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Administrative Law Summary

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SUMMARY

WATKINS v. UNITED STATES ARMY: THE NINTH CIRCUIT FORCES THE ARMY OUT OF THE CLOSET

I. INTRODUCTION

In *Watkins v. United States Army*,[1] a sharply divided 11 member en banc panel of the Ninth Circuit equitably estopped the Army from denying reenlistment to Sergeant Perry J. Watkins.[2] This was the third time in seven years that the case came before the Ninth Circuit.[3] The Ninth Circuit withdrew both of its previous opinions and reinstated an order that it had reversed in 1983.[4] Contrary to the Ninth Circuit's first decision in

1. Watkins v. United States Army, 875 F.2d 699 (9th Cir. 1989) (en banc) (per Pregerson, J.; the other panel members were Goodwin, C.J., Schroeder, J., Alarcon, J., Nelson, J., Canby, J., concurring, Norris, J., concurring in the judgment, Beezer, J., Hall, J., dissenting, O'Scannlain, J., and Trott, J.).

2. *Id.* at 704-05.

3. *See* Watkins v. United States Army, 721 F.2d 687 (9th Cir. 1983) (equity powers of the federal courts cannot be exercised to order military officials to violate their own regulations absent a determination that those regulations violate the Constitution or the military's statutory authority); Watkins v. United States Army, 847 F.2d 1329 (9th Cir. 1988) (Army's reenlistment regulations violate the Equal Protection Clause by discriminating against persons of homosexual orientation, a suspect class, without promoting a legitimate compelling government interest).

4. *Watkins*, 875 F.2d at 711. The majority noted that the law of the case doctrine did not prevent it from reconsidering issues raised in the earlier panel decisions of the case. *See e.g.* Shimman v. International Union of Operating Engineers, Local 18, 744 F.2d 1226, 1229 n.3 (6th Cir. 1984) (en banc) ("law of the case doctrine . . . does not

the case, hereinafter called *Watkins I*, a majority ruled that Watkins' equitable estoppel claim was justiciable.[5] Reaching the merits of the claim, the majority held that the Army had effectively waived its right to deny reenlistment to Watkins on grounds that his reenlistment would violate an Army regulation barring the reenlistment of gays and lesbians.[6] Contrary to the Ninth Circuit's second decision in the case, hereinafter called *Watkins II*, the majority concluded that it was unnecessary to reach the difficult constitutional issue of whether to apply strict, intermediate or rational level scrutiny to government classifications based on sexual orientation.[7] The Ninth Circuit's decision illustrates that under extraordinary circumstances a federal court can and will exercise its equity powers to order the military to violate its own regulations.[8]

II. FACTS

In 1967, at the age of 19, Perry J. Watkins was drafted and admitted into the United States Army, despite the Army's long-

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impair the power of an en banc court to overrule any panel decision."), *cert. denied*, 469 U.S. 1215 (1985); Van Gemert v. Boeing Co., 590 F.2d 433, 436-37 n. 9 (2d Cir. 1978) (en banc) (law of the case doctrine cannot immunize panel decisions from review by the court en banc), *aff'd*, 444 U.S. 472 (1980); *cf.* United States v. Mills, 810 F.2d 907, 909 (9th Cir. 1987) (law of the case is a discretionary doctrine), *cert. denied*, 180 S.Ct. 107 (1987).

5. *Watkins*, 875 F.2d at 706.

6. *Id.* at 711.

7. *Id.* at 705. However, two of the seven judges in the majority wrote separately and urged that the court should have reached Watkins' constitutional claim. Judge Norris wrote that he believed Watkins' equitable estoppel claim was barred by precedent, but he concurred in the judgment because he also believed that Watkins had prevailed on his equal protection claim. *Id.* at 711 (Norris, J., concurring in judgment). Judge Canby wrote that the court should have reached Watkins' constitutional claim even though Watkins had prevailed on his equitable estoppel claim. *See id.* at 731 (Canby, J., concurring).

The dissent, written by Judge Hall and joined by three other judges, sharply disagreed with the majority's refusal to reach Watkins' constitutional claim. *See id.* at 731 (Hall, J., dissenting). "The en banc majority shies away from this issue . . . . " *Id.* "The majority's steadfast desire to avoid constitutional adjudication does not support its destruction of a valuable justiciability doctrine." *Id.* at 736. "The majority's desire to avoid the difficult equal protection question presented in this case is no reason to dispense with well-established case law." *Id.* at 737.

Thus, actually a six to five majority of the court (the four dissenting judges plus Judges Norris and Canby) agreed that Watkins' constitutional claim should have been addressed. However, Judge Norris was the only judge who wrote an opinion on Watkins' constitutional claim and Judge Canby was the only judge who joined.

8. *See infra* notes 83 - 109 and accompanying text.

standing "non-waivable" policy of excluding all gays and lesbians from service.[9] About one year later, the Army conducted a criminal investigation into Watkins' sexual conduct, during which Watkins signed an affidavit stating that he had been gay from the age of 13 and that, since his enlistment, he had engaged in sodomy with two other servicemen.[10] The Army subsequently dropped the investigation because of insufficient evidence.[11] In 1961, the Army accepted Watkins' application for a second three-year term.[12]

In 1972, the Army again investigated Watkins for allegedly committing sodomy and, for the second time, terminated the investigation for insufficient evidence.[13] The Army honorably discharged Watkins in 1974 and immediately accepted his application for a six-year reenlistment.[14] In 1975, the Army convened a board of four officers to determine whether Watkins should be discharged because of his homosexual tendencies.[15] The Secretary of the Army adopted the board's unanimous recommendation to retain Watkins.[16]

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9. *Watkins*, 875 F.2d at 701. The Army's preinduction medical form required Watkins to indicate whether he had homosexual tendencies. Watkins answered in the affirmative. *Id.* Watkins served as a chaplain's assistant, personnel specialist and company clerk during his initial three-year tour of duty in the United States and Korea. *Id.*

10. *Id.* Article 125 of the Uniform Code of Military Justice makes it a crime for a serviceperson to engage "in unnatural carnal copulation with another person of the same or opposite sex." 10 U.S.C. § 925 (1976). This language has been held to outlaw both heterosexual and homosexual oral and anal intercourse, even if it occurs in the privacy of a bedroom, where both persons have meaningfully consented and neither has used force or money to coerce the other. *See* United States v. Morgan, Jr., 8 C.M.A. 341 (1957) (consensual as well as nonconsensual sodomy is included within 10 U.S.C.S. § 925); United States v. Jones, 14 M.J. 1008 (CMR 1982) (10 U.S.C.S. § 925 is constitutional as applied to private sodomy between consenting adults of different sex).

11. *Watkins*, 875 F.2d at 701-02.

12. *Id.* at 702. Watkins received an honorable discharge in 1970. *Id.* His reenlistment eligibility code was listed as "unknown." *Id.* Watkins requested clarification of his reenlistment eligibility code in 1971. *Id.* The Army changed the code to category 1, "eligible for reentry on active duty." *Id.*

13. *Id.* The investigation followed the Army's denial of Watkins' application for a security clearance. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* Watkins' commanding officer and a sergeant testified that Watkins did "a fantastic job" and that Watkins' well known homosexuality did not affect the company. *Id.* The board recommended that the Army retain Watkins because "there is no evidence suggesting that his behavior has had either a degrading effect upon unit performance, morale or discipline, or upon his own job performance." *Id.*

In November 1977, the Army granted Watkins a security clearance.[17] Watkins worked without incident until he publicly disclosed his sexual orientation in an interview on March 15, 1979.[18] This prompted another Army investigation.[19] While the investigation was pending, the Army accepted Watkins' application for a three-year reenlistment.[20] In July 1980, the Army revoked Watkins' security clearance.[21]

In August 1981, Watkins filed suit against the Army in Federal District Court.[22] On October 5, 1982, the district court enjoined the Army from refusing to reenlist Watkins because of his sexual orientation.[23] The court held that the Army was equitably estopped from relying on its longstanding policy of disqualifying

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17. *Id.* However, the Nuclear Surety Personnel Reliability Program initially rejected Watkins' application for a position. *Id.* Watkins' commanding officer subsequently requested that Watkins be requalified for a position in the program, stating that Watkins was highly trusted and respected among peers, superiors and subordinates. *Id.* Based on the request of Watkins' commanding officer and an examining Army physician's conclusion that Watkins' sexual orientation did not cause him problems in his work, Watkins was admitted into the program. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* The Army based its decision on Watkins' March 1979 admission of homosexuality, medical records containing his 1968 affidavit stating that he had engaged in homosexual conduct, and his history of performing (with the permission of his commanding officer) as a female impersonator in various revues. *Id.*

22. *Id.* at 703. Watkins' suit originally sought only to have his security clearance reinstated. *Id.* at 703, n. 3. In 1981, the Army promulgated a new regulation which mandated the discharge of all gays and lesbians from service, regardless of merit. *Id.* at 702. The new regulation also clarified the Army's longstanding policy of disqualifying all gays and lesbians from reenlistment. *See id.* at 703 n. 5. *See also* AR 635-200, chpt. 15 (mandating discharge of all homosexuals, regardless of merit); AR 601-280, § 2-21(c) (disqualifying all homosexuals from reenlistment).

