No. _____

In the Supreme Court of the United States

CDR JOHN F. SHARPE, USN, PETITIONER

v.

UNITED STATES OF AMERICA

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case concerns the Defense Finance and Accounting Service (DFAS) and its inexplicable refusal under 10 U.S.C. § 1552(c) to calculate, with respect to certain military pay and allowances, which it administers, the amounts "found to be due the [Petitioner] on account of his service in the . . . Navy," *id.*, following the correction of his naval record by the Secretary of the Navy (SECNAV), acting through the Board for Correction of Naval Records (BCNR).

Instead of exercising its discretion as obliged under § 1552(c) – clearly interpreted by regulations and by 65 years' worth of settled administrative and judicial case law, consistent with the legislative history as to the statute's meaning – and under 31 U.S.C. § 3702, implemented at 32 C.F.R. § 281, making DFAS responsible for setting military pay claims, the latter balked, instead demanding – a year after SECNAV's favorable action – that Navy personnel officials tell DFAS what the financial consequences of Petitioner's § 1552 record correction should be. The Navy improperly acquiesced, for purposes of litigation (then stayed in the Court of Federal Claims), and had a uniformed attorney draft a letter for a civilian colleague in the Bureau of Personnel (BUPERS), directing DFAS to "re-correct" Petitioner's record to arrive at the entitlements outcome Navy litigators thought appropriate, not only contrary to the original Secretarial correction but in violation of every conceivable correction-board case, statute, and regulation.

Both the Court of Federal Claims and the Federal Circuit upheld the Navy lawyers' actions, while strangely ignoring the volume of statutory, regulatory, and case law cited in Petitioner's briefs.

This factually simple case has sweeping implications. The Federal Circuit's errors contradict this Court's (and its own) precedents in fundamental areas of constitutional and administrative law, clouding a previously clear horizon of adjudication and practice in administratively settling claims arising from military-record corrections. Summary reversal and remand to DFAS are absolutely in order, on the basis of the answers to the following questions presented:

I. Whether the acts of officials of the Departments of Defense and of the Navy are bound by statute and regulation.

II. Whether a court may find valid an act of agency counsel purporting to exercise agency discretion, when the officials entrusted with it have failed to act in the first instance, and the court's judgment will thereby substitute for the agency's.

III. Whether the federal separation of powers permits the judiciary to exercise discretion with respect to military personnel assignments.

IV. Whether the Constitution permits disbursements from the federal treasury on an equitable basis without express statutory or regulatory authorization.

V. Whether the entitlement of a uniformed servicemember to pay and allowances depends on work performed or services rendered, absent a provision to the contrary by the applicable statutes or regulations.

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PETITION FOR WRIT OF CERTIORARI

CDR John F. Sharpe, USN, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a- 19a) is reported at 935 F.3d 1352. The opinion and order of the Court of Federal Claims (App. 20a-50a) is reported at 134 Fed. Cl. 805.

JURISDICTION

The judgment of the court of appeals was entered on

August 27, 2019. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent provisions of the U.S. Constitution, Article I, § 9, cl. 7, the Legislative Reorganization Act of 1946 (and the 1951 Act amending it), codified at 10 U.S.C. § 1552 *et seq*, the Military Pay Act, 37 U.S.C. §§ 305a and 403, the Budget and Accounting Act, 1921, as amended and codified at 31 U.S.C. § 3702, and applicable regulations and policies and other matters are reproduced in the appendix to the petition (App. 387a-423a).

STATEMENT

This case could be an ideal vehicle for clarifying the operation of 10 U.S.C. § 1552(c) with respect to determining amounts due an aggrieved servicemember incident to a correction of military records. The lower courts' opinions clearly reflect confusion. But the more practical approach is a summary reversal or vacatur, recommended *infra*, to prevent those opinions from offending this Court's decisions in crucial areas of administrative law, key Constitutional principles, the Federal Circuit's own case law, and well-established administrative practice.

A. Factual and Procedural History

1. Petitioner is an active-duty Naval officer who was illegally discharged in September 2009. Prior to his discharge, he was assigned to the aircraft carrier

USS CARL VINSON (CVN 70) as his permanent duty station by BUPERS Order 0867, App. 351a. He reported on June 20, 2006, App. 60a. To effect his discharge, the Navy issued him BUPERS Order 2589, App. 372a, directing him to take three steps: 1) "WHEN DIRECTED BY REPORTING SENIOR, DETACH IN SEP 09 FROM CVN 70 VINSON"; 2) "ACCORDANCE MILPERSMAN 1910-812 REPORT PRESENT CO FOR TEMPORARY DUTY IN CONNECTION WITH SEPARATION PROCESSING";[1] 3) "UPON COMPLETION AND WHEN DIRECTED DETACH." The orders did not order his discharge or separation; instead, they made that separation effective and contingent upon his executing the orders to detach from the ship: "BY DIRECTION OF THE PRESIDENT, AND PURSUANT TO PROVISIONS OF SECNAVINST 1920.6 (SERIES) AND 10 U.S.C. SEC. 1184/1186, DISCHARGE FROM THE U.S. NAVAL SERVICE TO TAKE EFFECT AT 2400 ON DATE OF DETACHMENT FROM ACTIVITY AT WHICH SEPARATED."

2. In September 2015 Petitioner applied to the BCNR and filed a Complaint with the COFC for back pay and reinstatement; the former to meet the statute of limitations concerns, the latter remain stayed while BCNR and the Navy took remedial action. BCNR voted in October 2015 to grant him full relief, but processing the decision was not complete until April 2016, when it was approved for the SECNAV. That decision, made under 10 U.S.C. § 1552(a), determined that Petitioner's separation was "void due to plain legal error," App. 346a, and corrected Petitioner's record to show that he had never left the Na-

[1] Navy personnel regulations provide that "Members . . . will normally be separated on board their current command." App. 407a.

vy, expunged BUPERS Order 2589, and directed that "no [similar] entries or material be added to [his record] in the future." Incident to BCNR's action, on December 6, 2016, Petitioner received BUPERS Order 3426 directing him to "REPORT NOT LATER THAN MAY [20]17 TO CHINFO/FSD LIAISON OFFICE PERMANENT DUTY STATION DC, WASHINGTON" by way of a first temporary duty stop to commence no later than February 13, 2017. App. 30a. No order intervened[2] between the order attaching him to CARL VINSON and the new December 2016 order to disturb his attachment to the ship[3] or otherwise effect a change of duty station.[4] And because Order 2589 was never legally in his record, in view of BCNR's action,[5] his record unavoidably reflected – following that action – continuous assignment to CARL VINSON from his June 2006 report date until the day before he reported to the new temporary duty station. Indeed, the Navy itself had acknowledged that Petitioner's having "orders to USS CARL VINSON" meant that he was "assigned"

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[2] As the government and courts acknowledged. App. 9a n.5., COFC 15-1087C ECF No. 43 at 22.

