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SUMMARY

KHALSA v. WEINBERGER: NO JUDICIAL REVIEW OF ARMY APPEARANCE REGULATIONS

I. INTRODUCTION

In *Khalsa v. Weinberger*,[1] the Ninth Circuit held that Army appearance regulations causing a denial of enlistment were not subject to judicial review. Although it determined that the district court's decision to dismiss the case for lack of subject matter jurisdiction was an error, the Ninth Circuit found the error to be harmless in this case. In deciding the legal reviewability of plaintiff's claims, the panel affirmed the district court's application of the test established by the Fifth Circuit in *Mindes v. Seaman*,[2] which had been adopted by seven other circuits in-

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1. 779 F.2d 1393 (9th Cir. 1986) (per Beezer, J; other panel members were Boochever, J., and Carroll, D.J., United States District Judge for the District of Arizona, sitting by designation).

2. 453 F.2d 197 (5th Cir. 1971). In this case, Air Force Captain Mindes alleged that his separation from the service was based upon a factually erroneous and adverse Officer Effectiveness Report. The Fifth Circuit remanded for further proceedings consistent with the test set out in the opinion. As modified by the Ninth Circuit, the *Mindes* test states as follows:

> [A]n internal military decision is unreviewable unless the plaintiff alleges (a) a violation of [a recognized constitutional right], a federal statute, or military regulations; and (b) exhaustion of available intraservice remedies. If the plaintiff meets both prerequisites, the trial court must weigh four factors to determine whether review should be granted:
> (1) *The nature and strength of the plaintiff's claim . . . .*
> (2) *The potential injury to the plaintiff if review is refused.*
> (3) *The extent of interference with military functions.*

cluding the Ninth.[3] Plaintiff's contention that the *Mindes* test was not applicable to this case was rejected.[4]

II. BACKGROUND

A practicing Sikh, plaintiff Guru Sant Singh Khalsa was required to wear unshorn head and facial hair and iron bracelets and was strongly encouraged to wear a turban. In 1982, Khalsa attempted to enlist in the United States Army. Refusing to process his application, the Army informed Khalsa that he could not enlist because he would be unable to take the statutory oath promising to obey orders.[5] When Khalsa's request for an individual exemption was denied,[6] he sued the Army, alleging viola-

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(4) *The extent to which military discretion or expertise is involved.*

779 F2d. at 1398 (emphasis in original) (citing Wallace v. Chappell, 661 F.2d 729, 732-33 (9th Cir. 1982) (expressly adopting the *Mindes* test), *rev'd on other grounds*, 462 U.S. 296 (1983)).

3. 779 F.2d at 1396.

4. *Id.* at 1396-98.

5. *See* 10 U.S.C. § 502 (1982), which states that each person enlisting in an armed force shall take the following oath:

> I, _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the uniform Code of Military Justice. So help me God.

See also Army Regulation 670-1, which requires soldiers to cut their hair, shave, and wear only specified types of jewelry and headgear. 779 F.2d at 1394, 1395.

6. The majority noted as follows:

> From 1958 to 1974, the Army exempted conscripted Sikhs from these regulations. In 1974, the Army expanded the exemption to cover enlisted Sikhs.
>
> In the late 1970's, the Army received requests from other groups for similar exemptions. It reviewed the problem and concluded that allowing exemptions for numerous groups would adversely affect the Army's discipline, morale, esprit de corps, and public image. The Army also evaluated the impact of beards and long hair on the effectiveness of gas masks, and concluded that they impair the ability of U.S. troops to survive chemical attacks by aggressor forces. The Army therefore amended its appearance regulations in 1981 to eliminate the blanket exemption for Sikhs. It apparently retained procedures for granting individual exemptions based on case by case evaluations of need. Neither the original appearance regulations nor the amendments were published in the Federal Register. The amendments did not apply to the approximately

tions of the Administrative Procedure Act[7] and of his first and fifth amendment rights.[8]