Pursuant to the new regulation, the Army convened discharge proceedings against Watkins. *Watkins*, 875 F.2d at 702. Watkins amended his complaint to enjoin the Army from discharging him on the basis of his sexual orientation. *Id.* at 703 n. 3. The Army board rejected evidence that Watkins had engaged in homosexual conduct after 1968, but recommended discharging Watkins anyway because "he has stated that he is a homosexual." *Id.* at 702-03. In May 1982, the Army Secretary adopted the board's recommendation. *Id.* Before the Army discharged Watkins, however, the district court ruled that the Army's double jeopardy provision barred it from discharging Watkins on the basis of his stating that he was homosexual and that the evidence was insufficient to support a finding that he had engaged in homosexual conduct subsequent to the 1975 discharge proceedings. *Id.* at 703 n. 4.

The Army allowed Watkins to complete his current tour of duty, which expired in October 1982. *Id.* The Army rejected Watkins' application for reenlistment, citing its longstanding policy of disqualifying gays and lesbians from reenlistment. *Id.*

23. *Watkins*, 875 F.2d at 703.

gays and lesbians from service to deny Watkins' application for reenlistment.[24] The Army appealed the decision to the Ninth Circuit.[25]

In *Watkins I*, a Ninth Circuit panel reversed the district court's injunction, reasoning that the equity powers of the federal courts could not be exercised to order military officials to violate their own regulations, absent a determination that the regulations violated the Federal Constitution or the military's statutory authority.[26] On remand, the district court held that the Army's regulations did not violate the Constitution or the Army's statutory authority.[27] Watkins appealed.[28] In *Watkins II*, a different Ninth Circuit panel held that the Army's reenlistment regulations violate the Equal Protection Clause because they discriminate against gays and lesbians, a suspect class.[29] The Army petitioned for an en banc rehearing.[30] The full court granted review to address the issues raised in *Watkins I* and *Watkins II*.[31]

III. COURT'S ANALYSIS

A. BACKGROUND

A plaintiff attempting to sue a federal agency or officer must first demonstrate that the court has subject matter jurisdiction (because the suit is authorized by a specific federal statute) and that the suit is not barred by sovereign immunity.[32] Even if sub-

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24. *Id.* Accordingly, the Army reenlisted Watkins for a six-year term on November 1, 1982, on condition that the reenlistment would be voided if the district court's injunction were not upheld on appeal. *Id.* at 703.

While the Army's appeal of the district court injunction was pending, Watkins' superiors rated his performance and professionalism, giving Watkins perfect scores in every category and writing that Watkins' potential is "unlimited" and that Watkins should be promoted "at the earliest opportunity." *Id.* at 703-04.

25. *Id.* at 704.

26. *Id.* (citing *Watkins I*, 721 F.2d 687, 691 (9th Cir. 1983)).

27. *Id.*

28. *Id.*

29. *Id.* (citing *Watkins II*, 847 F.2d 1329, 1352-53 (9th Cir. 1988)).

30. *Id.*

31. *Id.* (citing *Watkins II*, 847 F.2d 1362, 1363 (9th Cir. 1988)).

32. *See* 14 Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE § 3655 (1985). The Tucker Act, the Federal Tort Claims Act and the Administrative Procedure Act provide the major exceptions to the doctrine of sovereign immunity. *Id.* For a general discussion of jurisdiction over actions against the United States, see §§ 3654 - 3660.

ject matter jurisdiction exists, the concept of justiciability forces federal courts to decline their jurisdiction to hear certain claims.[33] Justiciability plays a crucial role in determining whether a court will hear a particular claim against the military; "[f]ederal courts restrict their review of military decision-making not because they lack jurisdictional power to hear military disputes, but out of deference to the special function of the military in our constitutional structure and in the system of national defense."[34]

In *Watkins*, the Army did not dispute the court's subject matter jurisdiction or assert sovereign immunity as a defense.[35] Instead, it focused its defense on the justiciability issue, arguing that, under *Mindes v. Seaman*,[36] the court must decline to hear Watkins' equitable estoppel claim.[37] Watkins argued that *Mindes* did not apply and that, under *Wagner v. Director, Federal Emergency Management Agency*,[38] he was entitled to equitable estoppel.[39] *Watkins* was the first case analyzing whether *Mindes* bars all nonconstitutional equitable claims against the

33. "Justiciability is an analytical approach that has been 'developed to identify appropriate occasions for judicial action, both as a matter of defining the limits of the judicial power created by Article III of the Constitution, and as a matter of justifying refusals to exercise the power even in cases within the reach of Article III.' " Malamud v. Sinclair Oil Corp., 521 F.2d 1142, 1146 (6th Cir. 1975) (quoting Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE § 3529 at 146 (1975)). "An all purpose definition of justiciability has never been published because of the 'notorious difficulty' of defining the concept." Wymbs v. Republican State Executive Comm., 719 F.2d 1072, 1085 n. 34 (11th Cir. 1983), *cert. denied*, 104 S.Ct. 1600 (1984). *See generally* 13, 13A Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE §§ 3529 - 3537 (1984).

34. Sebra v. Neville, 801 F.2d 1135, 1141 (9th Cir. 1986) (citing Khalsa v. Weinberger, 779 F.2d 1393, 1395-97 (9th Cir. 1985), *judgment aff'd*, 787 F.2d 1288 (9th Cir. 1985)). "[T]he doctrine of limited reviewability of certain military regulations and decisions is a matter of justiciability, analagous to the political questions doctrine." Khalsa v. Weinberger, 779 F.2d 1393, 1395 (9th Cir. 1985), *judgment aff'd*, 787 F.2d 1288 (9th Cir. 1985).

35. *See supra* note 3. *See also* Watkins v. United States Army, 541 F.Supp. 249, 257 (1982) (voiding Army ruling discharging Watkins on grounds that it "was arbitrary, unsupported by substantial evidence and contrary to law"); Watkins v. United States Army, 551 F.Supp. 212 (1982) (estopping Army from relying on regulation that bars reenlistment of gays and lesbians as grounds for denying reenlistment to Watkins).

36. 453 F.2d 197 (5th Cir. 1971) (Air Force captain alleged that Air Force's decision to transfer him from active to reserve duty violated his right to procedural due process).

37. *See infra* notes 40 - 65 and accompanying text.

38. 847 F.2d 515 (9th Cir. 1988) (insureds sought review of federal insurance agency's denial of insureds' claims for damage to their home caused by flood induced by landslide).

39. *See infra* notes 66 - 82 and accompanying text.

military and, if not, whether *Wagner* governs some such claims.

1. The *Mindes* Test

In 1950, the Supreme Court held in *Feres v. United States*[40] that the government has no Federal Tort Claims Act liability for injuries to military service members arising in the course of military service.[41] The Court has not retreated from this position; in fact, a series of cases actually expanded upon it.[42] The Court has recently stated that *Feres* bars tort claims against the military because these are the "type of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness."[43]

In 1971, the Supreme Court held in *Bivens v. Six Unknown Fed. Narcotics Agents*,[44] that a person may redress federal agents' constitutional violations of his rights by filing an action under federal constitutional law seeking money damages.[45] Justice Harlan's concurring opinion in *Bivens* and the majority in

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40. 340 U.S. 135 (1950) (widow of soldier who was killed when a defective heating plant caused his barracks to catch fire brought wrongful death action against Army).