[3] See App. 410a ("Change of duty orders . . . detach members from one duty station and assign them to another station.")

[4] App. 410a ("A [Permanent Change of Station (PCS)] order must direct a PCS.").

[5] *Craft v. United States*, 218 Ct Cl. 579, 600 (1978) (noting a military "record correction relates back and retroactively changes the factual situation"); *see e.g., Weller v. United States*, 41 Ct. Cl. 324 (1906) ("An illegal order of discharge or dismissal is void and has no effect upon the status of the officer."); *Sanders v. United States*, 219 Ct. Cl. 285, 316 (1979) (Nichols, J., concurring) ("The result of the voiding was that the [orders] were legally never in his file. This kind of record correction is effective *ab initio* unless otherwise stated").

there.[6]

3. Petitioner subsequently engaged in administrative and judicial efforts (via the stayed COFC case) to have his back pay and allowances determined pursuant to § 1552(c) and to have the claim he submitted with his BCNR application settled.[7] App. 312a. In January 2017 the government reported to the COFC that

> DFAS will ultimately determine how Mr. Sharpe's basic allowance for housing (BAH) and Career Sea Pay (CSP) will be calculated, pursuant to applicable regulations. DFAS has its own administrative appeals process, which would be available to Mr. Sharpe if he is unsatisfied with DFAS's ultimate calculations.

App. 246a. Notwithstanding this and consistent prior and subsequent representations,[8] DFAS determined in early May 2017 that it would not make calculations "pursuant to applicable regulations" of these

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[6] COFC A.R., 0085, Dep. Asst. Judge Advocate General letter of Aug. 31, 2015 (emphasis supplied).

[7] COFC A.R., 1688-92. *See* 32 C.F.R. § 723.10(b)(1) App. 396a ("[A] claim for settlement and payment may be filed as a separate part of the application for correction of the record.").

8 In April 2016 BCNR directed DFAS to pay amounts due, App. 203a. The government reported on December 12, 2016, that "[DFAS] will calculate the back pay amounts due." App. 206a. On February 10, 2017, DFAS acknowledged that there would be a "settlement . . . made." App. 278a. On two occasions in March 2017, the government informed the COFC that DFAS pay calculations were pending or underway. App. 284a ("DFAS has begun calculating the back pay amounts."); App. 292a ("DFAS has informed counsel that once it receives all the necessary documentation, the remainder of the process would take a maximum of thirty days.").

pay items, but would instead demand "a memorandum from the Navy's Chief of Naval Personnel, reflecting the personnel decisions on which these entitlements would be based." App. 298a. DFAS was apparently uncomfortable with the idea that, as counsel represented to the court, "during [years of his constructive service] *the ship to which Mr. Sharpe was assigned* changed ports (going from a locale with a lower BAH to a higher one), [because the] move raises the question of the proper geographic locale to use for computing BAH." *Id.* (emphasis supplied), App. 298a. But there was no "question," because if Petitioner was indeed "assigned" to CARL VINSON, it would just be a matter of accounting for CARL VINSON's admitted move to San Diego, Calif., on April 1, 2010, App. 61a, and applying to Petitioner's corrected record the federal regulations making the BAH rate depend on the location of the home port in the case of a member assigned to a ship[9] and directing pay officials to "[c]hange the housing allowance to the new home port rate on the home port change effective date prescribed by the Service." App. 412a. DFAS also balked at paying CSP, because that was another entitlement Petitioner was receiving on the basis of his assignment to CARL VINSON, consistent with statute and regulation. (He was also close to receiving a CSP-Premium (CSP-P) (together "Sea Pay") due to sea-service longevity. App. 62a)

Thus, rather than apply law and regulation to Petitioner's record as corrected, DFAS put the onus on Navy personnel officials to "reconstruct" his record – more than a year after BCNR made its correction, "final and conclusive on all officers of the United

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[9] "[A] housing allowance is paid based on . . . the home port for a member assigned to a ship or afloat unit." App. 412a.

States," § 1552(a)(4). The Navy acquiesced, telling the court it was "drafting the memorandum to the Chief of Naval Personnel, [to] reflect all the entitlements the Navy believes should be accorded." App. 298a-299a. Petitioner responded by noting that he had already in September 2015 submitted a detailed "Claim for settlement and payment" which DFAS had simply ignored. App. 304a-305a.

The Navy personnel marshaled to accede to DFAS's request were not pay-entitlement officials or even personnel managers but rather military and civilian attorneys responding to understandable pressure from the COFC, following a May 5, 2017, status call, to finalize the government's view regarding *inter alia* the increasingly controversial BAH and Sea Pay questions. App. 55a. To meet the court's demands, a uniformed Judge Advocate General's (JAG) Corps officer drafted a letter in early May 2017 that she had a legal adviser named Brian Bourne at Navy Personnel Command (NPC) – an office wholly unrelated to BCNR – sign on May 11, 2017. App. 57a-63a. The letter directed *DFAS* to "correct [Petitioner's] record"[10] to show his assignment to CARL VINSON ended on September 30, 2009,[11] and to show the kinds of pay that – on the basis of that assumption – the JAG thought he was "not entitled" to,[12] based upon what she thought "would have happened" in

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[10] "I request that DFAS take the following actions pertaining to CDR Sharpe's pay to correct his record." App., 60a.

[11] "[H]is record (including pay) should be corrected to show that his sea duty ended on 30 Sep 09." App., 61a.

[12] His "naval record should be corrected to show BAH allowance at the Norfolk, Virginia rate from 1 Oct 09 until he returned to active duty on 13 Feb 17," App., 61a; "naval record should be corrected to reflect he is not entitled to [CSP] for that period," App., 61a; "naval record should be corrected to show he is not entitled to [CSP-P]." App., 62a.

the absence of Petitioner's discharge (improperly memorialized in her letter)[13] and upon other extra-record facts.[14]

Armed with the NPC letter, DFAS paid Petitioner BAH at the Norfolk, Va., rate, COFC 15-1087C ECF No. 39 at 1, even though there was not a stitch of evidence in his record that he was assigned to a Norfolk, Va., duty station and therefore authorized by law to a payment of BAH at the Norfolk rate. DFAS also declined to pay Sea Pay on the basis of Petitioner's Bourne-directed (in May 2017) detachment (in September 2009) from his ship.