The lower court concluded that the Army's appearance regulations were not subject to review. The Ninth Circuit upheld this ruling but found that the district court erroneously dismissed the case for lack of subject matter jurisdiction, noting that the doctrine of limited reviewability of certain military regulations and decisions was a justiciable matter.[9] In concluding that the error was harmless, however, the panel stated that the district court applied the proper analytical test for determining whether the military regulations challenged were subject to judicial review.[10] The majority concluded that characterization of the test as one of subject matter jurisdiction rather than as a "prudential doctrine of justiciability" did not affect the lower court's ability to reach the appropriate result.[11]

III. COURT'S ANALYSIS

A. Reviewability of Claims

1. *Internal Decisions*

Khalsa first claimed that the *Mindes* test only determined the reviewability of internal military decisions, and that Army appearance regulations were not internal in scope because they effectively prevented certain civilians from enlisting.[12] The panel's response, however, was to note that all cases from *Mindes* circuits deciding the reviewability of enlistment regulations had found such regulations nonreviewable.[13] Thus, the Ninth Circuit concluded that since those decisions involved reg-

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15 Sikhs then on active duty.

779 F.2d at 1395.

7. *Id. See* 5 U.S.C. §§ 500-576 (1982).

8. 779 F.2d at 1395. *See* U.S. Const. amends. I, V.

9. 779 F.2d at 1396. The panel also noted that "[o]wing to the distinctive role of the military and the exceptional nature of its organization and activities, the 'courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon the military might have.' " *Id.* at 1396 n.1 (quoting Chief Justice Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181, 187 (1962)).

10. 779 F.2d at 1396.

11. *Id.*

12. *Id.*

13. *Id.* at 1396 (citing Lindenau v. Alexander, 663 F.2d 68 (10th Cir. 1981); West v. Brown, 558 F.2d 757 (5th Cir. 1977), *cert. denied*, 435 U.S. 926 (1978); Henson v. Alexander, 478 F.Supp. 1055 (W.D. Ark. 1979)).

ulations that expressly and directly prohibited the enlistment of certain classes of civilians and were internal for *Mindes* purposes, regulations affecting civilians by only indirectly preventing them from enlisting could not be considered less internal.[14] The majority also noted that "if regulations governing soldiers' appearance are not 'internal,' then no Army regulations are 'internal.' "[15]

2. *Conflict With Recent Decisions*

Khalsa then asserted that *Rostker v. Goldberg*[16] and *Callahan v. Woods*[17] required a judicial determination that the military exercised its discretion in making the regulations.[18] Plaintiff argued that "the proper exercise of discretion involves giving reasoned consideration to the need for such regulations and the possibility of making exceptions, and considering alternative methods of serving legitimate state interest in a way that minimizes the burden on the free exercise of religion."[19] The panel responded by noting that it was unclear how these requirements would fit into the *Mindes* framework.[20]

The *Rostker* decision, the court noted, involved a congressional statute rather than a military action, regulation, or decision.[21] Thus, the power of the federal courts to review the challenged rule was not even addressed. Furthermore, *Rostker* was decided before the Ninth Circuit adopted the *Mindes* test in *Wallace v. Chappell*,[22] and neither that case, nor more recent authorities, referred to *Rostker* as modifying the *Mindes* test.[23]

As to *Callahan*, the panel noted that that case was an ap-

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14. 779 F.2d at 1396, 1397.
15. *Id.* at 1397.
16. 453 U.S. 57 (1981).
17. 736 F.2d 1269 (9th Cir. 1984).
18. 779 F.2d at 1397.
19. *Id.*
20. *Id.*
21. *Id.*
22. 661 F.2d 729 (9th Cir. 1982), *rev'd on other grounds*, 462 U.S. 296 (1983). *See supra* note 2.
23. The panel noted further that it was not able to find a case from a *Mindes* circuit applying *Rostker* to determine the constitutionality of military regulations. 779 F.2d at 1397 n.3.

peal from a judgment upholding a non-military regulation requiring the use of social security numbers to receive public assistance, and that the reviewability of the regulation was never in question.[24] Thus, neither *Rostker* nor *Callahan* were found to alter the Ninth Circuit's test for the reviewability of military regulations.

