No. 00-1103

In the Supreme Court of the United States

MICHAEL D. STRICKLAND, PETITIONER

v.

RICHARD DANZIG, SECRETARY OF THE NAVY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner could satisfy the equitable standards for bringing an action seeking an injunction ordering the Navy to invalidate his discharge and reinstate him in his military position, without first attempting to make use of the avenues for review of a discharge offered by the military.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is unpublished, but the decision is noted at 235 F.3d 1339 (Table). The opinion of the district court (Pet. App. 4-50) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 2000. The petition for a writ of certiorari was filed on January 4, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a former Navy petty officer, brought this action challenging his administrative "General Discharge under Honorable Conditions." The district court

granted summary judgment to respondents and dismissed the suit. Pet. App. 51-53. The court of appeals dismissed his appeal. *Id.* at 2-3.

1. Before his discharge, petitioner had served in the Navy for 17 years. On March 30, 1998, he was arrested by the Jacksonville, Florida police on charges of lewd and lascivious acts in the presence of a child, a second degree felony under state law. Petitioner was charged with having walked up to a woman and her children while they were seated in a car, with his penis exposed and masturbating. Petitioner contends that he had merely been shaking sand out of his shorts in a private area near a beach. Petitioner pleaded *nolo contendere* to a charge of indecent exposure, a misdemeanor. He was placed on 12 months' probation, fined $1,000, required to complete 50 hours of community service, and ordered to have no unsupervised contact with children. Pet. App. 5-6.

Upon receiving a report of the incident, the Navy Family Advocacy Program at Naval Station Mayport, Florida, presented petitioner's case to a review committee under Navy regulations. Pet. App. 7. That committee determined that the case was one of child sexual abuse and forwarded its determination to the Bureau of Naval Personnel. The Bureau in turn notified petitioner that he was being considered for administrative separation "by reason of 'misconduct due to a civilian conviction' and 'misconduct due to commission of a serious offense.'" *Id.* at 8. At petitioner's request, an administrative board was convened and military counsel was appointed for him. After a hearing, the board found misconduct but recommended that he nonetheless be retained in the Navy. *Id.* at 8, 10.

The board's findings and recommendations were reported to the Chief of Naval Personnel by petitioner's

former commanding officer, who concurred with the recommendations. Pet. App. 10. The Chief of Naval Personnel, however, disagreed with the recommendations and forwarded the case to the Assistant Secretary of the Navy for a determination. *Id.* at 11. The Assistant Secretary concurred with the Chief of Naval Personnel and ordered that petitioner be separated with a "General Discharge (Under Honorable Conditions)." *Ibid.* Petitioner's unit was ordered to discharge him by June 28, 1999. *Id.* at 12.

2. Petitioner filed suit in district court, seeking to enjoin the Navy from discharging him. The district court initially issued a temporary restraining order (TRO) prohibiting the Navy from discharging petitioner. Pet. App. 12. The court ultimately extended the TRO until August 9, 1999. *Ibid.* After that time, petitioner's discharge was held in abeyance by agreement of the parties until the district court ruled on the case. On January 12, 2000, after having held a hearing, the district court issued an order denying petitioner's motion for a preliminary injunction and granting summary judgment to respondents. *Id.* at 51-53. We are informed that petitioner was discharged on February 3, 2000.

The district court applied the substantive standards governing review of an internal military decision set forth in the Fifth Circuit's decision in *Mindes* v. *Seaman*, 453 F.2d 197 (1971). Under those standards, the availability of such review depends on (1) "[t]he nature and strength of the plaintiff's challenge to the military determination," (2) "[t]he potential injury to the plaintiff if review is refused," (3) "[t]he type and degree of anticipated interference with the military function," and (4) "[t]he extent to which the exercise of military

expertise or discretion is involved." *Id.* at 201; see Pet. App. 28-29.

With respect to the first factor, the district court extensively analyzed and rejected petitioner's several claims that the procedures used in his separation violated Navy regulations. Pet. App. 30-35. The court also rejected petitioner's claim that his separation violated principles of fundamental fairness because he had pleaded *nolo contendere* to the state criminal charge in reliance on a statement by his ship's legal officer that he would not be processed for separation if he did so. The court held that petitioner's contention, which was similar to a claim of estoppel against the government, failed because Navy regulations "clearly indicate[] that [petitioner] would be processed for separation for a civilian conviction" and because there was no evidence that anyone had "deliberately misled" petitioner. *Id.* at 39. Finally, the court rejected petitioner's procedural due process claim on the ground that petitioner had no liberty or property interest in his military position. *Id.* at 41.