4. In response to the Bourne record "reconstruction," Petitioner moved the court for leave to amend his Complaint to address the irregularities with the approach to the BAH and Sea Pay, and to file a Motion for Summary Judgment (MSJ).[15] In his motion, Petitioner sought legal review of the key problems he saw with the Navy-DFAS action: 1) the illegality of Bourne's attempt to "correct" his record, outside of a correction-board proceeding and contrary to the correction BCNR had made the year before; 2) his un-

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[13] "Sharpe was assigned to USS CARL VINSON (CVN 70) from 20 Jun 06 to 30 Sep 09, when he was separated from the Navy ... he would not have continued to serve aboard USS CARL VINSON past 2009," App., 60a-61a; "after the date on which CDR Sharpe would have been transferred under permanent change of station orders, had he not been separated"; that "CDR Sharpe did not serve aboard ship, and for constructive service purposes would not have been assigned to a ship, from 1 Oct 09 to 12 Feb 17," App., 61a.

[14] "Following his separation, CDR Sharpe and his dependents continued to reside in Carrollton, Virginia." App., 61a.

[15] The MSJ had 5 counts originally, including one for BAH and one for Sea Pay; the others were minor pay issues and a state tax withholding issue, each mooted by administrative resolution.

lawful arrogation of discretion to give direction as to the entitlements that accrued to Petitioner under § 1552(c) following BCNR's record correction; 3) DFAS's improper reliance on Bourne's void "record correction" and his frankly irrelevant opinion as to Petitioner's entitlements; and 4) DFAS's and the Navy's failure to apply statutes, regulations, and case law (where necessary) to his record as it stood following BCNR's correction and arrive at an dispassionate accounting of the Sea Pay and BAH due to him.

5. Rather than engage in a serious review, the COFC produced instead an opinion declaring only that Bourne had every right to exercise discretion with regard to Petitioner's record and pay, that the Navy's decisions regarding BAH and Sea Pay were "reasonable," and anything otherwise would be "illogical." This is partly because, the court said – in the case of the BAH – the Navy put Petitioner in the "same position" he had at the time of his separation, App. 46a, but what the court meant was gave him the "same pay," because the "same position" would have required his pay rate to change during the course of the constructive-service period, as DFAS recognized regarding the change in Petitioner's basic pay due to annual pay raises and his increase in longevity in the service.[16] (And the "same position" equals "same pay" logic was only used when it defeated finding an entitlement; where the logic would have granted the entitlement, in the case of Sea Pay, which Petitioner was receiving when separated, App. 47a n.16, the court avoided it.) The lengthy MSJ Petitioner provided explaining the legal background to correction-board action, constructive-service case law, the statutes and regulations relating to BAH,

[16] App. 311a.

Sea Pay, and the predicate issues of military personnel assignments and duty stations was simply ignored by the court. Instead, its opinion took advantage of Petitioner's assigned failure to prove that he "would have" remained assigned to CARL VINSON following his separation from the Navy, had he not been separated,[17] to endorse the contrary, speculative Bourne presumption that Petitioner *would not have* remained assigned to CARL VINSON (even though the effect of BCNRs record correction was to make his record reflect that he *did* remain so assigned), directly contrary to binding circuit precedent (briefed to the court, App.147 a) holding that a court "*will not speculate* as to what the outcome might have been *had the error not occurred.*"[18]

6. Petitioner fared no better with his motion to reconsider (MTR) or appeal. The COFC claimed that all of his arguments had been "carefully considered by the Court," App. 53a. The Court of Appeals for the Federal Circuit (CAFC) added no analysis of the legal issues involved, but instead asserted – equally contrary to *Wagner, supra* – that "the facts make clear," App. 15a, 17a-18a, that Petitioner "would *not* have continued to be assigned to" CARL VINSON following the date he was separated from the Navy (a date which, thanks to BNCR, is a nullity in any event), though the court cited not a single record fact to justify its claim other than the underlying and improper Bourne memorandum justifying its assump-

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[17] Even though the posture of his naval record as corrected by BCNR is a consequence of the fact that he was *actually* separated and but *constructively* in the service, making what "would have happened" otherwise utterly irrelevant.

[18] *Wagner v. United States*, 365 F.3d 1358, 1365 (Fed. Cir. 2004) (emphasis supplied).

tions by reference to nominal tour-length policies that apply to *prospective* assignment management (not retroactive record correction), App. 16a, 60a. The court also endorsed the idea of placing Petitioner in the "same position" he was in for BAH purposes, and of not placing him in the "same position" regarding Sea Pay, finding that approach, as the COFC did, to be "quite reasonable," App. 15a-16a.

Petitioner now therefore respectfully seeks this Court's intervention to remedy, through one of the alternatives herein suggested, the consequences of the Federal Circuit's decision and the incorrect principles it memorializes. Analysis follows of the legislative and regulatory background that the lower courts failed to consider in reviewing the Navy-DFAS process for determining the pay consequences of Petitioner's record correction, and by which to appreciate how the lower court's opinions will offend this Court's precedents in key areas of administrative and Constitutional law relating to expenditures from the treasury and the separation of powers between the judiciary and the military, and put into confusion settled circuit law with regard both to these matters and to issues specific to military record-correction cases.

B. The Meaning of Amounts "Found To Be Due" in § 1552(c) and the Distinction Between Record Corrections and Ensuing Pay Entitlements, According to Legislative History, Regulatory Interpretation, and Consistent Administrative Practice

1. The Military Department Secretaries acquired the authority to correct servicemember records with the Legislative Reorganization Act of 1946 (the "1946

Act").[19] It had no provision for making payments to servicemembers who would have a claim for payment as a result of the record correction, which the Comptroller General of the United States (CompGen) – who exercised claims-settlement authority for the United States via the General Accounting Office (GAO), which he supervised[20] – pointed out soon after the 1946 Act was passed.[21]

The CompGen's opinion prompted Congress to draft H.R. 1181, An Act To Amend Section 207 of the Legislative Reorganizations Act of 1946 so as To Authorize Payment of Claims Arising From Correction of Military or Naval Records (the Act), [22] introduced in the House on January 9, 1951. 97 CONG. REC. 121 (1951). The bill at first contained a controversial provision regarding the settlement of claims that provoked intense discussion between legislators and witnesses which affords a crystal clear glimpse at the intent of Congress relative to the connection between the correction of facts in military records determination of monetary amounts "*found to be due* on ac-

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[19] Pub. L. No. 79-601, § 207, 60 Stat. 812, 837. App. 387a.