41. *Id.*

42. *See* United States v. Muniz, 374 U.S. 150,162 (1963) (federal prisoner sued under the Federal Torts Claim Act to recover damages for personal injuries sustained during confinement in a federal prison). In distinguishing the *Feres* case and allowing a federal prisoner to maintain an action against prison officials, the Court in *Muniz* stated that "*Feres* seems to be best explained by the 'peculiar and special relationship of the soldier to his superiors, [and] the effects of the maintenance of such suits on discipline . . . .' ") (quoting United States v. Brown, 348 U.S. 110, 112 (1954)). The Court recently expanded the scope of *Feres* to preclude tort actions by military service members who were injured in the course of service by the action of a civilian government employee. *See* United States v. Johnson, 481 U.S. 681 (1987) (widow of coast guard helicopter pilot brought wrongful death action against United States alleging that civilian air traffic controller's negligence caused the helicopter crash that killed her husband).

43. United States v. Shearer, 473 U.S. 52, 59 (1985) (mother of Army private brought wrongful death action against Army alleging that it had negligently failed to warn her son that the serviceman who kidnapped and murdered him had been previously convicted of murder and manslaughter). Likewise, the Court in *Johnson* concluded that the mere pendency of a suit against the government by a service member "could undermine the commitment essential to effective service and thus have the potential to disrupt military discipline in the broadest sense of the word." United States v. Johnson, 107 S.Ct. 2063, 2069 (1987).

44. 403 U.S. 388 (1971) (plaintiff sued Federal Bureau of Narcotics for damages resulting from the warrantless entry and search of his apartment and his subsequent arrest).

45. *Id.*

Butz v. Economou,[46] reasoned that injunctive or declaratory relief is useless in most instances of constitutional violations because the plaintiff has already been injured.[47] " 'For people in [those] shoes, it is damages or nothing.' "[48] The Court in *Butz* concluded that "[t]he extension of absolute immunity from damages liability to all federal executive officials would seriously erode the protection provided by basic constitutional guarantees."[49]

Although the Supreme Court subsequently applied the *Feres* rationale to bar *Bivens*-type damages claims against the military,[50] federal courts have never granted military officials absolute immunity from claims seeking only declaratory and injunctive relief.[51] In 1971, the Fifth Circuit articulated the *Mindes* test for determining whether the federal court could review a claim for injunctive and declaratory relief against the military.[52] According to the first prong of the *Mindes* test, the plaintiff must establish that he has properly alleged that the military's action either deprived him of a federal constitutional right or violated a military statute or regulation and that he has exhausted all available intraservice remedies.[53] Assuming the claim survives this preliminary analysis, *Mindes* requires the court to consider the nature and strength of the plaintiff's claim, the potential injury to him if review is refused, the type and degree of anticipated interference with the military function if review is granted and the level of military expertise and discretion involved.[54]

Except for the Third Circuit, which rejected the *Mindes* test because "it intertwines the concept of justiciability with the standards to be applied to the merits of the case,"[55] all the cir-

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46. 438 U.S. 478, 506 (1978) (action for damages against Department of Agriculture after it had unsuccessfully attempted to revoke or suspend the registration of plaintiff's company).

47. *Bivens*, 403 U.S. at 410 (Harlan, J., concurring); *Butz*, 438 U.S. at 504.

48. *Butz*, 438 U.S. at 505 (quoting *Bivens*, 403 U.S. at 410 (Harlan, J., concurring)).

49. *Butz* 438 U.S. at 505.

50. *See infra* notes 62 - 63 and accompanying text.

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

52. *Id.* at 198.

53. *Id.* at 201.

54. *Id.* at 201-02.

55. Dillard v. Brown, 652 F.2d 316, 323 (3d Cir. 1981) (servicewoman claimed that Army regulation prohibiting the enlistment of a single parent with a dependent child

cuits have adopted the *Mindes* test, at least in part.[56] The Ninth Circuit first applied the *Mindes* test in 1978,[57] but did not formally adopt it until 1981 when it decided *Wallace v. Chappell.*[58] In *Chappell*, five Navy enlisted men alleged that certain officers discriminated against them on the basis of race in making duty assignments and performance evaluations.[59] The Ninth Circuit held that the *Mindes* test should be applied to ascertain the reviewability of constitutional claims against the military, but expressed "no view as to whether the *Mindes* test should govern federal nonconstitutional claims."[60] Applying the first prong of

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constituted sex discrimination and violated her equal protection rights).

56. *See e.g.* Costner v. Oklahoma Army Nat'l Guard, 833 F.2d 905, 907 (10th Cir. 1987) (*per curiam*) (member of state national guard claimed that he had been discriminated against on the basis of his age); Stinson v. Hornsby, 821 F.2d 1537, 1540 (11th Cir. 1987) (member of state national guard claimed that he had been discriminated against on the basis of his race), *cert. denied*, 109 S.Ct. 402 (1988); Williams v. Wilson, 762 F.2d 357, 359 (4th Cir. 1985) (member of state national guard claimed that National Guard had violated its own procedural regulations regarding selective retention); Ogden v. United States, 758 F.2d 1168, 1179 n. 7 (7th Cir. 1985) (Navy personnel claimed that their first amendment rights had been violated); Penagaricano v. Llenza, 747 F.2d 55, 60-61 (1st Cir. 1984) (member of Air National Guard claimed that his discharge violated procedural due process); Nieszner v. Mark, 684 F.2d 562, 564 (8th Cir. 1982) (sergeant in Air Force Reserve claimed that he had been discriminated against on the basis of his age), *cert. denied*, 460 U.S. 1022 (1983); *Cf.* Bois v. Marsh, 801 F.2d 462, 468 (D.C.Cir. 1986) (former Army officer claimed that she had been discriminated against on the basis of her sex); Schultz v. Wellman, 717 F.2d 301, 306-07 (6th Cir. 1983) (member of National guard claimed that his dismissal violated § 1983); Crawford v. Cushman, 531 F.2d 1114, 1120 (2d Cir. 1976) (former servicewoman claimed that Marine Corps.' policy mandating discharge for pregnancy violated her rights to equal protection and due process).

57. Schlanger v. United States, 586 F.2d 667 (9th Cir. 1978) (former Air Force enlistee challenged his removal from the Airman's Education and Commissioning Program and his reassignment elsewhere), *cert. denied*, 441 U.S. 943 (1979).

58. 661 F.2d 729, 733 n.4 (9th Cir. 1981) (Navy enlisted men brought race discrimination action against superior officers), *rev'd on other grounds*, 462 U.S. 296 (1983).

59. *Wallace*, 661 F.2d at 730.

60. *Id.* at 733 n. 4. Dicta in most Ninth Circuit cases following *Chappell*, including *Watkins I*, implies that an internal military decision is reviewable only when the plaintiff alleges a constitutional, statutory or regulatory violation. *See* Christoffersen v. Washington State Air National Guard, 855 F.2d 1437, 1442 (9th Cir. 1988) (former national guardsmen claimed that the Guard's decision not to retain them violated their first amendment rights); Sandidge v. State of Washington, 813 F.2d 1025, 1026 (9th Cir. 1987) (National Guard officer sought revision of job performance evaluation that allegedly violated his constitutional right to free association); Sebra v. Neville, 801 F.2d 1135, 1141 (9th Cir. 1986) (member of California National Guard claimed that his transfer violated his due process and first amendment rights and that it also violated § 1983 and the National Guard's own regulations); Khalsa v. Weinberger, 779 F.2d 1393, 1398 (9th Cir. 1985) (member of Sikh religion claimed that Army appearance regulations violated his first amendment rights) *reaff'd* 787 F.2d 1288 (9th Cir. 1986). *But see* Gonzalez v. Department of the Army, 718 F.2d 926, 929 n.5 (9th Cir. 1983) (serviceman claimed that Army had subjected him to race discrimination) ("[w]e limited our adoption of the

the *Mindes* test, the Ninth Circuit concluded that the plaintiffs had alleged a *Bivens*-type claim to recover damages from a superior officer for alleged constitutional violations and remanded the case to the district court for consideration of the second prong of *Mindes*.[61]

Without overruling *Mindes*, the Supreme Court reversed,[62] on the grounds that *Feres* precludes enlisted military personnel from maintaining any kind of damages claim against military officials that is not authorized by a specific statute, even if the claim is based on an alleged constitutional violation.[63] Since *Chappell*, circuit courts have applied the *Mindes* test to the two types of claims that *Chappell* does not expressly foreclose: (1) claims seeking strictly injunctive or declaratory relief against military officials,[64] and (2) damages claims against military officials based upon an explicit statute, such as 42 U.S.C. § 1983 or § 1985(3).[65]

Mindes analysis to 'cases in which the plaintiff has alleged [a violation of] a 'recognized' constitutional right' ").

61. *Wallace*, 661 F.2d at 737-38.