3. *Factual Determinations*

Plaintiff further claimed that the district court had to decide various disputed factual matters in applying the *Mindes* test.[25] The Ninth Circuit noted, however, that a careful reading of the district court's order revealed that it did not rely on disputed facts, but rather cited only the Army's conclusions on the kinds of military judgments the courts have refused to review.[26] The panel also admitted that "the fact that the *Mindes* test requires courts to make a preliminary assessment of the strength of a claim without the benefit of a full trial has led to some criticism of the test."[27]

B. Reviewability Under *Mindes*

Plaintiff additionally argued that the district judge erred in defining and weighing the *Mindes* factors. The Ninth Circuit agreed with the district court that Khalsa met the requirement of the first prong of the *Mindes* test by alleging a violation of his constitutional rights and exhausting all intraservice remedies. The panel did not agree, however, with the district court's failure to weigh the strength of his claim, as required in the second prong of the *Mindes* test. Again, however, this error was not considered significant by the court, which noted that even if the district court had considered the strength of plaintiff's claims "it would have concluded, without having to make any factual determinations, that appellant's claims were not strong."[28] The court cited the *Mindes* decision, which stated that "constitu-

24. *Id.* at 1397.

25. *Id.* at 1398.

26. *Id.*

27. *Id.* at 1398 (citing Dillard v. Brown, 652 F.2d 316, 323 (3rd Cir. 1981) (declining to adopt the *Mindes* test for this reason)).

28. 779 F.2d at 1399.

tional claims . . . are themselves unequal in the whole scale of values—compare haircut regulation questions to those arising in court-martial situations which raise issues of personal liberty."[29] Khalsa's claims, the court concluded, were on the least significant end of the constitutional scale.[30] The court added that even if the district court had reached the merits, appellant would have lost.[31]

The court responded to plaintiff's further objection to the district court's finding that "the potential injury to plaintiff if review is refused is not substantial [in that] plaintiff will lose the opportunity to enlist in the Army, but will be deprived of no constitutionally cognizable liberty or property interest . . ."[32] by citing three decisions that gave little weight to injuries flowing from denial of enlistment.[33]

Plaintiff also challenged the district court's finding that there would be significant interference with military functions and discretion if the regulation were reviewed.[34] He also argued that the lower court should have considered whether the Army could accommodate his religious beliefs without undue interference with its primary functions.[35] Both arguments were rejected by the Ninth Circuit.[36] The panel rejected the former because the district court did not decide factual issues, but only summarized military conclusions that the district court judge was not free to second guess.[37] The latter was rejected as resting on *Rostker*.[38] The Ninth Circuit affirmed the district court's holding that a weighing of all the *Mindes* factors established the

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29. *Id.* (quoting Wallace v. Chappell, 661 F.2d at 733 (citing this portion of *Mindes*)).

30. 779 F.2d at 1399.

31. *Id.*

32. *Id.*

33. *Id.* at 1399, 1400 (citing Lidenau v. Alexander, 663 F.2d 68, 74 (10th Cir. 1981) (there is no right to enlist); West v. Brown, 558 F.2d 757, 760 (5th Cir. 1977) (review would entail interference in area where only compass is accumulated military experience), *cert. denied*, 435 U.S. 926 (1978); Henson v. Alexander, 478 F. Supp. 1055, 1058 (W.D. Ark. 1979) (the potential injury to plaintiff from being denied enlistment if review is refused does not weigh strongly for review as plaintiff is neither being denied accrued benefits nor incurring punishment)).