[20] § 236 of the revised statutes, as amended by the Budget and Accounting Act of 1921, Pub.L. No. 67–13 (hereinafter "Budget Act"), 42 Stat. 20, 23-24. In 1982 the act was codified as part of U.S. Code, Title 31, whereupon the CompGen was expressly named as exercising the claims-settlement function of the GAO. See Act of Sept. 13, 1982, Pub. L. No. 97-258, § 1, 96 Stat. 877, 970 (codified as amended at 31 U.S.C. § 3702).

[21] *Assistant Comptroller General Yates to the Secretary of the Army*, 27 Comp. Gen. 665 (1948). The history of the amendment to the correction-board statute necessitated by the CompGen's opinion is well known. See, e.g., Defense Office of Hearings and Appeals, Claims Case No. 2012-CL-082003.2, at 7 (2012); 97 CONG REC 7588; H.R. REP. NO. 82-449, at 2 (1951).

[22] The Act to Amend Section 207 of the Legislative Reorganization Act, Pub. L. No. 82-220, § 1, 65 Stat. 655, 656 (1951).

count of military or naval service as a result" of any such correction, as the 1951 amendment (Amendment) to the original act puts it, consistent with today's 10 U.S.C. § 1552(c).[23]

2. On May 3, 1951, Stephen S. Jackson, counsel for the Personnel Policy Board, Department of Defense (DoD), appeared before a House Committee on Armed Services (HASC) Subcommittee to discuss the bill, of which two subsections are relevant. Subsection (b) circumvented the adverse CompGen opinion by authorizing the Secretary concerned "to settle and pay . . . claims of any persons . . . of amounts . . . found to be due on account of military or naval service as a result" of the record correction, while subsection (c) purported to make the settlement "final and conclusive":

> The acceptance by the claimant of any settlement . . . shall constitute a complete release by the claimant of any claim against the United States on account of such correction of record and such settlement shall be final and conclusive on all officers of the Government, including review by the courts of the United States, except when procured by means of fraud.[24]

It had emerged during the hearings that the GAO objected to that language, which Mr. Jackson addressed as follows:

> I urge that we [] not be forced to delete this

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[23] Authorizing payment of an amount ""found to be due the claimant on account of his or another's service."

[24] H.R. REP. NO. 82-449, at 5-6 (1951). Language referring to the courts was later removed.

> [subsection (c)] language, because it would be implied then that the [GAO] . . . would have the right to go in and review the merits and to determine the Board had erroneously made a decision, and thereafter the money would not be forthcoming."[25]

A GAO witness followed Jackson and distinguished the authority to correct records and the claims-settlement process. His office, he said, "do[es] not propose to say the [CompGen] should review the matter of whether the Board was correct in what it did, but simply that the [he] should have authority to audit the payment."[26] Burns appeared again before the subcommittee and continued the distinction.

> Mr. BURNS. [T]here are really two different things here, and I think it is well to keep that in mind. One thing is the determination the correction of the record; and the other thing is the settlement based on that correction. Subsection (a) would give the head of the Department the authority to make the correction. We do not want to challenge that authority.[27]

Subcommittee Chairman Durham then asked Burns to speak to the objections he thought possible from

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[25] *Subcommittee Hearings on H.R. 1181, To Amend Section 207 of the Legislative Reorganization Act of 1946 so as To Authorize Payment of Claims Arising from the Correction of Military or Naval Records: Hearing Before the H. Comm. on Armed Servs. Subcomm. No. 3*, 82nd Cong. 363 (1951) ("May 1951 Hearings") (statement of Stephen S. Jackson).

[26] *Id.*, 368 (statement of John T. Burns, attorney in the Office of the General Counsel, GAO).

[27] *Id.*, 377.

the DoD to his position. Burns opined that there may be a fear "that the [GAO]" would

> encroach upon the jurisdiction of the Departments to make these corrections of records . . . . that after they see fit to make certain corrections the [GAO] will . . . say, "Congress never thought you would make any such corrections as this. This is obviously 'haywire' and we just won't pay off . . . . "[28]

Similar conversation continued between other subcommittee members and a Navy official representing the DoD. He stated that "the [DoD] would like to have this bill enacted as is," explaining that "we do not want the [GAO] to go into the merit of the thing."[29] One subcommittee member offered his understanding that the GAO "do[es] not propose to pass on the merits of the case . . . . But they do want to pass on the accounting end of it. Have you objections to that?" "No sir," was the reply, "not if they stick to accounting or arithmetic."[30]

3. In reporting the bill, the HASC left subsection (c) intact but distinguished between the boards' "authority to determine the merits of each particular case . . . to the exclusion of the [CompGen]" and "the normal auditing authority of the [CompGen]" which the committee intended not to "disturb."[31]

The CompGen, however, was still concerned that

> [t]he normal auditing authority of the [GAO]

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[28] *Id.*, 381 (statement of William H. Baier, Department of Navy).

[29] *Id.*. 387.

[30] *Id.*, 394.

[31] H.R. REP. NO. 82-449, at 3 (1951).

> definitely would be disturbed if the bill should be enacted in its present form . . . . It is believed that it was the intention of your Committee . . . [merely] to make final and conclusive on all officers of the Government any action taken by the Secretaries . . . . in making corrections of records.[32]

He offered two amendments that would move the finality clause from subsection (c), applicable to settlements, to subsection (a), applicable solely to "corrections" of records.[33]

The full HASC then considered the bill and the CompGen amendments. Before putting the amendments to a vote, which was favorable, the HASC Chairman confirmed his understanding that correction board findings would be protected from pay officials' reconsideration.

> The CHAIRMAN. Now, does it go into the question of the finding on the merit by the Department? That is final and conclusive?
>
> Mr. SMART. That is correct, sir.
>
> The CHAIRMAN. That is right. We want to keep it that way.
>
> But it merely gives the Comptroller the authority to audit what?
>
> Mr. SMART. Audit the payment.
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> The CHAIRMAN. Audit the payment.
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> Mr. SMART. So the determination of the merits as to whether or not a record should be corrected is final and conclusive by the Board.

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[32] Letter from Comptroller General, May 25, 1951, B-74279, at 1.

[33] *Id.*

The CHAIRMAN. That is right.[34]

On July 2, 1951, Senator Vinson briefed the whole House on the bill and amendments.