62. The Court in *Chappell* noted that service members are not precluded from obtaining any relief whatsoever for constitutional violations, citing to three cases which involved injunctive or declaratory relief. Chappell v. Wallace, 462 U.S. 296 (1983). The Court subsequently acknowledged that these citations "referred to redress designed to halt or prevent the constitutional violation rather than the award of money damages." United States v. Stanley, 483 U.S. 669, 683 (1987) (member of Army brought suit under Federal Torts Claim Act after Army secretly administered four doses of LSD to him thereby causing severe personality changes that led to his discharge and the dissolution of his marriage).

63. Chappell v. Wallace, 462 U.S. 296 (1983). In fact, the Court noted that "[i]t is clear that the Constitution contemplated that the Legislative Branch have plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline." *Id.* at 301.

64. *See* Ogden v. United States, 758 F.2d 1168, 1175 (7th Cir. 1985) (*Chappell* does not preclude an equitable remedy).

65. *See* Christoffersen v. Washington State Air Nat'l Guard, 855 F.2d 1437, 1441 (9th Cir. 1988) (holding that *Chappell*'s rationale leaves the field open for Congress to enact legislation authorizing servicemen's constitutional damages claims against their superiors, but declining to decide whether *Chappell* bars any or all § 1983 claims for alleged civil rights violations by military personnel). *See also* Mollnow v. Carlton, 716 F.2d 627 (9th Cir. 1983) (finding that *Chappell* merely rejected an implied damages remedy but, nonetheless, holding that plaintiff's expressly authorized § 1985(a) remedy was properly dismissed because such liability would conflict with *Chappell*'s underlying rationale), *cert. denied*, 465 U.S. 1100 (1984). *See also* Miller v. Newbauer, 862 F.2d 771, 775 (9th Cir. 1988) (leaving open the question of whether *Chappell* is inconsistent with a damages suit pursuant to § 1985(3)).

Other circuits have concluded that *Chappell*'s reasoning is inconsistent with a dam-

2. The *Wagner* Test

In *United States v. Lazy FC Ranch*,[66] the Ninth Circuit recognized that "[n]o fewer than eight circuits . . . have stated that there are some circumstances in which the Government will be estopped . . .", and that estoppel should be applied against the government "where justice and fair play require it."[67] In *Lavin v. Marsh*,[68] three years after it first applied the *Mindes* test,[69] the Ninth Circuit resolved an estoppel claim against the Secretary of the Army according to principles governing estoppel against the government.[70] Similarly, in *Jablon v. United States*,[71] the Ninth Circuit analyzed an estoppel claim against the Air Force according to principles governing estoppel against the government.[72] Dicta in *Helm v. State of California*,[73] sum-

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ages action under § 1983 against state National Guard officials. *See* Jorden v. National Guard Bureau, 799 F.2d 99, 108 (3d. Cir. 1986) (former National Guard member claimed that his various supervisors had engaged in a conspiracy to harass him and to discharge him on the basis of race and in retaliation for the exercise of his first amendment rights), *cert. denied*, 108 S.Ct. 66 (1987); Brown v. United States, 739 F.2d 362, 366-67 (8th Cir. 1984) (black national guardsman's mother sued United States, the guardsman's superior officers and the participants in a mock lynching incident involving her son), *cert. denied*, 473 U.S. 904 (1985); Martelon v. Temple, 747 F.2d 1348, 1350-51 (10th Cir. 1984) (National Guard member sought relief from his termination as a technician), *cert. denied*, 471 U.S. 1135 (1985).

66. 481 F.2d 985 (9th Cir. 1973) (United States sued agriculture partnership to recover certain money paid to it under soil bank program).

67. *Id.* at 988-89. Later, in *Saulque*, the Ninth Circuit stated in dicta that the government may be estopped only when it is acting in its proprietary capacity and not when it is acting in its sovereign capacity. Saulque v. United States, 663 F.2d 968, 978 (9th Cir. 1981) (Paiute Indian challenged Bureau of Indian Affairs' denial of his application for Indian allotment of land). That dicta was rejected, however, in Johnson v. Williford, 682 F.2d 868 (9th Cir. 1982) (prisoner, who was erroneously paroled, was entitled to equitably estop the government from revoking his release). In *Johnson*, the court held that the government could be estopped even when it is acting in its sovereign capacity *if the effects would not unduly damage the public interest. Id.* at 871 n.1 (emphasis added).

68. 644 F.2d 1378 (9th Cir. 1981) (lieutenant colonel sued for injunctive relief to prevent mandatory removal from active service because of an age-based statutory years-of-service limitation).

69. *See supra* note 57 and accompanying text.

70. *Lavin*, 644 F.2d at 1383-84. The court stated: "[w]hile the Army's acts which led to Lavin's mistaken belief may be labeled negligent, we do not find in the facts of this case the kind of affirmative misconduct which would justify the application of equitable estoppel." *Id.* at 1383.

71. 657 F.2d 1064 (9th Cir. 1981) (physician, who sold his medical practice and house in reliance on recruiter's promise that incentive pay for enlisting was payable upon physician's giving oath of office and not upon entry on active duty, was not entitled to equitably estop Army from revoking his active duty orders).

72. The Ninth Circuit held that the plaintiff could not rely on principles regarding

marily analyzed an equitable estoppel claim against the Army. In *Helm*, the Ninth Circuit held that an age discrimination claim against the Army was not justiciable even though it satisfied the first prong of the *Mindes* test because "the special policy considerations involved in judicial review of military decisionmaking" favored finding Helm's claims nonreviewable.[74] It also held that Helm's equitable estoppel claim could not be raised for the first time on appeal.[75] In dicta, it stated that "even had the issue been presented below," it would have been precluded by *Lavin v. Marsh*.[76] Thus, since its formal adoption of the *Mindes* test in 1981, *Watkins* is the first case that required the Ninth Circuit to analyze an equitable estoppel claim against the military.

The United States Supreme Court has reversed several Ninth Circuit decisions invoking equitable estoppel against the government.[77] In *Heckler v. Community Health Services of Crawford County, Inc.*,[78] however, the Court declined to hold that "there are *no cases* in which the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with the Government."[79] Rather, the majority held that "the Government may not be estopped on the same terms as any other litigant" because "[w]hen the Government is unable to enforce the law because the conduct of its agents has

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equitable estoppel against the government because he was relying on a promissory estoppel theory rather than an equitable estoppel theory. *Id.* at 1067-70.

73. 722 F.2d 507 (9th Cir. 1983) (retired member of Army reserves sued for equitable relief from alleged age discrimination that resulted in his not being granted a promotion to grade of lieutenant colonel).

74. *Id.* at 510.

75. *Id.*

76. *Id.*

77. *See* INS v. Miranda, 459 U.S. 14, 17-19 (1982) (per curiam) (INS delay in processing alien's spouse application for residency not grounds for invoking equitable estoppel against the INS); INS v. Hibi, 414 U.S. 5,94 (1973) (per curiam) (INS could not be equitably estopped from denying citizenship to Filipino war veteran); Montana v. Kennedy, 366 U.S. 308, 314-15 (1961) (government could not be equitably estopped from denying citizenship to the child of a United States citizen born abroad even though the child's mother relied on the advice of a United States government official who incorrectly told her that she could return to the United States to deliver her baby).

78. 467 U.S. 51 (1984) (government sought to recover overpayments it had made to provider of home health care services to Medicare beneficiaries).

79. *Id.* at 60-61 (emphasis in original).

given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined."[80]

In *Wagner v. Director, Federal Emergency Management Agency*,[81] the Ninth Circuit clarified its approach to cases where the plaintiff seeks to invoke equitable estoppel against the government. The court held that "[a] party seeking to raise estoppel against the goverment must establish 'affirmative misconduct going beyond mere negligence'; even then, 'estoppel will only apply where the government's wrongful act will cause a serious injustice, and the public's interest will not suffer undue damage by imposition of the liability.' "[82]

B. The Majority Opinion

1. Reviewability of Watkins' Equitable Estoppel Claim

Noting that it would be "fruitless" for Watkins to pursue further intraservice remedies,[83] the majority opinion began by determining that Watkins had exhausted all "effective" intraservice remedies.[84] The majority then addressed the issue of whether *Mindes* bars all nonconstitutional claims against the military.[85]

The majority reasoned that if the Ninth Circuit extended the application of *Mindes* to bar nonconstitutional claims such as equitable estoppel, federal courts would be forced to decide cases against the military on the broadest possible (constitutional) grounds rather than on the narrowest (nonconstitutional) grounds.[86] Noting that "[t]he estoppel doctrine, like the *Mindes* test, addresses the concerns of comity, prudence and deference

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80. *Id.* at 60.

