

No.

In The
Supreme Court of the United States

LT. COLONEL DENNIS BUCKOVETZ,
Petitioner,

v.

UNITED STATES DEPARTMENT OF THE NAVY,
Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Retired U.S. Marine Lt. Colonel Dennis Buckovetz was copied on emails revealing a covert scheme in which a military general had on-duty U.S. Marines sell Marine Corps “Challenge Coins” awarded to recruits who complete grueling training. The proceeds topped \$100,000 per year – accumulated under the radar of government accounting. The ill-gotten gains funded parties and activities prohibited from being paid for with public funds. The creators replaced the enduring motto of “*God, Corps and Country*” with “*God, Corps and Cash.*” The Colonel filed a federal Freedom of Information Act (“FOIA”). The Navy’s response hid emails Colonel Buckovetz had revealing the scheme, and did not provide a full response. Because the Navy later provided ‘some’ emails, the lower courts dismissed his case, overlooking a critical fact: the Navy did not provide **all** required responsive records. The Ninth Circuit’s decision is a seal of approval for federal agencies to provide citizens only a partial response violating the letter and spirit of FOIA. The net effect of the decision will gut FOIA – the nation’s premier law designed as a “check against corruption and to hold the governors accountable to the governed.” The critical federal questions presented are:

1. **Whether the Ninth Circuit erred** in holding that the District Court lacked jurisdiction because the case was not justiciable premised on mootness.
2. **Whether the Ninth Circuit erred** in holding that the District Court lacked jurisdiction at the time the case was filed because the action was not justiciable premised on a lack of standing.

PARTIES TO THE PROCEEDING

Petitioner is Lt. Colonel Dennis M. Buckovetz.

Respondent is the United States Department of the Navy.

RELATED PROCEEDINGS

**United States District Court for the Ninth
Circuit**

Case Number: 23-55284

DENNIS M. BUCKOVETZ, an individual,
Plaintiff-Appellant,
and

LYNNE M. BIRD, an individual,
Plaintiff,

v.

UNITED STATES DEPARTMENT OF
THE NAVY,
Defendant-Appellee.

**United States District Court
Southern District of California**

Case Number: 3:21-cv-640-WQH-KSC

DENNIS M. BUCKOVETZ, an individual,
and LYNNE M. BIRD, an individual,
Plaintiffs,

v.

THE DEPARTMENT OF THE NAVY,
Defendant.

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INTRODUCTION

This Court should review the Ninth Circuit's dangerous and misguided decision because it has sweeping consequences as to how the nation's one hundred and twenty (120) federal agencies will respond to requests for records under the Freedom of Information Act, 5 U.S.C. § 552. This decision mark the first time in FOIA's 58-year-old history that agencies are given a greenlight by a federal court to conceal or destroy documents, or only partly respond to a request. This well-respected circuit carries weight and its decision empowers officials to 'pick and choose' the responsive records provided to citizen requestors – without regard to FOIA's procedural mandates. Records are presumed to be public under FOIA unless they fall into nine narrow exemptions; left unchecked by this Court, the lower court decision will encourage agency employees to cordon off government filing cabinets from the very people who own them – the American public. The Court should grant review to concurrently correct the mootness and lack of justiciability holdings that stemmed from the Court's misapplication of FOIA and the underpinnings of this case.

OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit decision (23-55284) is not yet published but is available at D.C. No. 3:21-cv-00640-WQH-KSC.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its decision on April 5, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

**CONSTITUTIONAL PROVISIONS AND
STATUTES**

5 U.S.C. § 552(a)(4)(B)
28 U.S.C. § 1291
U.S. Const. art. III

STATEMENT OF THE CASE

The FOIA requests at the heart of this case sought public records about an unlawful scheme by certain Marine Corps officers to sell award memorabilia without official U.S. Navy or other government oversight and keep the cash for parties and events prohibited from being paid for with public monies. Unauthorized, General James W. Berman and senior officers produced and sold these award coins netting a \$100,000 a year.

Highly decorated retired Marine Lt. Colonel Dennis M. Buckovetz, who served as a federal civilian employee, was copied on an email string revealing the illegal activity. Thus began the factual and procedural components that bring Lt. Colonel Buckovetz to One First Street seeking relief in the form of this Petition for Writ of Certiorari.

Statement of Facts and Procedural History

The Marine Corps Recruit Depot (“MCRD”) is a military installation charged primarily with the initial training of enlisted recruits living west of the Mississippi River. As part of that mission, MCRD hosts approximately 40 graduation ceremonies per year for recruits who have successfully completed the grueling training of becoming a Marine. It is worth noting that in Marine Corps recruit training, recruits are trained with the goal of transforming them into the world's most elite fighting force. They undergo rigorous physical training and are expected to learn the core values of Honor, Courage, and Commitment, all culminating in what is called The Crucible: a 54-

hour sleepless and continuous challenge that tests every skill and value the recruits learned. Upon completion of The Crucible recruits are awarded Challenge Coins (“Coins”), to mark the end of their training. The Marine Corps Community Services (“MCCS”) is a government entity within the Department of Defense that operates programs to support and enhance the operational readiness, war fighting capabilities, and quality of life for Marines, their families, and military retirees. MCCS funds these programs in part by selling Marine Corps memorabilia, particularly at MCRD’s graduation-related activities. Sales at those graduation activities bring in much of MCCS’s business revenue as family members purchase mementos and souvenirs to commemorate the occasion.