> When the committee reported the bill, it was under the impression it had preserved the normal authority of the GAO to audit the payments which would accrue from the correction of a record. Subsequently, the [CompGen] advised the committee that he did not feel that we had preserved his normal auditing authority and he suggested three amendments which would accomplish that purpose. Before appearing before the Rules Committee on this bill, the Committee on Armed Services considered these suggested amendments of the [CompGen] and unanimously approved them.[35]

Following the ensuing discussion, the amendments were agreed to by the House.[36]

4. Senate action and discussion of the bill followed. Mr. Jackson again appeared to testify, but this time confirming before a subcommittee of the Senate Committee on Armed Services (SASC) that the "[GAO] objected to the original language making

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[34] *Full Committee Hearing on H. R. 662, H. R. 1199, H. R. 1200, H. R. 1201, H. B. 1203, H. R. 2736, H. R. 2737, H. B. 1179, H. R. 2735, H. R. 1181, H. R. 1215, H. R. 1216, S. 927, H. R. 3911: Hearing Before the H. Comm. on Armed Servs.*, 82nd Cong. 600-01 (1951). Mr. Smart's gloss was that prior to the amendment, the finality "pertained to the payment and not to the correction." *Id.*, 601.

[35] 97 CONG. REC. 7589 (1951).

[36] *Id.*

settlements final and conclusive. The [DoD] yielded and accepted the language submitted by the [GAO] on this point."[37] When the SASC reported the bill it also affirmed that "Corrections made by the boards are conclusive on all officers of the Government . . . . This provision does not disturb the normal auditing function of the [GAO] but makes the findings of the boards not subject to review by other Government departments."[38]

H.R. 1181 became law on October 25, 1951. 97 CONG. REC. 13785. See App. 387a-388a.

5. The distinction set up late in 1951 between Secretarial record corrections and payments owed as a result afforded the CompGen and the implementing agencies grounds for establishing a consistent and coherent administrative interpretation.

A word is in order on the key role of CompGen in interpretation of the correction-board statutes relating to payment of amounts "found to be due." The 1951 Amendment would not have been made had it not been for the definitive 1948 CompGen ruling foreclosing possibility of payment being made on the basis of the 1946 Act. On that basis alone his opinions are decisive as to agency claims settlement practice. His central role is provided for by the statute creating his position:

> All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned ei-

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[37] *Authorizing Payment of Claims Arising From Correction of Military and Naval Records: Hearing on H.R. 1181 Before a Subcomm. of the S. Comm. on Armed Serv.*, 82nd Cong., 3 (1951).

[38] S. REP. 82-788, at 2 (1951).

> ther as debtor or creditor, shall be settled and adjusted in the [GAO].[39]

This authority remained vested in CompGen until 1995, when his claims settlement authority for uniform servicemember pay and allowances moved to the Secretary of Defense,[40] who further delegated it via the DoD General Counsel (GC) to the Defense Office of Hearings and Appeals (DOHA),[41] also bound by CompGen's precedents.[42] The transfer of functions did nothing to alter the distinctions evident from Congressional and other authorities between military record corrections and payment made thereupon.

Soon after the 1946 Act was modified, CompGen had occasion to consider its implications.

> [W]hile subsection 207 (b) of the Legislative Reorganization Act, as amended, supra, authorizes the Department concerned to pay claims for amounts found to be due on account of military or naval service as a result of a correction of records made pursuant to the preceding subsection 207 (a), the said subsection

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[39] Budget Act, § 305. Section 301 of the act established the GAO with CompGen at its head. *Id.,* 42 Stat. at 23.

[40] See The Legislative Branch Appropriations Act, Pub. L. No. 104-53, § 211, 109 Stat. 514, 535 (1995), App. 398a-399a, and The General Accounting Office Act of 1996, Pub. L. No. 104-316, § 202, 110 Stat 3826, 3843 (codified at 31 U.S.C. § 3702), App. 401a-402a.

[41] App. a

42 DOHA Claims Case No. 00060601, at 2 (2000) ("DOHA bases its decisions on the Comptroller General's decisions."); DOHA Claims Case No. 04090713 (2004) ("This Office follows the Comptroller General's interpretation of the law regarding corrections of military records.")

> 207 (a) does not authorize a correction of the records to show the amount due or that any amount is due or that the claimant will be entitled to any monetary benefits. The amount to be paid under 207 (b) pursuant to a correction of records under 207 (a) depends on a proper application of the pay statutes to the facts in the case and the claimant's status as fixed by his corrected records. Subsection 207 (a) provides that corrections made thereunder shall be final and conclusive on all officers of the Government except when procured by fraud. But subsection 207 (b) . . . does not make departmental determinations final and conclusive as to amount payable under the corrected record.[43]

Less than two years later CompGen again reviewed the history of the 1951 Amendment. His conclusion was that "the Secretaries of the departments concerned are not vested . . . with any discretionary power to make determinations of the specific amounts to be paid as a result of the correction of military or naval records."[44] He emphasized that subsection (b) of H.R. 1181 originally authorized Secretaries of the military departments to "settle and pay" claims – settlements which under subsection (c) would be final and unreviewable[45] – while the statute as enacted authorizes the military departments only to "pay" amounts due,[46] and that the HASC be-

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[43] *Assistant Comptroller General Yates to J. W. Eldridge, U. S. Marine Corps*, 32 Comp. Gen. 242, 246 (1952).

[44] *Acting Comptroller General Weitzel to the Secretary of the Army*, 34 Comp. Gen. 7, 12 (1954).

[45] H.R. REP. NO. 82-449, at 5 (1951).

[46] 1951 Amendment, App. 388a.

lieved that sums payable on a record correction were "merely collateral" to the correction itself.[47] In conclusion, CompGen opined that, rather than being discretionary as determined by the Secretary or correction board,

> payments based on corrections of military or naval records . . . are required to be made in the amounts ascertained or determined to be due by applying pertinent laws and regulations to all material facts shown by the records as so corrected.[48]

6. CompGen's 1954 discussion has been widely cited. The Court of Claims relied upon his language in explaining how military back pay cases are settled: "Plaintiff's resulting benefits and liabilities are dependent upon application of statutes and regulations that pertain to the reconstituted military status,"[49] and elsewhere summarized his opinion (commended as "able") as standing for the proposition that "to avoid Constitutional questions, the grant of discretion must end with the record correction."[50] And CompGen relied heavily in a 1970 opinion on his 1954 decision (which he noted was "uniformly adhered to"[51]), capturing the key elements as follows:

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[47] H.R. REP. NO. 82-449, at 3 (1951).

[48] 34 Comp. Gen. at 7.

[49] Craft v. United States, 218 Ct Cl. 579, 600 (1978).

[50] *Ray v. United States*, 197 Ct. Cl. 1, 6 (1972).