81. 847 F.2d 515 (9th Cir. 1988).

82. *Id.* at 519 (quoting Morgan v. Heckler, 779 F.2d 544, 545 (9th Cir. 1985)).

83. *Watkins*, 875 F.2d at 705. The Army's position was that Watkins' admitted homosexuality is a non-waivable disqualification for reenlistment. *Id.* The majority opinion, written by Judge Pregerson, did not cite any authority or provide any explanation for beginning the analysis in this manner. *Id.*

84. *Id.* (citing Southeast Alaska Conservation Counil, Inc. v. Watson, 697 F.2d 1305, 1309 (9th Cir. 1983) ("[e]xhaustion of administrative remedies is not required where administrative remedies are inadequate or not efficacious, [or] where pursuit of administrative remedies would be a futile gesture . . . .")).

85. *See id.*

86. *See id.* at 706.

[to the military],"[87] the majority determined that "where estoppel obtains, there is simply no need to apply the reviewability factors of the *Mindes* test."[88] The majority concluded that "the *Mindes* doctrine should not be extended to bar equitable estoppel against the military."[89]

2. Merits of Watkins' Equitable Estoppel Claim

a. Affirmative Misconduct

The majority then proceeded to analyze Watkins' equitable estoppel claim according to *Wagner*, which requires that a plaintiff attempting to invoke equitable estoppel against the government must establish that the government engaged in affirmative misconduct.[90] Affirmative misconduct requires an affirmative misrepresentation or affirmative concealment of a material fact by a government agent[91] acting within the scope of his employment.[92] The majority ruled that the Army committed affirmative misconduct by representing, throughout Watkins' 14 year military career, that Watkins was qualified for reenlistment[93] The majority noted that the Army's conduct in this case was "readily distinguishable" from the Army's conduct in *Lavin*.[94]

The majority also summarily rejected the Army's argument

87. *Id.*

88. *Id.*

89. *Id.*

90. *See supra* notes 81 - 82 and accompanying text.

91. *See* Lavin v. Marsh, 644 F.2d 1378, 1382-83 n. 6 (9th Cir. 1981); United States v. Ruby Co, 588 F.2d 697, 703-04 (9th Cir. 1978) (government brought action to quiet title to "omitted lands" which lay between meander lines established by two different government surveys), *cert. denied*, 442 U.S. 917 (1979); Jablon v. United States, 657 F.2d 1064, 1067 n.5 (9th Cir. 1981).

92. The government is not bound by the unauthorized acts of its agents. *See* Saulque v. United States, 663 F.2d 968, 976 (9th Cir. 1981) (citing Utah Power & Light Co. v. United States, 243 U.S. 389 (1917)). *See also* Federal Crop Insurance Co. v. Merrill, 332 U.S. 380 (1947) (wheat grower whose application for insurance on his wheat crop had been erroneously accepted by federal crop insurance agency sued to recover for loss on his reseeded acreage).

93. *Watkins*, 875 F.2d at 707. The majority also cited the district court's finding that the Army had "plainly acted affirmatively in [violation of its regulations by] admitting, reclassifying, reenlisting, retaining, and promoting Watkins." *Id.* at 708.

94. *Id.* In *Lavin*, the Ninth Circuit refused to estop the Army from denying an Army Reserve officer's entitlement to pension benefits because the Army's conduct "did not amount to a 'pervasive pattern of false promises' for which the government could be estopped." *Id.* (quoting *Lavin*, 664 F.2d at 1383).

that the alleged misconduct in question was performed by the unauthorized acts of its agents.[95] The Army Secretary had not exceeded his authority each of the three times that he decided to reenlist Watkins.[96]

b. Balancing the Hardships

According to *Wagner*, a plaintiff attempting to invoke equitable estoppel against the government must also establish that the balance of hardships tips in his favor.[97] The majority quoted the district court's analysis of the balance of interests in Watkins' case:

> The injury to plaintiff from having relied on the Army's approval of his military career — and being denied it now — is the loss of his career. The harm to the public interest if reenlistment is not prevented is nonexistent. Plaintiff has demonstrated that he is an excellent soldier. His contribution to this Nation's security is of obvious benefit to the public. Furthermore, when the government deals "carefully, honestly and fairly with its citizens," the public interest is likewise benefited.[98]

The majority concluded the balance of hardships tipped in Watkins' favor because the possibility of damage to the public interest was still nonexistent.[99]

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95. *Id.*

96. *Id.* The Army had previously argued that reenlistment was exclusively the function of the Army Secretary. *Id.*

The majority also noted that an agent of the Army had "erased" the handwritten July 29, 1981 entry on Watkin's Reenlistment Data Card and had "forged" a new entry indicating that Watkins was ineligible for reenlistment due to his homsexuality. *Id.* at 708 n.15. The erased entry, besides being legible, was also corroborated by an unrebutted affidavit from an Army sergeant. *Id.* The court deemed this circumstantial evidence of the Army's consciousness of misconduct and an attempt to conceal that misconduct from exposure. *Id.* The court did not indicate whether this evidence supported its conclusion that the Army had engaged in affirmative misconduct. *Id.*

97. *See* Note, *Equitable Estoppel of the Government*, 79 COLUM. L. REV. 551 (1979). *See also* United States v. Johnson, 481 U.S. 681 (1987); Gestuvo v. District Director of INS, 337 F.Supp. 1093, 1102 (C.D.Cal. 1971) (estopping the INS from refusing to revalidate approval of an immigrant's third preference classification).

98. *Id.* (citing *Watkins*, 551 F.Supp. 212, 223 (W.D.Wash. 1982) (citation omitted)).

99. *Id.* The court noted that the Army's most recent written evaluation of Watkins, completed during the course of this legal action, contained nothing but the highest praise, describing Watkins' duty performance as "outstanding in every regard" and his

c. Traditional Elements of Estoppel

Finally, according to *Wagner*, a plaintiff attempting to invoke equitable estoppel against the government must also prove each of the traditional elements of equitable estoppel. According to *United States v. Wharton*,[100] traditional estoppel doctrine required Watkins to demonstrate that 1) the Army knew of its policy mandating disqualification of all homosexuals from reenlistment; 2) the Army intended Watkins to rely on its waiver of the policy; 3) Watkins was ignorant of the policy; and 4) Watkins was injured by his reliance on the Army's conduct.[101]

The majority observed that the Army had been aware of Watkins' homosexuality throughout his military career[102] and concluded that the Army's argument that Deputy Chief of Staff for Personnel[103] was unaware of the contents of Watkins' personnel file was "patently absurd."[104] The majority found that the Army had intended that Watkins rely on its acceptances of his reenlistment applications and that Watkins reasonably believed that the Army had intended to reenlist him. The majority cited the district court findings that "[t]aken together, over a career spanning more than 14 years, those acts amounted to a policy of ignoring this service-member's homosexuality" and that "[a]s a matter of law, the court concludes that the second element of plaintiff's estoppel claim has been satisfied."[105] The

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potential as "unlimited." *Id.* Furthermore, an Army review board had determined in 1975 that "there was no evidence suggesting that [Watkins'] behavior has had either a degrading effect upon unit performance, morale or discipline, or upon his own job performance." *Id.*

100. 514 F.2d 406 (9th Cir. 1975) (United States brought action for ejectment of defendants from 40 acre parcel of government land).

101. *Id.* at 412. "(1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury." *Id.* (quoting United States v. Georgia-Pacific Corp., 421 F.2d 92, 96 (9th Cir. 1970)).

102. *Watkins*, 875 F.2d at 710. "For the Army to acknowledge that it is aware of plaintiff's homosexuality when it comes to conducting criminal investigations, holding discharge proceedings, and revoking security clearances, but maintain that it is ignorant when four enlistments are at issue, suggests bad faith." *Id.* (quoting *Watkins*, 551 F.Supp. at 220).

103. The Deputy Chief of Staff for Personnel is primarily responsible for Army reenlistment. *Id.*

104. *Id.* (quoting *Watkins*, 551 F.Supp. at 200).

