhaps if Congress is made aware of the seriousness of claims such as [claimant's daughter] Denise's it will be moved to grant relief to the individuals who request it, or to change the FTCA to allow such recoveries in the federal courts. We sincerely hope Congress will do at least the former.

Id.

34. 669 F.2d 1242 (9th Cir. 1981) (per Wallace, J.; the other panel members were Wright, J. and East, D.J., sitting by designation) (rehearing and rehearing en banc denied, Mar. 8, 1982).

35. 669 F.2d at 1245.

36. *Id.*

37. *Id.* at 1247.

38. Fed. R. Civ. P. 36(a) (Supp. 1982) provides in part:

> A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the

As to the principal factual issues, the defendant responded as follows: "Answering party cannot admit or deny. Said party has made reasonable inquiry. Information known or readily available to this date is not complete. Investigation continues."[39]

After plaintiff deposed more of defendant's employees, it became convinced that defendant had in fact known the cause of the damage claim for many months, and therefore could have admitted or denied the requests for admissions.[40] On a motion to have these requests ordered admitted, the defendant claimed that its responses were proper under rule 36(a) because it did not have first hand information. In spite of this claim, the district court granted the motion in favor of plaintiff.

On appeal, the defendant argued that its responses satisfied rule 36(a), and, in the alternative, that the proper sanction for the failure to make a reasonable inquiry prior to answering a request for admission lies in an award of the expenses incurred in proving the fact at trial, pursuant to Federal Rule of Civil Procedure 37(c).[41]

> truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request . . . .
> The matter is admitted unless . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter . . . . The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. . . . An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. . . .
> The party who has requested the admissions may move to determine the sufficiency of the answers or objections. . . . If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served.

39. 669 F.2d at 1244.

40. *Id.* at 1244-45.

41. *Id.* at 1245. In pertinent part, Rule 37(c) provides:

> If a party fails to admit the . . . truth of any matter requested under rule 36, and if the party requesting the admissions thereafter proves the . . . truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including

The Ninth Circuit found that "[t]he purpose of Rule 36(a) is to expedite trial by establishing certain material facts as true and thus narrowing the range of issues for trial."[42] A party may not refuse to admit or deny when the information to the request is readily available to him because a reasonable burden may be imposed on the parties to facilitate trial. "The appropriate penalty for a party's failure to discharge that burden, however, is unclear."[43]

The court noted three circumstances under which a request for admission may be deemed admitted if the answer does not comply with the requirements of the rule: (1) failure to answer or object to a proper request for admission; (2) an evasive denial which does not specifically deny the matter;[44] and (3) a response which does not set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter.[45]

Rule 36(a) states that if a party has insufficient information to admit or deny the matter and that party has made a reasonable inquiry, it must so state.[46] The defendant argued that its an-

---

reasonable attorney's fees. . . .

42. 669 F.2d at 1245. *See also* Keen v. Detroit Diesel Allison, 569 F.2d 547, 554 (10th Cir. 1978); Webb v. Westinghouse Electric Corp., 81 F.R.D. 431, 436 (E.D. Pa. 1978).

43. 669 F.2d at 1245.

44. *Id. See also* United States v. Kenealy, 646 F.2d 699 (1st Cir. 1981). In *Kenealy*, the defendants appealed from the granting of a summary judgment supported by "matters involuntarily admitted against them, pursuant to Rule 36." *Id.* at 702. The court stated:

> They do not—as they cannot—dispute that deeming matters admitted is a proper remedy under appropriate circumstances for intransigence during discovery. Rule 36 requires specificity, detailed explanation when a truthful answer cannot be framed, good faith, and fairness. Given appellants' opaque, generalized, and tardy denials, their failure to oppose the government's request for this relief, and their incredibly cavalier conduct in this litigation, we decline to tamper with the district court's action, which was well within its discretion.

Id. at 702-03.

45. *Id.* at 1245. *See* Havenfield Corp. v. H & R Block, Inc., 67 F.R.D. 93 (W.D. Mo. 1973). "One cannot answer properly in the alternative but 'must comply strictly and literally with the the terms of the statute upon peril of having [one's] response construed to be in legal effect an admission' "). *Id.* at 97 (citation omitted). The court held that the remedy for the answering party's failure to respond adequately was to order that party to answer properly the day following the issuance of the order or to have those requests for admissions deemed admitted. *Id.*

46. *See supra* note 38.

swer was sufficient because it was literally in compliance with the rule.[47] But the rule also requires that the answering party make a reasonable inquiry into knowledge and information readily obtainable by him.[48] Again, the appropriate sanction for failure to take such steps is not clear.[49]

The court noted that it found no case holding that a "response which includes the statement required by Rule 36(a) may nonetheless be deemed an admission."[50] The court did find however that even when a party fails to state that it had made a reasonable inquiry, and thus fails to comply with the requirements of the rule, the "courts generally order an amended answer rather than deem the matter admitted."[51] Some courts have held a response to be insufficient if the answering party

---

47. 669 F.2d at 1246. *See* Adley Express Co. v. Highway Truck Drivers and Helpers, Local No. 107, 349 F. Supp. 436 (E.D. Pa. 1972). In *Adley*, the court stated that "it would appear that mere statement in the answer that the answering party has made reasonable inquiry and that the information solicited was insufficient to enable him to admit or deny the requested matter will suffice." 349 F. Supp. at 451-52. But the court continued: "[w]e are not confronted with the mere statement of the union that it conducted a reasonable inquiry . . . ; on the contrary, it is apparent from the answer that the union had attempted to procure the information necessary to admit or deny." *Id.* at 452.