[51] *To Lieutenant (jg) H. F. Beerman, Department of the Navy*, 49 Comp. Gen. 656, 660 (1970). See also *To Commander M. M Alexander, Department of the Navy*, 42 Comp. Gen. 252, 254 (1962) (finding the military to be "without authority to decide [how] correction action shall be applied for pay purposes") (emphasis added).

> [1] [T]he correction functions to be performed through record correction boards of civilian employees and the payment functions to be performed by regular military and naval disbursing officers to allow amounts due on the basis of corrected records were intended to be separate and distinct functions governed by different considerations and provisions of law and regulation.[52]
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> *****
>
> [2] [A]ny determination by the correction board as to the basis on which their money claims would be settled, is without effect, the amounts due being for determination upon a proper application of the statutes and regulations to the facts as shown by the corrected records.[53]

In 1997, the DoD GC, after CompGen authorities were transferred to him, had occasion to provide his "interpretation of the general guidance found in relevant [CompGen] decisions and other pertinent sources"[54] to an inquirer who had asked whether a record could be corrected with "the sole purpose [being] to provide the member a monetary benefit *that the board believes is equitably due.*" DoD's response was unequivocal:

> In many decisions over the years, however, the [CompGen] has set forth the view that the question of what monetary entitlements may

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[52] 49 Comp. Gen. at 660.

[53] *Id.*

[54] DoD GC Opinion DoD/GC #97-5, at 1 (1997).

> have become due as a result of a record correction action is for determination by the pay officials of the Government, through application of the pertinent laws and regulations to the material facts shown by the records as so corrected by the board. In other words, the facts as reflected by the corrected records determine the rights of the members involved, as if the corrected records reflect the true facts. Thus, when a correction board has attempted to make determinations or issue guidance governing amounts payable to a member as a result of a record correction, the [CompGen] has held that such determinations are outside the scope of the board's authority.[55]

Finally, DOHA, as ultimate successor to CompGen, reaffirmed as recently as 2012 the importance of the distinction between the correction of a record and the consequences for pay and allowances that flow from it. Addressing a situation in which DFAS refused to make the payment accruing due to a correction-board's correction of the date of an applicant's marriage, because the former did not accept the finality of the correction board's action, DOHA directed that

> [m]ore emphasis . . . be placed upon the term "corrected record." . . . In this case, the record as corrected . . . *is final and conclusive on DFAS.*[56]

7. The consistency of agency regulations with the foregoing interpretation is conspicuous and persua-

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[55] DoD GC, *id.,* 5-6.

[56] Claims Case No. 2012-CL-082003.2, at 7 (2012).

sive. The DoD's regulatory text even follows *verbatim* the CompGen decree of 1954.

In 1954, the CompGen wrote:

> payments based on corrections of military or naval records . . . are required to be made in the amounts ascertained or determined to be due by applying pertinent laws and regulations to all material facts shown by the records as so corrected.[57]

And DoD financial regulations provide:

> Payment based on a correction of military records must be made in the amounts determined to be due by applying pertinent laws and regulations to all the material facts shown in the corrected record.[58]

And, finally, pertinent Navy regulations provide:

> Settlement of claims shall be upon the basis of the decision and recommendation of the Board, as approved by the Secretary or his designee. Computation of the amounts due shall be made by the appropriate disbursing activity.[59]

8. As indicated by legislative history, consistent administrative and judicial interpretation, and agency implementing regulations, all of which – notwith-

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[57] 34 Comp. Gen. at 7.

[58] Department of Defense (DoD) Financial Management Regulation (DoD FMR), DoD 7000.14-R, Volume 7B, Chapter 10, Correction of Records, 100201, App. 395a.

[59] 32 C.F.R. § 723.10(c)(1). App. 397a.

standing any facial ambiguity in the phrase "found to be due," 10 U.S.C. § 1552(c) – bind the courts under *Chevron USA v. Nat. Res. Def. Council*, 467 U.S. 837 (1984) or *United States v. Mead Corp.*, 533 U.S. 218 (2001),[60] a correction of facts in a servicemember's record is final and binding on all officers of the government (meaning that the corrected record serves as *the* predicate for determination of any amounts accruing to the member as a result of the correction), while the determination of the amounts and kinds of payments that may be due to the member is left to financial disbursing officials charged with settling money claims against the government on the basis of, as CompGen put it, the "proper application of the statutes and regulations to the facts as shown by the corrected records."[61]

Against this backdrop, the problem with the way the Navy and DFAS proceed in Petitioner's case should be evident, as should the need for this Court's intervention to remedy the consequences of the lower courts' acquiescence.

REASONS FOR GRANTING THE PETITION

There is an inherent dilemma posed by Bourne's action. If it was necessary to (re-)memorialize Petitioner's detachment from CARL VINSON as a predicate for arriving at the government's desired entitlement outcome, it follows that absent that memorialization the entitlements would be as Petitioner ar-

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[60] Even if not so binding, DoD cannot arbitrarily depart from policy so well settled. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

[61] 34 Comp. Gen. at 7.

gued they should be[62] – as they are, if he is right that Bourne's act is illegal and void, which it is by every possible measure. To avoid that conclusion the courts must make his memorandum harmless by asserting that entitlements do not depend upon Petitioner's record after all. But Congress said, and the agency it empowered to manage § 1552 continues to say, that they do. Either way, Petitioner wins, and this Court's key decisions, along with principles of even Constitutional significance – absent this Court's intervention – lose.

A. The result reached by the courts rests on an illegal foundation, which, if uncured, will endure to offend Constitutional, Congressional, and this Court's principles, as well as the Federal Circuit's own precedents upholding them.

1. "It is a familiar rule of administrative law that an agency must abide by its own regulations." *Ft. Stewart Schools v. Federal Labor Relations Authority*, 495 U.S. 641, 654 (1990) (citations omitted). This principle applies equally to the military. *Winters v. United States*, 89 S. Ct. 57, 59 (1968); *Lindsay v. U.S.*, 295 F.3d 1252, 1257 (Fed. Cir. 2002).

The lower courts' acquiescence in Bourne's attempt to alter Petitioner's military record offends against this principle, owing to the panoply of legal norms his actions violated. SECNAV corrected that record with finality, and no federal officer may disturb it. 10 U.S.C. § 1552(a)(4). As head of the Navy Department, 10 U.S.C. § 8013(a)(1), SECNAV's order

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[62] The CAFC admitted as much, acknowledging that without Bourne's intervention "Mr. Sharpe [would be] assigned to a ship whose home port, and correspondingly, the associated BAH rate, could change." App. 15a.

enjoining anyone from introducing into Petitioner's record material similar to what was expunged, App. 350a, was to be obeyed. Bourne violated both constraints, with the courts' sanction. Moreover, Bourne had no position whatsoever – authoritative or otherwise – in the record-correction hierarchy, which is composed solely of the BCNR, SECNAV's manpower assistant, App. 391a, and SECNAV himself, while Bourne's own regulations require him to "implement" rather than make corrections of records, App. 393a.