105. *Id.* (quoting *Watkins*, 551 F.Supp. at 222). For further support, the majority

majority found that the Army's repeated waiver of its disqualification policy made it "impossible" for the court to charge Watkins with the knowledge that the disqualfication was, in fact, nonwaivable.[106] Finally, the majority observed that Watkins relied on the Army's repeated waiver of its theoretically nonwaivable policy to his detriment.[107]

The majority agreed with the district court's "thorough analysis of this question" and its conclusion that Watkins had sustained his burden of proving all of the traditional elements of estoppel.[108] Accordingly, the majority held that "[t]his is a case where equity cries out and demands that the Army be estopped from refusing to reenlist Watkins on the basis of his homosexuality."[109]

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likened Watkins' claim to that of the prisoner in the *Johnson* case. *Id.* In *Johnson*, after eight adminstrative reviews, a prisoner was erroneously released on parole. Johnson v. Williford, 682 F.2d 868, 872 (9th Cir. 1982). The mistake was not discovered for 15 months. *Id.* The court held that, as a matter of law, the prisoner had a right to believe that he would remain on parole during good behavior. *Id.*

106. *Watkins*, 875 F.2d at 710. Again, the majority likened Watkins' claim to that of the prisoner in the *Johnson* case. *Id.* In *Johnson*, the court held that, given the government's continuing active misadvice regarding his eligibility for parole, the prisoner could not be charged with even constructive knowledge of the proper meaning of a parole statute. Johnson v. Williford, 682 F.2d 868, 872 (9th Cir. 1982).

107. *Watkins*, 875 F.2d at 710-711 (citing *Watkins*, 551 F.Supp. at 223). The majority stated that Watkins had:

> developed skills necessary for military employment and refrained from developing skills suitable for civilian jobs. He worked more than 14 years toward a retirement benefit that he could have sought elsewhere. Had the Army refused plaintiff reenlistment in the past, plaintiff would not have lost the opportunity for civilian employment that would have brought him to a point of equivalent achievement.

Id.

108. *Watkins*, 875 F.2d at 709.

109. *Id.* at 711. Only part IV of the dissent expressed the view that Watkins' equitable estoppel claim should fail on its merits. *See id.* at 737 (Hall, J., dissenting). Judge Trott was the only judge who joined that part of the dissent. *See id.* at 739. The other judges who believed that Watkins should not prevail on his equitable estoppel claim did so on the ground that the estoppel claim was not reviewable. *See id.* at 711 (Norris, J., concurring). Judge Beezer concurred in parts I, II, III and the first paragraph of part V of the dissenting opinion. Chief Judge Goodwin concurred in parts I and III of the dissent. *See id.* at 739.

C. Concurring Opinions

1. Judge Norris' Concurring Opinion

Judge Norris agreed with the majority's decision that the Army must reconsider Watkins' reenlistment application without regard to his homosexuality.[110] However, Judge Norris disapproved of the majority's decision to review Watkins' equitable estoppel claim.[111] Judge Norris noted that the Supreme Court "has declined to approve the invocation of equitable estoppel against the government in cases where the facts are no less sympathetic than the facts in Sgt. Watkins' case."[112] Judge Norris also noted that, in the *Heckler* case, the Supreme Court expressed uncertainty as to whether equitable estoppel can ever be invoked against the goverment.[113] Judge Norris concluded that Watkins' only justiciable nonconstitutional claim was a meritless claim that the Army's discharge and reenlistment regulations violate the Administrative Procedure Act.[114]

Judge Norris also disapproved of the majority's refusal to analyze the merits of Watkins' claim that the Army's discharge and reenlistment regulations denied him (and other persons of homosexual orientation) equal protection.[115] Judge Norris reiterated the painstaking analysis of the majority opinion in *Watkins II*, which had concluded that the Army's reenlistment regulation violates the equal protection clause by discriminating against persons of homosexual orientation, a suspect class, without promoting a legitimate compelling government interest.[116]

Judge Norris found that the Army's discharge and reenlistment regulations discriminate against persons of homosexual orientation.[117] Judge Norris then determined that the Ninth Cir-

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110. *Watkins*, 875 F.2d at 711 (Norris, J., concurring in judgment).

111. *Id.* "I agree with the dissent that the judgment cannot rest on the doctrine of equitable estoppel." *Id.*

112. *Id.* (citing INS v. Miranda, 459 U.S. 14 (1982) (per curiam); INS v. Hibi, 414 U.S. 5 (1973) (per curiam); Montana v. Kennedy, 366 U.S. 308 (1961)).

113. *Id.*

114. *Id.* at 712. This claim lacked merit because Watkins had not alleged that the regulations were arbitrary or capricious on their face. *Id.* (emphasis added). Instead, Watkins had claimed only that the regulations were arbitrary as applied to him. *Id.*

115. *Id.* at 711.

116. *Compare id.* at 712-31 with *Watkins II*, 847 F.2d at 1330-53.

117. *Id.* at 712-16. Judge Norris found that "[t]he regulations make any act or state-

cuit had never issued a ruling on whether persons of homosexual orientation constitute a suspect class under the Equal Protection Clause.[118] Judge Norris concluded that gays and lesbians constitute a suspect class for equal protection purposes.[119] Finally, Judge Norris urged that the Army's reenlistment regulations violate the Equal Protection Clause because they are not necessary to promote a compelling governmental interest.[120]

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ment that might conceivably indicate a homosexual orientation evidence of homosexuality; that evidence is is turn weighed against any evidence of a heterosexual orientation." *Id.* at 716.

118. *Id.* at 716-24. Judge Norris distinguished this issue from the issue decided by the Supreme Court in Bowers v. Hardwick, 478 U.S. 186 (1986) (states may criminalize consensual homosexual sodomy because the Due Process Clause of the Fourteenth Amendment does not give gays and lesbians a fundamental right to engage in sodomy). *Id.* at 716-20. He also distinguished this issue from the issues decided by the Ninth Circuit in several other cases. *Id.* at 720-23. *See* Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980) (Navy regulations providing for the discharge of personnel who engaged in homosexual acts do not violate any substantive due process rights), *cert. denied*, 452 U.S. 905 (1981); Hatheway v. Secretary of the Army, 641 F.2d 1376 (9th Cir. 1980) (Army's policy of prosecuting cases involving homosexual sodomy while refusing to prosecute cases involving heterosexual sodomy did not unconstitutionally burden the exercise of an important substantive right under the Equal Protection Clause of the Fifth Amendment because the Army's policy bore a substantial relationship to an important government interest), *cert. denied*, 454 U.S. 864 (1981); DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979) (gays and lesbians do not have a right of action against private parties who conspire to deprive any person or class of persons of the equal protection of the laws because the courts have not yet designated them a suspect or quasi-suspect class). Finally, Judge Norris explained why the Ninth Circuit should not summarily dismiss the issue on the ground that it would be anomalous to declare that state classifications based on sexual orientation deserve strict scrutiny when states are permitted to criminalize homosexual conduct. *Id.* at 723-24. *See* Padula v. Webster, 822 F.2d 97 (D.C.Cir. 1987) (FBI's policy of discriminating against practicing homosexuals in its hiring decisions does not violate the Equal Protection Clause).

119. *Id.* at 724-28. Judge Norris noted that lesbians and gays have suffered a history of purposeful discrimination, that one's sexual orientation is irrelevant to the quality of one's contribution to society, that one's sexual orientation is an immutable characteristic because it is so central to one's identity that it would be abhorrent for government to penalize a person for refusing to change that characteristic and that lesbians and gays lack the political power necessary to obtain redress from the political branches of government. *Id.*

120. *Id.* at 728-31. Even granting special deference to the Army policy, Judge Norris found that *Palmore* foreclosed the Army from justifying its refusal to reenlist homosexuals on grounds that the presence of homosexuals would lead to tensions between soldiers, and to recruitment problems because many other members of the armed forces despise homosexuality. *Id.* at 728 (citing Palmore v. Sidoti, 466 U.S. 429 (1984) (state could not grant custody of a white child to her father on ground that the child would likely suffer social stigmatization if she lived with her mother because her mother had remarried to a black man)). Further, he found that *Loving* foreclosed the Army from arguing that its regulations are grounded in legitimate moral norms. *Id.* at 729-30 (citing Loving v. Virgina, 388 U.S. 1 (1967) (state could not outlaw marriages between whites and blacks even if it sincerely believed that miscegenation — the mixing of racial blood lines — was

2. Judge Canby's Concurring Opinion

Judge Canby concurred wholeheartedly in the majority opinion.[121] He wrote separately, however, because he believed that the majority should have reached Watkins' equal protection claim even though its ruling on Watkins' equitable estoppel claim may have disposed of the case.[122]

D. The Dissenting Opinion

The dissenting opinion shared "the majority's admiration of Watkins' fine service to his country."[123] The dissent, however, concluded that the majority had failed to heed "well-established case law which counsels against unnecessary judicial oversight of and intrusion into military matters."[124] The dissent disagreed with all of the majority's reasons for refusing to apply *Mindes*. The dissent urged that Watkins' equitable estoppel claim failed to satisfy the first prong of the *Mindes* test in that it did not raise a federal constitutional, statutory or regulatory matter.[125] The dissent also disagreed with the majority's application of the

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evil)).