34. 779 F.2d at 1400.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id. See supra* text accompanying notes 21-23.

nonreviewability of plaintiff's claims.[39]

C. Consideration of Matters Outside the Pleadings

The assertion that factual issues going to the merits of the case were necessarily resolved in determining the reviewability issue was also rejected by the appellate court.[40] The panel stated that the district court did not actually decide any factual disputes on the merits.[41] The panel also noted, however, that although the *Mindes* test did require courts to make a preliminary assessment of some factual assertions, this requirement did not rise to the level of adjudication of disputed facts.[42] The court noted that a contrary holding would mean that no *Mindes* challenge to a trial court's military review could ever be disposed of prior to a full determination on the merits.[43]

D. Administrative Procedure Act Claim

Finally, Khalsa claimed that the district court erred in not addressing his statutory claim under the Administrative Procedure Act (APA).[44] This claim was dismissed by the panel, which stated that "the *Mindes* test also applies to statutory claims against the military."[45] The court went on to state that "[t]he only substantial difference between the district court's analysis of appellant's constitutional claims and the proposed analysis of the APA claim is that constitutional claims give *more* weight to an argument for reviewability."[46]

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39. 779 F.2d at 1400. The panel noted that for the purpose of application of the initial *Mindes* test to determine whether a military action is reviewable "the court is not free to substitute its judgment in matters of military expertise. The degree of deference due to factual assertions by the military is proportionate to the need for the application of military experience, judgment, and expertise in evaluating the assertion." *Id.* at 1400 n.4 (citing Folk, *Military Appearance Requirements and Free Exercise of Religion*, 98 Mil. L. Rev. 53, 82 (1982)).

40. 779 F.2d at 1400.

41. *Id.*

42. *Id.* at 1400, 1401.

43. *Id.* at 1401.

44. *Id. See supra* note 7.

45. 779 F.2d at 1401.

46. *Id.* (emphasis in original) (citing Mindes v. Seaman, 453 F.2d 197, 201 (5th Cir. 1971)).

E. Minority Opinion

In a part concurrence, part dissent, the minority argued that rather than ruling on the issue of justiciability, the case should have been remanded so that the district court could have considered the facts under the *Mindes* standard enunciated by the majority.[47] The minority also believed that a challenge involving core religious beliefs must be considered as involving a strong claim.[48] The majority, in applying the first *Mindes* factor, seemed to "belittle the seriousness of plaintiff's claims that the Army's appearance regulations interfere with basic principles of the Sikh religion."[49]

Also emphasized by the minority was the majority's treatment of the potential injury to Khalsa if review was refused.[50] The minority noted that the potential injury to Khalsa and to other Sikhs may be significant, "especially in view of what appears to be a tradition among Sikhs of service in the armed forces."[51] The minority also felt that decisions as to what facts should be accepted as unreviewable military judgments should first be made by the trial court under the appropriate nonjurisdictional standard.[52]

IV. CONCLUSION

The Ninth Circuit recognized that if the Army prevented Khalsa from enlisting and the courts refused to review that decision, he would be deprived of any means of challenging the Army's appearance regulations and that his only recourse might be through the political process.[53] The court concluded that although this may seem inadequate, every circuit using the *Mindes* test has declined review rather than deciding the question on the merits.[54]

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47. 779 F.2d at 1401. (Boochever, J., concurring in part, dissenting in part).
48. *Id.*
49. *Id.*
50. *Id.* at 1402.
51. *Id.*
52. *Id.* at 1401.
53. *Id.*
54. *Id.*

Khalsa v. Weinberger exemplifies the latitude the courts grant to military decisionmaking. Such latitude is necessary to avoid undue interference with military discipline and effective operations. It also protects the military against disruption that would ensue as a result of requiring military officers to submit examinations of their reasons for decisions concerning enlisted personnel or adoption of uniform standards and regulations.

The Ninth Circuit's application of the *Mindes* test can be contrasted with the standard applied by the Supreme Court to review congressional statutes concerning the military. That standard requires the courts to determine whether the military, in exercising its discretion, properly examined alternatives to the regulations at issue in an effort to minimize the burden on the free exercise of religious beliefs.[55] While a strict standard is suitable for review of military statutes effected by Congress, the *Mindes* test appropriately gives the Army control over procedures that will be in the best interest of the armed forces, and accords needed deference to the Army's accumulated military experience.

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55. *See* 779 F.2d at 1402 (citing Rostker v. Goldberg, 453 U.S. 57, 70-74 (1981)).

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