General James W. Bierman took command of MCRD in July 2013. In his official position, he perpetuated the unauthorized and illegitimate practice of having on-duty Marines, in uniform, sell Coins and other Marine Corps memorabilia at graduation ceremonies. It was a cash-only, off-the-books scheme so revenue could not be tracked or monitored by Navy accountants or those responsible for monitoring government property. These activities topped \$100,000 a year. Worse, the money did not benefit the rank-and-file Marines or their families. It benefited a small klatch of commanders: Gen. Bierman, his Chief of Staff, Col. Michael Lee, and his Commanding Officer of the Recruit Training Regiment, Col. Jim Gruny. This scheme siphoned MCCS’s own authorized sales of Marine Corps merchandise and diminished MCCS’s revenues, which typically go towards recruits and their families.

MCCS's precipitous drop in revenue caught the eye of other Marine leadership who raised the issue with Gen. Bierman and MCCS Director Thomas W. Spencer. With Marine Corp grit, Gen. Bierman ignored these warnings, and kept going as if he were on a recruit march.

Colonel Buckovetz is a retired highly decorated Marine Corps Lt. Colonel who served as an infantry officer in ground combat operations during the Vietnam war and has been awarded numerous medals in his 21 years of active duty. Colonel Buckovetz subsequently served as the MCCS Administrative Director at the MCRD in San Diego.

On December 18, 2014, Buckovetz was carbon-copied on a string of four emails between Gen. Bierman, MCCS Director Spencer, Col. Lee, and others with the subject line "Coins." Gen. Bierman started the string with an email to Col. Lee and Director Spencer stating: "We sold all one hundred by 0815. I don't want to ever run out . . . Ever . . . Again!!!!" (ellipses in original). Director Spencer assured Col. Lee, "[t]his will not happen again."

FOIA Requests

Hoping to uncover the full scope of the scheme and Gen. Bierman's involvement in the unauthorized selling of merchandise that robbed revenue of MCCS, Colonel Buckovetz submitted a FOIA request to MCRD on January 23, 2015.

Navy Response To FOIA

In March 2015, MCRD produced 319 pages of records containing 384 individual emails. However,

MCRD omitted from its response the smoking gun: the December 18, 2014 email string on which Buckovetz was cc'ed and in which Gen. Bierman ordered his associates to never again "run out" of coins to sell.

Additional Navy FOIA Response

In November 2015 - more than eight months later (well after the FOIA procedural timeline) MCCA Headquarters also produced some records responsive to the FOIA Request. MCCA's production included the smoking gun emails that had not appeared in MCRD's production. These emails are particularly damning as they directly implicate Gen. Bierman of participating in the coin-selling scheme.

Proceedings Below

In April 2021, Buckovetz filed his FOIA lawsuit in the Southern District of California. The complaint outlined Gen. Bierman's effort to:

- sell memorabilia
- keep the scheme quiet
- retain control of the sales revenue
- silence any objections

Colonel Buckovetz's complaint asserted the Navy violated FOIA by concealing or destroying documents responsive to Colonel Buckovetz's FOIA request.

**With No Discovery, Navy moved for
summary judgment**

Before any discovery was taken, the Navy moved for summary judgment, arguing that no triable issue of material fact existed as to (1) whether or not the Navy's searches for responsive records were reasonable and (2) whether anyone at the Navy independently violated FOIA by intentionally destroying records after receiving the FOIA request.

Buckovetz argued that discovery was proper and necessary to probe whether the Navy's search for responsive records was conducted in good-faith, reasonable, and complete in compliance with FOIA. Discovery would have unearthed whether the Navy violated FOIA by destroying records before any search, adequate or not, could be conducted. Without discovery, this determination was not possible.

**District Court ordered Navy to submit
additional declarations**

In response to Colonel Buckovetz's request for discovery, the District Court ordered the Navy to provide supplemental declarations and offer possible reasons why various responsive records were excluded from MCRD's production. The District Court concluded that the Navy declarations were not sufficiently detailed to carry the their burden of proof to demonstrate an adequate search because the declarations did not identify any reason for the five known missing emails, which are the smoking gun emails.

The Navy submits flawed declarations

The Navy then filed declarations from Lt. Col. Matthew M. McConnell and Karl Rosenbaum. Lt. Col. McConnell stated that MCRD FOIA Specialist Cinthia Camacho was “no longer employed by MCRD,” and acknowledged that he had “no first-hand knowledge of the 2015 production to Mr. Buckovetz . . .” He stated that several of the emails in MCRD’s original production were redacted to remove mention of Gen. Bierman, but that he had since “re-released” those documents “without redaction of Gen. Bierman’s name.” Lt. Col. McConnell did not provide any additional information concerning the Navy’s search for records.