Judge Norris also discounted the Army's argument that military discipline might be undermined if emotional relationships developed between homosexuals of different military rank because the regulation at issue was poorly tailored to advance that interest. The regulation was grossly underinclusive in that did not address the problem of emotional attachments between male and female personnel. It was also grossly overinclusive in that it disqualified all homosexuals whether or not they have developed any emotional or sexual relationships with other soldiers. *Id.* at 730.

Finally, Judge Norris also rejected the Army's argument that its disqualification of all homosexuals is necessary to achieve its compelling interest in excluding persons who may be susceptible to blackmail. He found that the Army's regulations actually increase the risk of blackmail because they discourage servicemembers from declaring their homosexuality. Judge Norris argued that the Army would only achieve this compelling interest if it adopted a regulation banning only those gays who had lied about or failed to admit their sexual orientation. Moreover, Judge Norris argued that treating homosexuality as a nonwaivable disqualification from military service is not necessary to achieve this compelling interest for the same reasons that other serious potential sources of blackmail, such as drug abuse and the commission of other serious military offenses, are treated as waivable disqualifications. *Id.* at 731.

121. *Id.* (Canby, J., concurring).

122. *Id.* "Because we are en banc, and the constitutional issue is a recurring one, I think I may appropriately reach it even though equitable estoppel may dispose of the case." *Id.*

123. *Id.* at 731 (Hall, J., dissenting).

124. *Id.* at 739.

125. *Id.* at 732-33.

Wagner test, asserting that Watkins had not satisfied his burden of showing that the Army had engaged in affirmative misconduct or that the balance of hardships tipped in his favor.[126] Furthermore, the dissent also disagreed with the majority's analysis of the merits of Watkins' equitable estoppel claim, finding that Watkins failed to establish the reasonableness of his reliance on the Army's conduct.[127]

1. Reviewability of Watkins' Equitable Estoppel Claim

The dissent began by urging that *Feres* and its progeny establish a "military discipline rationale" which emphasizes that "*all* suits by active military personnel against the government they serve have the potential to undermine [military effectiveness]."[128] The dissent noted that in *Chappell* the Supreme Court "relied upon *Feres*' military discipline rationale to conclude that enlisted military personnel cannot maintain a *Bivens* suit to recover damages from a superior officer for alleged constitutional violations" and established that Congress has plenary control over remedies against the military establishment.[129] The dissent also noted that *Mindes* "itself arose solely in the context of a claim for injunctive and declaratory relief in connection with plaintiff's forced separation from active duty."[130] Reading *Feres, Mindes* and *Chappell* together, the dissent urged that although suits for injunctive relief are inherently less intrusive than suits for damages, "not all injunctive suits are equally well-taken."[131] In analyzing the justiciability of a suit for injunctive relief against the military, the dissent argued that the military discipline rationale requires federal courts to balance the military establishment's need for protection from judicial intrusion against the importance of the plaintiff's rights at stake.[132] Noting that only the vindication of federal interests outweighs the qualified immunity given to federal executive officials,[133] permits

126. *Id.* 737-38.

127. *Id.* at 739.

128. *Id.* at 733 (emphasis in original). *See also supra* notes 40 - 43 and accompanying text.

129. *Id. See also supra* notes 59 - 65 and accompanying text.

130. *Id.* at 735. *See also supra* notes 50 - 54 and accompanying text.

131. *Id.*

132. *Id.*

133. *See supra* notes 44 - 49 and accompanying text.

federal courts to grant equitable relief in nondiversity suits,[134] and permits federal courts to review claims against state officers,[135] the dissent analogized that only the possible vindication of federal interests should permit federal courts to review claims for equitable relief against the military.[136] The dissent concluded that *Mindes* governs the reviewability of all claims against the military not directly precluded by the Supreme Court's *Chappell* decision because it "insures that judicial intrusions into military matters are limited to the vindication of federal interests."[137]

The dissent urged that the majority failed "to marshal any case law in support of its holding that a common law estoppel claim is justiciable against the military."[138] The dissent found that the majority interpreted the *Chappell* case completely out of context by quoting *Chappell* as expressing no view as to whether the *Mindes* test should govern federal nonconstitutional claims.[139] The dissent urged that the majority had dispensed

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134. *Watkins*, 875 F.2d at 735 (citing Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 400 (1971) (Harlan, J. concurring)).

135. The dissent noted that the Supreme Court declined to erect the Eleventh Amendment as a complete bar to federal court jurisdiction of claims alleging unconstitutional conduct by a state actor. *Id.* (citing Ex Parte Young, 209 U.S. 123 (1908)). *See also* Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 105 (1984) (the *Young* doctrine rests on the need to promote the vindication of federal rights); Papasan v. Allain, 478 U.S. 265, 277 (1986) ("*Young*'s applicability has been tailored to conform as precisely as possible to those specific situations in which it is 'necessary to permit the federal courts to vindicate federal rights' and hold state officials responsible to 'the supreme authority of the United States' ") (quoting *Pennhurst*, 465 U.S. at 105).

136. *Id.* at 735-36.

137. *Id.* at 736. According to the dissent, the majority's conclusion that *Wagner* sufficiently "addresses the concerns of comity, prudence and deference [to the military]" and its "prediction that the United States military generally will be successful in estoppel suits does not carry the day." *Id.* at 736. The dissent noted that "[l]itigation is inherently disruptive, and entails the risk of 'erroneous judicial conclusions (which would becloud military decision-making).' " *Id.* (citing United States v. Stanley, 483 U.S. 669, 683 (1987)). As the Supreme Court aptly noted in *Stanley* and *Johnson*, the mere pendency of a lawsuit against the government has an adverse impact on military discipline in the broadest sense of the word. *Id.* Moreover, "[l]itigation has certain crucial costs, [which] include the expenses of litigation, [and] the diversion of official energy from pressing public issues." *Id.* (citing Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982)).

138. *Id.*

139. *Id.* at 736-37 (citing Wallace v. Chappell, 661 F.2d 729, 733 n. 4 (9th Cir. 1981), *rev'd on other grounds*, 462 U.S. 296 (1983)). The court in *Chappell* clearly indicated that "the [plaintiff's] allegations must amount to more than a traditional state law claim" to avoid the adverse impact that unnecessary judicial review of military matters would have on military discipline. *Id.* at 736-37 (citing Wallace v. Chappell, 661 F.2d 729, 733 n. 4,734 (9th Cir. 1981), *rev'd on other grounds*, 462 U.S. 296 (1983)). "[A]ll our cases

with "well-established case law" in its desire to avoid the difficult equal protection question presented in this case.[140]

2. Merits of Watkins' Equitable Estoppel Claim

a. Affirmative Misconduct

The dissent urged that the majority had failed "to give genuine substance to [the] requirement that the Army's conduct amounted to affirmative misconduct."[141] The dissent argued that the Army's prior practice of excusing Watkins' homosexuality, despite regulations precluding his reenlistment, created, at most, an inference that the Army would overlook the regulation as to a particular enlistment period.[142]

b. Balance of Hardships

The dissent urged that the majority attempted to finesse the issue of whether "the public's interest will not suffer undue damage by imposition of the liability"[143] by baldly stating that the "harm to the public interest if reenlistment is not prevented

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following *Chappell*" lend further support to this interpretation of *Chappell*, in that they all "have insisted that the plaintiff's claims allege a federal constitutional, statutory, or regulatory violation." *Id.* at 736.

140. *Id.* at 737. The dissent urged that the policy of avoiding unnecessary constitutional decisions does not, as the majority suggested, compel or persuade the court to refrain from applying the *Mindes* test to Watkins' equitable estoppel claim even though that would result in having to address the merits of his constitutional claim; the Supreme Court has held that such policy considerations "cannot override the constitutional limitation on the authority of the federal judiciary." *See* Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 121-23 (1984).