With respect to the second *Mindes* factor, the court held that "the harm to [petitioner], although significant, is not irreparable." Pet. App. 43. The court relied on the existence of further internal Navy remedies that were available to petitioner, such as review before the Board for Correction of Naval Records (BCNR). The court explained that "[i]f an error were found sufficient to warrant correction of [petitioner's] misconduct processing and discharge, he could be made whole by later rulings of the BCNR or in a court." *Id.* at 43-44. See also *id.* at 44-46.

With respect to the third and fourth *Mindes* factors, the court found "that the potential interference with [respondents'] ability to efficiently manage Naval per-

sonnel is great when a court interferes in a decision to separate enlisted personnel." Pet. App. 44; see also *id.* at 47 ("[A]n involuntary separation from the military has as its primary focus the preservation of the integrity and fighting fitness of the armed forces."). The court found that the fourth factor "balances against [petitioner], because this case clearly involves military discretion exercised in matters of military personnel moral[e] and discipline." *Id.* at 44.

3. The court of appeals affirmed in an unpublished per curiam decision. Applying the *Mindes* test for justiciability, which includes both the substantive standards applied by the district court and procedural elements concerning whether the servicemember has invoked internal military remedies, the court stated that dismissal for lack of jurisdiction was required because petitioner had "failed to exhaust his administrative remedy before the Board for Correction of Naval Records." Pet. App. 2. The court also stated that petitioner's request for an injunction barring his separation from the Navy is moot, because "[petitioner] already has been discharged from the service." *Id.* at 3.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Petitioner's principal argument (Pet. 8) is that the court of appeals' decision conflicts with this Court's decision in *Darby* v. *Cisneros*, 509 U.S. 137 (1993). This Court held in *Darby* that, in cases brought under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, the courts may apply the traditional doctrine of exhaustion of administrative remedies "only when expressly required by statute or when an agency rule

requires appeal before review and the administrative action is made inoperative pending that review." 509 U.S. at 154. The Court relied for that conclusion on Section 10(c) of the APA, which provides that "agency action otherwise final is final for the purposes of [obtaining judicial review] whether or not there has been presented or determined an application * * *, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority." 5 U.S.C. 704. In this case, the Navy has not required by rule that sailors must bring their claims to the BCNR or other internal review mechanisms before their separation is final, and it has not provided that separation of a sailor from the Navy will be "inoperative" until any such review is completed.

a. *Darby* established that the general doctrine of exhaustion of administrative remedies applies in APA cases only under the circumstances specified in Section 10(c). But this Court noted in *Darby* that "federal courts may be free to apply, where appropriate, other prudential doctrines of judicial administration to limit the scope and timing of judicial review." 509 U.S. at 146. One such doctrine is the traditional equitable rule that federal courts must weigh the public interest and consider the hardship that an injunction would impose before granting relief. That rule has particular force in cases involving the military, in which interference—especially premature interference—by a court can implicate serious separation of powers concerns.

For example, in *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 329-330 (1982), plaintiffs sued to enjoin the Navy from discharging wastes in violation of the Clean Water Act. This Court held that a court "should pay particular regard for the public consequences in

employing the extraordinary remedy of injunction," and it noted that "[a]n injunction should issue only where the intervention of a court of equity 'is essential in order effectually to protect property rights against injuries otherwise irremediable.'" *Id.* at 312 (quoting *Cavanaugh* v. *Looney*, 248 U.S. 453, 456 (1919)). Moreover, the Court relied on the existence of an alternative non-judicial remedy—the possibility that the Navy could apply for and obtain a permit for its discharges—in holding that the district court was not required to issue an injunction against the Navy. See also *Amoco Prod. Co.* v. *Village of Gambell*, 480 U.S. 531, 542-544 & n.8 (1987) (noting that the existence of alternative means to obtain statutory goal militated against injunction); *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944) ("A grant of *jurisdiction* to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances."). Those principles do not conflict with *Darby*, and they fully justify the refusal by the courts below to interfere with military discipline and personnel actions while internal military avenues of relief remain available. Cf. *Clinton* v. *Goldsmith*, 526 U.S. 529, 537-540 (1999) (holding injunctive relief under the All Writs Act unavailable because of existence of alternative avenues of relief).