In *Asea*, there was evidence which suggested that the defendant either had "sufficient information to admit or deny the requested admissions at the time it submitted its answers to [plaintiff], or that it subsequently discovered sufficient information to require it to amend its answers." *See* FED. R. CIV. P. 26(e)(2)(B). However the record would not necessarily support a finding that the defendant failed to make a reasonable inquiry. 669 F.2d at 1247.

48. The Advisory Committee's Note states:

> The revised rule requires only that the answering party make reasonable inquiry and secure such knowledge and information as are readily obtainable by him. In most instances, the investigation will be necessary either to his own case or to preparation for rebuttal. Even when it is not, the information may be close enough at hand to be "readily obtainable".

48 F.R.D. at 533.

49. The Advisory Committee's Note continues: "Rule 36 requires only that the party state that he has taken these steps. The sanction for failure of a party to inform himself before he answers lies in the award of costs after trial, as provided in Rule 37(c)." *Id. See supra* note 41.

50. 669 F.2d at 1246.

51. *Id. See* City of Rome v. United States, 450 F. Supp. 378, 383-84 (D.D.C. 1978), *aff'd*, 446 U.S. 156 (1980) (court ordered party to serve amended answers within five days of the date of the order); Alexander v. Rizzo, 52 F.R.D. 235, 236 (E.D. Pa. 1971) ("If the Court determines that the answer does not comply with the Rule it may order *either* that the matter is admitted *or* that an amended answer be served.") (emphasis in original) (court ordered amended answers).

fails to make a reasonable inquiry, but have ordered amended answers rather than deem the matters admitted, even if the information necessary to admit or deny was readily obtainable.[52] To this extent, courts have conditioned denials of motions to order matters admitted on the answering party's timely submission of a sufficient response.[53]

With this background, the *Asea* court addressed the crux of the appeal—was it proper for the district court to order the matters admitted even though the defendant's responses literally fell within the mandates of Rule 36? The court stated that in its view, "permitting a party to avoid admitting or denying a proper request for admission simply by tracking the language of Rule 36(a) would encourage additional abuse of the discovery process."[54] Such a response, if deemed to be adequate, would have the deleterious result of permitting the answering party to shield himself from making an admission, and in most cases, from the award of sanctions. The court reasoned that

> Since a district court may order that a matter is admitted only if an answer does not 'comply' with the requirements of the Rule, it could be argued that the only sanction for a party's willful disregard of its obligation to make reasonable inquiry would be an award of the expenses of proving the matter at trial pursuant to Rule 37(c).[55]

However, such a holding would emasculate the power of the court and reduce the litigant's obligation to make a reasonable inquiry into the information available to him.[56] The court therefore held that a response which fails to admit or deny a proper request for admission does not comply with the requirements of the rule if the party in fact failed to make a reasonable inquiry or if information readily available is sufficient to enable him to admit or deny the matter.[57]

---

52. *Id. See* Madison v. Mississippi Medicaid Comm'n, 86 F.R.D. 178, 186 (N.D. Miss. 1980); Webb v. Westinghouse Electric Corp., 81 F.R.D. 431 (E.D. Pa. 1978); Lumpkin v. Meskill, 64 F.R.D. 673, 678-80 (D.C. Conn. 1974) (answering party ordered to make reasonable inquiry before amending response).

53. *See, e.g.*, Lumpkin v. Meskill, 64 F.R.D. 673, 680 (D.C. Conn. 1974); Havenfield Corp. v. H & R Block, Inc., 67 F.R.D. 93, 97 (W.D. Mo. 1973).

54. 669 F.2d at 1246.

55. *Id. See supra* note 41.

56. 669 F.2d at 1246-47.

57. *Id.* at 1247.

If a propounding party feels that the answering party has not exercised its duty to make a reasonable inquiry in good faith, he may move to have the court determine the sufficiency of the answer, compel a proper response, or have the matter ordered admitted. The court noted that a district court should ordinarily first order an amended answer, and deem the matter admitted only if a sufficient answer is not timely filed. It added that the severe sanction of ordering a matter admitted still lies within the sound discretion of the district court and could be imposed when it is demonstrated that a party has intentionally disregarded the obligations imposed by Rule 36(a).[58]

Applying this standard, the court found that the trial court deemed admitted certain key matters to the case although the trial record did not disclose any evidence showing that the defendant had failed to make a reasonable inquiry or that information readily obtainable was sufficient to allow it to admit or deny the particular requests.[59] The court vacated the order and remanded for the limited purpose of reconsideration of the order deeming the requests admitted and the filing of appropriate findings of fact.[60]

Asea v. Southern Pacific Transportation Co. serves as a warning to attorneys to keep in mind the boundaries of their good faith posture with respect to their duty of reasonable inquiry. The defendant in *Asea* was fortunate in that the district court did not properly support with facts its findings of law. After *Asea* however, even a questionable breach of the duty of reasonable inquiry may support an order deeming these requests admitted.

58. *Id. See* David v. Hooker, Ltd., 560 F.2d 412, 418 (9th Cir. 1977) ("[b]y the very nature of its language, sanction imposed under Rule 37(b) must be left to the sound discretion of the trial judge."), quoting Von Brimer v. Whirlpool Corp., 536 F.2d 838, 844 (9th Cir. 1976); Herrin v. Blackman, 89 F.R.D. 622, 623 (W.D. Tenn. 1981) (magistrate erred as a matter of law in holding that defendant's failure to file response to request for admissions within prescribed time resulted in automatic conclusion that requests would be deemed admitted).

59. 669 F.2d at 1247.

60. Id.