141. *Watkins*, 875 F.2d at 738. Although there is not a clear definition of "affirmative misconduct," the Supreme Court's reversals of several Ninth Circuit decisions invoking equitable estoppel against the government and the Supreme Court's rationale for imposing the additional requirement illustrate that affirmative misconduct occurs only in the most extraordinary circumstances. *Id.*

142. *Id.* "Such apparent acquiescence or ambivalence does not meet the threshhold level of misfeasance needed to trigger equitable estoppel against the military" *Id.* The *Lavin* case demonstrated that "even . . . a direct misrepresentation can fail to constitute affirmative misconduct." *Id.* (citing Lavin v. Marsh, 644 F.2d 1378 (9th Cir. 1981)). In *Lavin*, Army Reserve Recruiters had induced the plaintiff into joining the Army Reserve by representing that he could earn pension benefits after a specified number of years. *Id.* The Army's years of service regulation mandated the plaintiff's removal before he could earn the pension benefits that he had been promised. *Id.* The court did not estop the Army from enforcing its years of service regulation. *Id.*

143. *Id.* at 739 (quoting Wagner v. Director, Federal Emergency Management Agency, 847 F.2d 515, 519 (9th Cir. 1988)).

is nonexistent . . . [because] [p]laintiff has demonstrated that he is an excellent soldier."[144] The dissent stressed that the majority simply has no authority to substitute its own assessment of Watkins' impact on military matters for the Army's assessment that having homosexual soldiers, even good ones like Watkins, interferes with its mission.[145] Furthermore, the dissent asserted that the majority greatly minimized the probable damage to the public interest by failing to consider the ramifications of its holding if other homosexuals besides Watkins invoked equitable estoppel against the Army.[146]

c. Traditional Elements of Estoppel

Finally, the dissent urged that Watkins did not prove that he acted reasonably in believing that the Army had intended to excuse his homosexuality, despite regulations precluding his reenlistment.[147] The dissent concluded that Watkins simply was not justified in assuming that the Army's decision to accept a particular application for reenlistment would ensure such acceptance for all time.[148]

IV. CONCLUSION

The panel of judges in *Watkins* addressed whether common law equitable estoppel claims against the military are justiciable and whether the military may be equitably estopped on the same principles as any other federal agency. These issues had never before been discussed at length by the Ninth Circuit or any other federal court, including the Fifth Circuit when it articulated the *Mindes* test.[149] Any statements in *Wallace* and its

144. *Id.*

145. *Id.* at 739.

146. *Id.*

147. *Id.*

148. *Id.* The dissent cited the *Lavin* case for the proposition that Watkins is charged with the knowledge that executive officials have the prerogative of implementing new programs and policies, so long as they do not run afoul of statutory or constitutional provisions. *Id.*

149. *See supra* note 36 and accompanying text. The dissent's argument that *Mindes* itself arose in the context of a claim for injunctive and declaratory relief in connection with plaintiff's forced separation from active duty is misleading. The plaintiff in *Mindes* did not assert equitable estoppel against the Air Force; he instead asserted that his dismissal had violated due process. *Id.*

progeny regarding these issues are merely dicta because none of those cases involved an equitable estoppel claim against the military.[150] Likewise, in *Lavin, Helm* and *Jablon*, the Ninth Circuit cannot be said to have implicitly rejected the argument that *Mindes* bars such claims because the military did not raise the justiciability issue as a defense and the court did not discuss it in any of those cases.[151] Further, the fact that no court has ever decided the justiciability of common law equitable estoppel claims against the military is not a ground for ruling that such claims are not justiciable. Therefore, the majority in *Watkins* cannot be criticized for finding that the Ninth Circuit's adoption of the *Mindes* test did not require it to rule that Watkins' equitable estoppel against the Army was nonjusticiable.

The majority's test for analyzing the merits of common law equitable estoppel claims against the military requires plaintiffs to demonstrate that 1) they have exhausted all effective instraservice remedies; (2) the military, via authorized acts of its agents, engaged in affirmative misconduct going beyond mere negligence; 3) the injustice done to the plaintiff outweighs the harm that will be done to the public interest if the military is estopped; and 4) all the traditional elements of estoppel are present.[152] This test does not abandon the concept of justiciability; instead it "intertwine[s] the concept of justiciability with the standards to be applied to the merits of the case."[153] The first three elements of the majority's test provide grounds upon which a federal court can summarily reject an equitable estoppel claim against the military and are very similar to elements of the *Mindes* test. The third element is a flexible one that gives the military more deference than other federal agencies[154] by requir-

150. *See supra* notes 57 - 60 and accompanying text.

151. *See supra* notes 68 - 76 and accompanying text. *Helm* is the strongest case in favor of the argument that the Ninth Circuit implicitly rejected the argument that its adoption of *Mindes* bars it from addressing federal nonconstitutional claims against the military because that case arose after the Ninth Circuit had formally adopted the *Mindes* test and also because after rejecting the plaintiff's constitutional claim on justiciability grounds, the court, in dicta stated that, were the estoppel claim properly before it, it would reject it on the merits. This argument, however, is not very persuasive because the Ninth Circuit's analysis of the estoppel claim was merely dicta and it is clear that the court had treated the estoppel issue very summarily.

152. *See supra* notes 83 - 101.

153. Dillard v. Brown, 652 F.2d 316, 323 (3d Cir. 1981) (rejecting the *Mindes* analysis).

154. It is well established that federal courts are required to give the military agen-

ing the court to consider the military's special need for protection from intrusion into its affairs. Thus, the test developed by the majority in *Watkins* cannot be criticized for failing to give appropriate comity, prudence and deference to the military.

The majority opinion probably will not be readily accepted by other circuits.[155] The majority opinion invites debate about whether its new test should be used to analyze all equitable estoppel claims against the military or only those claims that are coupled with a constitutional claim.[156] More importantly, it opens up speculation about the possible ramifications of the court's holding. In analyzing the balance of hardships element, the majority did not consider the possibility that there may be dozens or even hundreds of other openly gay and lesbian members of the military who might also attempt to invoke equitable estoppel against the military should they ever be denied reenlistment on the basis of their sexual orientation.

In a related omission, the majority does not discuss whether the military can ever radically change a policy or regulation such as the one at issue. The majority must have believed that the facts in the *Watkins* case were extraordinary and unlikely to recur and, for that reason, unlikely to have much impact on the military. The majority would probably reject a similar claim from a servicemember who had not always been as candid about his sexual orientation or who had not invested as much time in military service, or who had not always received such outstanding performance evaluations or whom the military could prove had actually committed illegal sexual conduct.

As a majority of justices pointed out, the court in *Watkins* should have issued a ruling on Watkins' constitutional claim.[157]

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cies more deference than other federal agencies. *See supra* notes 40 - 65 and accompanying text.

155. The Seventh Circuit has already stated that "we find the Ninth Circuit's estoppel application doubtful." *See* Ben-Shalom v. Marsh, 881 F.2d 454, 465 (7th Cir. 1989) (lesbian Army reserve sergeant who was barred from reenlistment claimed that Army regulation making homosexual status a nonwaivable disqualification for service violated her first and fifth amendment rights to free expression and equal protection).

156. The majority noted that by deciding the case on narrow equitable grounds it could avoid a decision on broad constitutional grounds. *See supra* notes 85 - 89 and accompanying text.

157. *See supra* note 7 and accompanying text.

This claim necessitated a holding on the recurring constitutional issue of the proper review of government classifications based on sexual orientation. By avoiding this issue and deciding the case on estoppel grounds, the majority in *Watkins* has necessitated piecemeal litigation and further disruption of military affairs.[158] Although Judge Norris's concurring opinion addresses this issue and will likely be of great value to other circuits,[159] a majority opinion would have been much more beneficial to the Army and gays and lesbians because it would have brought us much closer to having the issue finally resolved by the United States Supreme Court.

*John Glenn Karris**

158. At the time that the court in *Watkins* avoided determining the constitutional issue of the proper level of scrutiny of government classifications based on sexual orientation, the issue was pending in the Ninth Circuit and other circuits. *See* High Tech Gays v. Defense Industrial Security Clearance Office, 90 D.A.R. 1373 (9th Cir. 1990) (class of gay applicants for security clearances claimed that policy of subjecting gays to expanded investigations and mandatory adjudications violated their fifth amendment equal protection rights); Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989).

159. In *Ben-Shalom*, the Seventh Circuit rejected the reasoning of Judge Norris's concurring opinion and agreed with Judge Hall's dissent. *See* Ben-Shalom v. Marsh, 881 F.2d 454, 465 (7th Cir. 1989).

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