When a servicemember seeks to obtain an injunction in a matter affecting the relationship between the servicemember and military superiors, there is a paramount public interest in avoiding judicial interference —especially premature judicial interference—in internal military affairs. That public interest rests both on the public interest in the military's ability to maintain discipline and thereby serve its function of protecting the Nation's security and on the separation of powers concerns that are necessarily implicated by undue

judicial intrusion into internal military affairs. Accordingly, the public interest in avoiding an injunction in cases like this is at its apex. Applying the traditional equitable principles recognized in cases such as *Romero-Barcelo*, a court therefore would ordinarily abuse its discretion in issuing an injunction—and, therefore, in entertaining a suit for an injunction—when the servicemember's alleged injury can be redressed by internal military means.[1]

i. The military services play a crucial role in protecting the national security. "To prepare for and perform its vital role, the military must insist upon a respect for duty and a discipline without counterpart in civilian life." *Schlesinger* v. *Councilman*, 420 U.S. 738, 757 (1975). Having developed as a result of "centuries of experience," *Chappell* v. *Wallace*, 462 U.S. 296, 300 (1983), the "military exigencies" that require such discipline are "as powerful now as in the past." *Schlesinger*, 420 U.S. at 757. Indeed, "[t]he essence of military service 'is the subordination of the desires and interests of the individual to the needs of the service.'" *Goldman* v. *Weinberger*, 475 U.S. 503, 507 (1986) (quoting *Orloff* v. *Willoughby*, 345 U.S. 83, 92 (1953)). In short, "no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting." *Chappell*, 462 U.S. at 300.

The "heirarchical structure of discipline and obedience to command" is "unique in its application to the military establishment and wholly different from civilian patterns." *Chappell*, 462 U.S. at 300; see also *Orloff*, 345 U.S. at 94 ("The military constitutes a specialized community governed by a separate discipline from that

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[1] The same principles apply *a fortiori* to the issuance of temporary or preliminary relief in such cases. See note 4, *infra*.

of the civilian."). Because undue outside intervention in the system of military command risks compromising that structure, the judiciary must be "scrupulous not to interfere with legitimate [military] matters." *Orloff*, 345 U.S. at 94. "Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the Military Establishment." *Chappell*, 462 U.S. at 300.

ii. In addition to the special needs of military discipline, core constitutional separation-of-powers principles also require courts to exercise exceptional caution before intervening in internal military matters. The Constitution grants plenary authority to Congress "[t]o raise and support Armies," "[t]o provide and maintain a Navy," and "[t]o make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. Art. I, § 8, Cls. 12-14. It also provides that "[t]he President shall be Commander in Chief of the Army and Navy of the United States." *Id.* Art. II, § 2, Cl. 1. Because such broad authority over military matters and personnel is entrusted to Congress and the President—not to the courts—"[o]rderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters." *Orloff*, 345 U.S. at 94. Indeed, "[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches." *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973).

iii. Because of the exceptional dangers posed by undue—and, in particular, premature—judicial intervention in military personnel matters, the public interest, which is always a factor of overriding importance in exercising equity jurisdiction, generally prohibits courts from issuing injunctions in cases in which internal military remedies are available to address the plaintiff servicemember's complaint. That does not mean that courts have no role to play in enforcing constitutional and statutory requirements applicable to servicemembers. But "judicial inquiry into, and hence intrusion upon, military matters," *United States* v. *Stanley*, 483 U.S. 669, 682 (1987), should be avoided in cases in which a servicemember has alternative, intra-service remedies available.

b. This case provides a typical instance in which judicial intrusion into military matters is impermissible. Petitioner has made no effort to avail himself of at least two administrative processes—the BCNR and the Discharge Review Board—that could have remedied any violation of law that took place in his separation from the Navy. Indeed, these expert bodies offer not only the expertise in military matters not possessed by a district court, but also the ability to develop an administrative record that would likely assist in any ultimate judicial review sought by petitioner. Most importantly, however, the investigation and resolution of petitioner's claims by those bodies would not be an unwanted and potentially damaging interference with military discipline, but would instead be an invocation of an available procedure that is *within* the structure of internal military remedies that Congress has specifically provided.

i. First, the BCNR has statutory authority to "correct any military record * * * when [it] considers it necessary to correct an error or remove an injustice."

10 U.S.C. 1552(a)(i). A claimant or the claimant's heir may "file[] a request for the correction within three years after he discovers the error or injustice," although the Board may excuse failure to satisfy that limitations period "if it finds it to be in the interest of justice." 10 U.S.C. 1552(b).[2] The function of the BCNR is to determine "the existence of error or injustice," and when appropriate, "to make recommendations to the Secretary" of the Navy. 32 C.F.R. 723.2(b). The BCNR has the authority to consider claims of "constitutional, statutory and/or regulatory violations." 32 C.F.R. 723.3(e)(4). The Secretary of the Navy, upon receipt of a BCNR recommendation, is empowered to "direct such action as he or she determines to be appropriate." 32 C.F.R. 723.7(a). The Secretary thus may order reinstatement, back pay, promotion, or any other relief he finds "appropriate." See *Goldsmith*, 526 U.S. at 538;[3] *Chappell*, 462 U.S. at 301-303.