Even if we presume Bourne had requisite authority (which he did not – he is a legal advisor without executive power, App. 408a), the lack of compliance with mandatory procedure inherent in his act vitiates its validity. None of the provisions of statute or regulation were complied with, App. 130a-134a, rendering his action, "illegal and void," *Vandermollen v. U.S.*, 571 F.2d 617, 624 (D.C. Cir. 1977). Likewise Bourne had no organic authority to prospectively or retroactively alter Petitioner's duty assignment, that power being reserved exclusively to the Chief of Naval Personnel and his delegates. App. 407a-408a.

The lower courts' acquiescence in Bourne's attempt to establish Petitioner's entitlements and in DFAS's reliance it likewise sanctioned his violation of statute and regulations having the force and effect of law. *Jackson v. United States,* 216 Ct. Cl. 25, 36 (1978). 10 U.S.C. § 1552(c) provides that a payment may be made on a corrected record only if the record is corrected "under [that statutory] section." App. 394a. DoD regulations further provide that the right to payment must arise from a change of facts "as set out in the original record," App. 394s, and Bourne's memo offered nothing but an opinion about a hypothetical past that will never exist. Navy regulations require the settlement of a record-correction claim "be upon the basis

of the decision and recommendation of the Board, as approved by the Secretary or his designee," App. 397a, not on NPC legal advice. Finally, those same regulations provide that the "amounts due" are to be computed by the "appropriate disbursing activity," *id.*, not by Mr. Bourne.

2. The seriousness of the pay entitlements question arises with the Appropriations Clause of the U.S. Constitution, which provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," App. 387a. Implementing this principle are significant holdings of this Court. "[A] court is no[t] . . . authorized to overlook the valid regulation" establishing conditions for receipt of federal funds. *Schweiker v. Hansen*, 450 U.S. 785, 790 (1981). But this is precisely what the lower courts did. BAH may only be paid at a rate established by the duty station location, App. 412a, and that location is only established by the *assignment* of a member thereto, App. 409a-410a. Absent evidence that Petitioner was *assigned* to a Norfolk, Va., duty station during the period for which he was paid BAH at that rate, the payment was unlawful. "[A]ll courts [must] observe the conditions defined by Congress for charging the public treasury," *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385 (1947), and no "allowance [may be] furnished to officers or enlisted men of the Army or Navy . . . unless such payment is provided for by some statute or authorized regulation, *Smith v. United States*, 47 Ct. Cl. 313, 315 (1912).

This Constitutional principle also provides the inspiration as well for the legislative meaning imparted to the words "found to be due" in § 1552(c) by the agency regulations, the CompGen interpretations, and according to the legislative history itself. Record

corrections are discretionary (though the discretion was the Secretary's, not Bourne's, to exercise), but resultant pay entitlements are not – even if it were the Secretary who tried to exercise discretion, let alone Bourne. All because only a statute or regulation may authorize a public expenditure – which is precisely the principle undermined when the lower courts upheld the validity of DFAS having predicated its BAH and Sea Pay decisions on Bourne's non-authoritative written opinion about what *he* thought the entitlement results should be – and not what the regulations provided.

The corollaries to this principle provided by this Court's prior decisions were each also offended by the lower courts' sanction of the Bourne-Navy-DFAS action.

The first is that "equitable considerations cannot [determine] a money remedy Congress has not authorized," *Mercier v. United States*, 786 F.3d 971, 977 (Fed. Cir. 2015) (summarizing *Office of Pers. Management v. Richmond*, 496 U.S. 414 (1990)), which principle means likewise that "public funds [must] be spent according to the letter of the difficult judgments reached by Congress as to the common good, and not according to the individual favor of Government agents," *Richmond, id.* at 428, such as Bourne or DFAS who, counsel said, like the lower courts, sought to avoid Petitioner receiving a windfall.[63] The second is that because military pay in par-

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[63] App. 14a, 45a, 46a, 299a. Even the "equitable" (on the government's side) argument is unavailing, however, because the CAFC's confidence, App. 15a, that Petitioner "would not" have remained assigned to CARL VINSON does not mean that he wouldn't have been assigned – had he not been separated – to a location with a higher BAH rate than Norfolk and even than San Diego (as the MSJ explained to the COFC, App. 150a-

ticular is strictly "dependent upon statutory right." *Bell v. United States*, 366 U.S. 393, 401 (1961), entitlement to it "must be determined by reference to the [governing] statutes and regulations," *United States v. Larionoff*, 431 U.S. 864, 869 (1977). It is not "a quid pro quo for services rendered to the military," *Dock v. United States*, 46 F.3d 1083, 1086 (Fed. Cir. 1995). For this reason it was highly improper for the courts to uphold Bourne's judgment with regard to CSP on the basis of Petitioner's not having endured the hardship of sea duty, App. 14a,18a, and of his not having "[gone] to sea or performed any sea duties,"[64] App. 47a, or of judging the BAH equity on Petitioner's potential housing cost, especially where regulations expressly discount the latter consideration, App. 411a, and provide Sea Pay for members disembarked from overhaul ships provided they remain formally attached thereto by orders, App. 419a-422a.[65]

3. A third set of equally significance errors arises from DFAS's failure to exercise its discretion to arrive at its own organic position vis-à-vis the BAH and Sea Pay. Had it done so, particular procedures would have been invoked yield a detailed and reviewable agency judgment. App. 403a-406a. Absent having done so, and given the illegality of the Bourne determination – if for no other reason than that it is

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152a) – a possibility foreclosed courts' prescient (misplaced) certainty that Petitioner would have stayed in Norfolk.

[64] The courts' reliance on *Boruski v. United States*, 155 F. Supp. 320 (Ct. Cl. 1957) to support their view is unavailing because in *Boruski* the relevant statute *mandated* actual duty performance, App. 422a-423a, contrary to the relevant regulations here.

