

CHAPTER 19

SENIOR OFFICERS LEGAL ORIENTATION COURSE

**JUDICIAL REVIEW OF MILITARY ACTIVITIES, LEGAL
REPRESENTATION, AND OFFICIAL IMMUNITY**

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Outline of Instruction

I. INTRODUCTION.

- A. Military decision, programs, and policies are subject to challenge and judicial review in the federal courts.
- B. Military decision-makers can be named as defendants in such challenges.
- C. The unique character of the military influences the scope of review. The concept of judicial deference:

“We know that from top to bottom of the Army the complaint is often made . . . that there is objectionable handling of men. But judges are not given the task of running the Army. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be not to intervene in judicial matters.” Orloff v. Willoughby, 345 U.S. 83, 93 (1953).

- D. Judicial deference today.

II. REPRESENTATION OF THE UNITED STATES AND ITS EXECUTIVE AGENCY, THE DEPARTMENT OF THE ARMY.

- A. Venues
 - 1. Supreme Court.
 - 2. Courts of Appeals.
 - 3. District Courts.
 - 4. Court of Federal Claims.
 - 5. State courts of general jurisdiction.
- B. Representation of the interests of the United States. 28 U.S.C. §§ 516, 517, 518, and 519.
 - 1. The Department of Justice.
 - 2. Army Litigation Operations
 - a. The Army Litigation Division.

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- b. The Army Contract Appeals Division.
 - c. The Army Environmental Law Division.
 - d. The Army Regulatory Law and Intellectual Property Division.
3. Organization, caseloads, and practice.

III. TYPES OF SUITS FILED AGAINST THE ARMY AND ARMY OFFICIALS.

- A. Subject-matter of litigation (illustrative, not exclusive):
 1. Enlistments, inductions, activations.
 2. Discharges.
 3. Transfers and assignments.
 4. Promotions.
 5. Personnel policies.
 6. Military programs.
 7. Civilian personnel actions.
 8. Installations management decisions.
 9. Environmental compliance and remediation.
 10. Bankruptcy (as a creditor).
 11. Personal injury, death, or property damage caused by the negligence of Federal employees.
 12. Civil challenges to courts-martial convictions (habeas actions, corrections of military records).
 13. Contract disputes.
 14. Freedom of Information and Privacy Act.
 15. Federal and state administrative regulatory activities.
- B. Types of relief sought.
 1. Damages (money).

2. Injunction/mandamus.
3. Declaratory judgment.
4. Habeas corpus.

IV. SUITS AGAINST INDIVIDUALLY NAMED OFFICERS.

- A. The significance of being individually named.
 1. Official capacity.
 2. Individual (personal) capacity.
- B. Where is the suit filed.
 1. Federal court.
 2. State court.
- C. Representation.
 1. What is it?
 2. Who provides.
 - a. Role of the Department of Justice (DOJ).
 - b. Role of the installation Staff Judge Advocate.
 - (1) Request the local U.S. Attorney to provide temporary representation when “time for response is limited.” Army Reg. 27-40, Legal Services: Litigation, para. 3-2a(2) [hereinafter AR 27-40].
 - (2) Referring the request for representation to Litigation Division, OTJAG. AR 27-40, para. 3-2a(3).
- D. DOJ Representation Criteria 28 C.F.R. § 15.3 & § 50.15.
 1. Current or former employee of the federal government.
 2. Acting within the course and scope of employment.
 3. Not in connection with a federal criminal proceeding or agency disciplinary matter.
 4. Best interests of the United States.

- E. Who Is Liable for an Adverse Judgment?
1. Judgments against individual federal employees and the United States are paid by the United States.
 2. Judgments against individual federal employees are the responsibility of the employee.

V. IMMUNITIES AND JUDICIAL BARS FROM LIABILITY.

- A. Statutory immunities for **common law torts**.
1. Federal Employees Liability Reform and Tort Compensation Act, (codified at and amending 28 U.S.C. §§ 2671, 2674, 2679) (The Westfall Act). Federal employees, including members of the Armed Forces, who are sued for state law torts committed within the scope of their employment. *United States v. Smith*, 499 U.S. 160 (1991).
 - a. Certification.
 - b. Motion to substitute.
 - c. Reviewability. *Gutierrez de Martinez v. Lamango*, 515 U.S. 417 (1995).
 2. Military medical or dental personnel performing medical, dental, or other health-related functions within the scope of their employment. 10 U.S.C. § 1089 (The Gonzalez Act).
 3. Lawyers or members of legal staffs rendering legal advice within the scope of their employment. 10 U.S.C. § 1054.
- B. Judicial bar from personal liability for **common law torts**:
1. Suit filed by soldier against another soldier.
 2. When claim arises “incident to service” -- no personal liability. *Feres v. United States*, 340 U.S. 135 (1950).
- C. Judicial bar from personal liability for **constitutional torts**.
1. Constitutional torts are different, and the protection from liability is more limited.
 - a. General rule: You get only a “qualified immunity” from suit. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

- (1) Test for qualified immunity: Did the individual defendant's actions violate a clearly established constitutional right of which a reasonable person would have known? If no, immunity kicks in and suit cannot maintain against the defendant.
- b. Exceptions: You are absolutely immune when:
- (1) Suit filed by soldier against another soldier.
 - (a) When constitutional claim arises "incident to service" -- no personal liability. *Chappell v. Wallace*, 462 U.S. 296 (1983) (The *Feres* rationale applied to constitutional torts).
 - (2) Your actions were quasi-judicial or quasi-prosecutorial in character. *Butz v. Economou*, 438 U.S. 486 (1978).
 - (3) The suit is filed by a Federal civilian employee on a claim that is covered by the Civil Service System. *Bush v. Lucas*, 462 U.S. 367 (1983).

VI. CONCLUSION.