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[2] Petitioner accordingly would have three years from the date of his discharge in February 2000 to file a claim before the BCNR.

[3] *Clinton* v. *Goldsmith*, *supra*, presented the question whether the Court of Appeals for the Armed Forces, acting in aid of its jurisdiction over appeals from some courts-martial, had jurisdiction under the All Writs Act, 28 U.S.C. 1651(a), to enjoin the President and other officials from dropping an officer from the rolls. During the oral argument in *Goldsmith*, the government stated that "under this Court's decision in *Darby* v. *Cisneros*, unless there is a specific statutory or regulatory requirement of exhaustion, the servicemember need not, before bringing an APA action, exhaust * * * the provided administrative remedy, such as the BCMR. He can do it, but he can also make a challenge to the actual decision to drop him from the rolls." Tr. at 11, *Clinton* v. *Goldsmith*, *supra* (No. 98-347). The Court, however, recognized in *Darby* the continued application of "other prudential doctrines of judicial administration to limit the scope and timing of judicial review" in APA actions. 509 U.S. at 146. For the reasons given in this brief,

Second, the Discharge Review Board also has broad powers under 10 U.S.C. 1553. While the Discharge Board may not reinstate a discharged or dismissed serviceman, it is authorized to "change a discharge or dismissal, or issue a new discharge, to reflect its findings." 10 U.S.C. 1553(b). See also 32 C.F.R. 724.202(a)(2). The function of the Discharge Board is, *inter alia*, to correct any "injustice or inequity in the discharge issued." 32 C.F.R. 724.203(b). Such review is conducted on the basis of military records and "such other evidence as may be presented to the board," including evidence that may be presented "in person or by affidavit." 32 C.F.R. 724.202(a)(3). Aggrieved persons may be represented by counsel or by other persons. *Ibid.* The jurisdiction of the Discharge Review Board includes all discharges other than those pursuant to general court-martial. 32 C.F.R. 724.107. A

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longstanding equitable doctrines governing the issuance of injunctions ordinarily preclude courts from granting such relief so long as internal military remedies are available.

In its opinion in *Goldsmith*, the Court noted that one reason that All Writs Act jurisdiction was not available to the plaintiff was that the plaintiff had alternative remedies available—either "to present his claim to the Air Force Board for Correction of Military Records," 526 U.S. at 538, or to the federal courts either on APA review of the Board's decision or in a suit for money damages under the Tucker Act, *id.* at 539-540. The Court thus recognized and relied upon the fact that judicial review is available after a decision of the Board of Corrections, a proposition that is entirely consistent with the position taken in this brief. It is noteworthy that the Court did not suggest that a district court could exercise jurisdiction over the decision to drop the plaintiff from the rolls prior to a decision by the Board of Corrections; nothing in *Goldsmith* accordingly suggests that a district court could properly exercise jurisdiction over the analogous decision in this case to discharge petitioner.

servicemember has up to 15 years to apply for such review. 32 C.F.R. 724.205(b). Thus, the Discharge Review Board could change petitioner's discharge to a fully honorable discharge if the law or equities in his case so required.

ii. It is worth emphasizing that the facts that internal military remedies may take some time to operate, and that petitioner may in the meantime be separated from the service, do not warrant permitting him to proceed directly to district court. In *Romero-Barcelo*, for example, the alternative remedy on which the Court relied (the ability of the military to apply for and obtain a discharge permit) would not have remedied the existing violation of law as quickly as a simple order by the district court, perhaps even as a matter of temporary or preliminary relief, to the military to cease its discharges. Nonetheless, the Court held that the alternative remedy may be sufficient to warrant the court's withholding of injunctive relief. Here, the public interest in avoiding undue intrusion by the judiciary in internal military discipline is of overarching importance. So long as internal military remedies are available to petitioner, the fact that their invocation may take some time (as, of course, would district court litigation) does not justify a court's exercise of its equity jurisdiction.[4]

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[4] It is difficult to conceive of circumstances in which a district court would be warranted in granting a temporary restraining order or preliminary injunction in a federal military personnel matter. Such forms of preliminary relief are necessarily tentative, and the fact that they are subject to change later in the litigation serves to make them particularly threatening to the ability of the military command structure to administer military personnel in

c. In any event, further review in this case is unwarranted. The Fifth Circuit's decision is unpublished, and it therefore does not have full precedential effect even in the Fifth Circuit. See 5th Cir. R. 47.5.4. Petitioner

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the interests of the Nation's security.