[65] Both sets of regulations are authoritatively promulgated at the express invitation of Congress. App. 411a, 416a.

a "post hoc rationalization[of counsel] for agency action," which, under *SEC v. Chenery Corp.*, 332 U.S. 194 (1946), the courts "may not accept," *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962) – the lower courts were left to substitute their own judgment as to the rectitude of the entitlement determination, which impermissibly "remove[d] the discretionary judgment from the agency to the court," *Interstate Commerce Comm. v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987). Moreover, because Bourne's opinion was predicated upon his illegal and void fabrication of Petitioner's detachment from CARL VINSON, he extended the courts an invitation to inject themselves in the military-duty-assignments arena, which they should not have accepted, but did, by upholding the illegal and void act on the basis of their own judgment that it was "reasonable," thereby substituting theirs for his. Doing so was contrary to this Court's venerable decision in *Orloff v. Willoughby*, 345 U.S. 83 (1953) and the salutary separation-of-powers principle it upholds, but their affirmance also contravened the circuit law which removes speculation as to what "would have happened" from grounds upon which back pay and reinstatement cases such as this one are resolved. *Reale v. United States*, 208 Ct. Cl. 1010 (1976) ("[B]ack pay awards . . . do not pretend to be realistic reconstructions of what the pecuniary consequences of a serviceman's career would have been . . . . We do not speculate."); *Wagner v. U.S.*, 365 F.3d 1358, 1365 (Fed. Cir. 2004) (noting the court "will not speculate as to what the outcome might have been had the error not occurred"). The error was particularly grave in this case because, since Bourne's determination was *ultra vires*, the courts' judgments were made to replace, impermissibly, "the absolute discretion afforded the Secretary of

the [Navy] on personnel matters with a determination of [their] own." *Wagner, id.*

B. The Federal Circuit's decision puts its own settled case law in jeopardy.

1. While inter-circuit conflict is unlikely in a case like this where the trial courts cases are taken exclusively to the Federal Circuit, the CAFC's decision puts its own case law in disarray, and it will remain so absent this Court's intervention.

2. As noted, cardinal holdings of military back-pay case law such as *Wagner*, *supra*, *Reale*, *supra*, *Ray*, *supra*, and *Craft*, *supra*, are contradicted by the recent decision, and to safeguard the validity of these decisions – which the CAFC did not even cite let alone distinguish – its opinion should be vacated.

3. *Cathy v. United States*, 191 F.3d 1336 (Fed. Cir. 1999), dealing narrowly and illustratively with the impact of the constructive-service doctrine, was also jeopardized by the CAFC's decision. *Cathy* held that the term "service" on active duty used in U.S. Code, Title 10, incorporates the term "constructive service," *Cathy, id.* at 1339, disposing of the claim of Bourne and the lower courts that Sea Pay was not an entitlement here because Petitioner did not actually "serve" on a ship. How the decision can be squared with *Cathy*, which, again, was extensively briefed, App. 173a-176a, but ignored, is impossible to see.

4. Important circuit decisions standing for the proposition that military attorneys may not participate in the correction process, which requires the Secretary to act through "boards of civilians." *See Strickland v. United States*, 423 F.3d 1335, 1341 (Fed. Cir. 2005); *Weiss v. United States*, 187 Ct. Cl. 1, 10, 12 (1969); *Proper v. United States*, 139 Ct. Cl.

511, 526 (1957). *Weiss* in particular invalidated a record-correction action where the evidence showed that a military JAG advised the civilian authorities and drafted their memoranda. The evidence is as solid here, App. 57a-58a. The decision undermining the settled authority of these three cases should not be allowed to stand.

C. The issue is extremely important.

1. CompGen and the DOHA have for almost 70 years built consistent administrative adjudication and practice on the basis of the framework established by the CompGen's 1951 contribution to the correction-board statute. This decision risks upsetting it by intractably conflating its two parts. The last time CompGen encountered a case, see *Oleson v. United States*, 172 Ct. Cl. 9 (1965), which made a settlement rather than record correction "final and conclusive," he found it "in direct conflict with the legislative history of the statutory provisions involved," and refused to follow it, "since such legislative history is so clear as not to admit of differences of opinion." *To Emery, Sells and Wood, Attorneys*, B-147096, 1966 U.S. Comp. Gen. LEXIS 1983, at *6 (Comp. Gen., 1966). The CAFC's decision risks a similar outcome.

2. Military correction boards hear thousands of cases a year, many of which result in payments of amounts found to be due.[66] This Court, respectfully, owes it to veterans and uniformed service personnel to ensure that the case law interpreting and defining

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[66] App. 385a; 97 CONG REC 7588-89; H.R. REP. NO. 82-449, at 2 (1951); Eugene R. Fidell, *The Boards for Correction of Military and Naval Records: An Administrative Law Perspective*, 65:2 ADMINISTRATIVE LAW REVIEW 499, 501 (2008).

the records-corrections process is as coherent and consistent with Congressional intent as absolutely possible.

D. Summary reversal or vacatur and remand to agency is the proper remedy.

1. Petitioner has successfully resolved administratively the minor remaining consequences of the Navy's decision to separate and then reinstate him. App. 378a-384a. The disputed BAH and Sea Pay matters may have the same outcome, given the DOHA's expertise as successor to CompGen. The Court should give the agency a chance (which it declined to take before) to remedy its error.

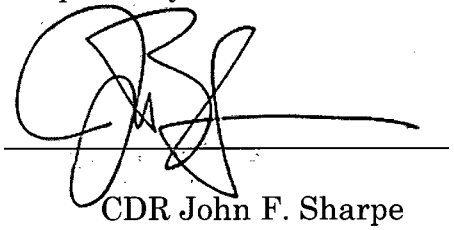
2. In the alternative, summary reversal is appropriate; "the law is well settled and stable, the facts are not in dispute, and the decision below is clearly in error," *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981). The lower courts should have reversed the Bourne-DFAS-Navy action – as this Court should – because, notwithstanding their finding it "reasonable," it must still be overturned if "not in accordance with law," 5 U.S.C. § 706; *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 518 (1994) (Thomas, J., dissenting) ("contrary to law" alone violates APA standard) or, with respect to the absence of evidence detaching Petitioner from CARL VINSON following September 30, 2009, based on (as here) less than even a "scintilla" thereof. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); 5 U.S.C., *id.*

3. A third alternative is a form of vacatur and remand, to prevent the opinions below from offending this Court's decisions in the crucial areas herein identified.

CONCLUSION

This Court should grant the petition for writ of certiorari and summarily reverse the judgment below, remanding with instructions to remand to the COFC for remand to DFAS to assess entitlements without the Bourne memorandum's interference. In the alternative, the Court should vacate and remand –the COFC retaining jurisdiction – or vacate and remand under *United States v. Munsingwear, Inc.*, 340 U. S. 36 (1950), with instructions to dismiss the case as moot to eliminate the erroneous decision and allow the claim to be considered administratively and relitigated, while preventing the adverse consequences, *id.*, at 40.

Respectfully submitted.



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