In a case involving the discharge of a federal civilian employee, this Court has held that a lower court would be "quite wrong in routinely applying * * * the traditional standards governing more orthodox 'stays.'" *Sampson* v. *Murray*, 415 U.S. 61, 83-84 (1974). To obtain such relief, a federal civilian employee "at the very least must make a showing of irreparable injury sufficient in kind and degree to override the[] factors cutting against the general availability of preliminary injunctions in Government personnel cases." *Id.* at 84. This Court "ha[s] held that an insufficiency of savings or difficulties in immediately obtaining other employment—external factors common to most discharged employees and not attributable to any unusual actions relating to the discharge itself—will not support a finding of irreparable injury, however severely they may affect a particular individual." *Id.* at 92 n.68. It follows *a fortiori* that temporary or preliminary relief in the even more sensitive context of personnel actions affecting members of the military are likely to be unavailable. See, *e.g.*, *Guitard* v. *United States Secretary of Navy*, 967 F.2d 737, 742 (2d Cir. 1992) (holding that *Sampson* "applies with as much or greater force in the case of a military discharge"); *Guerra* v. *Scruggs*, 942 F.2d 270, 274 (4th Cir. 1991) (holding that "*Sampson*'s higher requirement of irreparable injury should be applied in the military context given the federal courts' traditional reluctance to interfere with military matters"); *Hartikka* v. *United States*, 754 F.2d 1516, 1518 (9th Cir. 1985) (holding that *Sampson* requires the plaintiff to "make a much stronger showing of irreparable harm than the ordinary standard for injunctive relief"); *Chilcott* v. *Orr*, 747 F.2d 29, 34 (1st Cir. 1984) (holding that "the prospect of a general discharge under honorable conditions is not an injury of sufficient magnitude to warrant an injunction"). In sum, neither the irreparable injury nor the public interest prongs of the familiar four-part test for temporary injunctive relief will be satisfied in an action seeking to enjoin a military personnel decision.

claims (Pet. 9) that the decision in this case conflicts with *Dowds* v. *Clinton*, 18 F.3d 953 (D.C. Cir. 1994) (Table), but that decision too is unpublished, and it likewise lacks precedential effect. See D.C. Cir. R. 28(c) ("Unpublished orders or judgments of this court, including explanatory memoranda and sealed opinions, are not to be cited as precedent."). Accordingly, there is no conflict in the circuits.[5]

2. Petitioner claims (Pet. 10) that the court of appeals erred in finding that his claim for a permanent injunction precluding his discharge was moot. Petitioner had been discharged by the time the court of appeals issued its decision. He offers no reason why his claim for a permanent injunction prohibiting his discharge was therefore not moot. As petitioner notes (Pet. 11), his claim for reinstatement was not moot. But the court of appeals dismissed his appeal with respect to that claim because of his failure to seek a remedy before the BCNR, not because of mootness. The court of appeals' mootness holding was accordingly correct and does not warrant further review.

3. Petitioner's remaining contentions are that the district court erred in its analysis of petitioner's claim that his discharge violated the Due Process Clause

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[5] Two other appellate decisions have addressed similar or related issues, but they also were unpublished. *Robertson* v. *United States*, 145 F.3d 1346 (10th Cir. 1998) (Table), cert. denied, 525 U.S. 879 (1999); *Ostrow* v. *Secretary of the Air Force*, 48 F.3d 562 (D.C. Cir. 1995) (Table). The reported district court decisions are split. Compare *Saad* v. *Dalton*, 846 F. Supp. 889, 891 (S.D. Cal. 1994) ("[r]eview of military personnel actions * * * is a unique context with specialized rules limiting judicial review"), with, *e.g.*, *Crane* v. *Secretary of the Army*, 92 F. Supp. 2d 155, 162 (W.D.N.Y. 2000) (reviewing merits of discharge case despite availability of internal military remedies).

(Pet. 12-18) and that his discharge violated the APA because it was arbitrary and capricious (Pet. 18-22) and not supported by substantial evidence (Pet. 23-25). Those fact-bound contentions were not addressed by the court of appeals, and they are therefore not ripe for review by this Court. Petitioner is free to press those claims on their merits before the BCNR, which has the authority to consider claims of "constitutional, statutory and/or regulatory violations." 32 C.F.R. 723.3(e)(4). He may then seek judicial review of the resolution of those claims.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2001