Rosenbaum, a Marine Corps contractor whose duties including providing support for email infrastructure, offered no direct evidence regarding why the five emails were missing from MCRD’s production. Rather, he simply stated that one of his team was informed “by another [Marine Corps Cyberspace Operations Group] Contractor” that there were four hypothetical reasons why the Five Emails were not initially located. Those four reasons were: (1) the end user deleted the data; (2) the end user moved the data to a local PST file; (3) the data exists outside of the scope of the request, for example the data had been moved to a PST file and the request did not ask for those files to be acquired, or the data exists outside the timeframe requested; or (4) the data is not able to be located because the request specifies an exact set of search terms. For example, if the request asks for a search of the subject line, but the term is within the body of a message.

Finally, Rosenbaum stated that “[a]t this point in time, there is no way to determine, from a systems standpoint, which of the scenarios listed above . . . resulted in the five ‘missing’ emails not being located by MCRD’s IT team in its search.”

Buckovetz Offers Another Cause For Missing Emails: DELETION

Colonel Buckovetz responded to the Navy’s supplemental declarations by explaining that “[o]nly one reason offered by the Navy makes logical sense—deletion by custodians at MCRD.” That is because the other three theoretical responses provided by the Navy could not actually apply under the circumstances. The only way to know for sure is for Discovery to be permitted.

District Court denies discovery; grants summary judgment

The District Court denied Colonel Buckovetz’s request for discovery including that “(1) requiring Gen. Bierman to sit for deposition and (2) requiring the production of all communications to and from Gen. Bierman relating to the FOIA process and personnel, from January 23, 2015 through May 31, 2015.” The Court then granted the Navy’s motion for summary judgment. The court acknowledged that the missing emails “related to [the] unauthorized activities” concerning “the sale of commemorative coins, the quantity sold, and plans to reorder coins in the future.”

Ninth Circuit Ruling

The Ninth Circuit Court of Appeals vacated the district court's summary judgment order and remanded to the trial court with instructions to dismiss the action as nonjusticiable.

REASONS FOR GRANTING RELIEF

The U.S. Supreme Court should grant this Petition for Writ of Certiorari because if this decision stands, it will mark the first time in the 58-year-old history of FOIA that agencies would be permitted by a federal court to conceal and/or destroy public government records sought under a FOIA Request, or only partially respond to the request.

The Ninth Circuit carries weight among the circuits and its decision will create a buffet-style FOIA where officials can 'pick and choose' which responsive records they provide to citizen requestors – without regard to FOIAs procedural mandates. The Ninth Circuit ignored the error of the District Court in granting summary judgment before discovery when the District Court itself acknowledged that the Navy's failure to produce the smoking gun emails was "most plausibly explained by the possibility that an end user"—that is, someone with the Navy—"deleted the data." This holding caused a cascade of errors, and the Ninth Circuit decision compounded those errors.

Public records are presumed to be public under FOIA unless they fall into nine narrow exemptions; left unchecked by this Court, the lower court decision will encourage agency employees to wrap a yellow 'stay out' tape around government filing cabinets to

keep out the very people who own these records – the American public.

The Court should grant review to concurrently correct the mootness and lack of justiciability holdings that stemmed from the Court's misapplication of FOIA and the underpinnings of this case: a FOIA request to unearth records involving a scheme by military officials to sell Marine Challenge Coins and use the slush fund of cash for parties and travel.

1. The Ninth Circuit erred in holding that the District Court lacked jurisdiction because the case was not justiciable because it was moot.

"The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire Co.*, (1978). The Act establishes a statutory scheme imposing requirements on agencies to make public records promptly available. This phrase should not be dismissed as a convenient formalism. It defines a structural necessity in a real democracy. *NARA v. Favis*, 541 U.S. 157, 171-72 (2004).

The United States Navy failed in both letter and spirit to comply properly with FOIA. The Navy and the Court were aware of that; why and how could a court order summary judgment before discovery was taken to get to the root of the issue? Finding a document that "clearly indicates the existence of [other] relevant documents" creates an "obligation"

for agency to further search for those additional documents.” *Ctr. for Nat’l Sec. Stud. v. DOJ*, 215 F. Supp. 2d 94, 110 (D.D.C. 2002) *aff’d in part, rev’d in part & remanded on other grounds*, 331 F.3d 918 (D.C. Cir. 2003). Colonel Buckovetz had the smoking gun; and the Navy failed to provide that and other related documents.

The District Court in fact had jurisdiction because Colonel Buckovetz’s complaint was not moot. “A case is not moot where any effective relief may be granted,” *Forest Guardians v. Johanns*, 450 F.3d 455, 461 (9th Cir. 2006). Moreover, the mootness of a claim does not constitute the mootness of the entire action. *Id.*

There is still a present live controversy regarding a violation of FOIA due to the destruction and concealment of certain public records, a failure of the Navy to comply with FOIA’s mandates. Here, effective relief *was* available: permit discovery, issue an order to produce withheld records, issue a finding that the Navy acted in an arbitrary and capricious manner and award attorneys’ fees.

2. The Ninth Circuit erred in holding that the District Court lacked jurisdiction at the time the case was filed because the action was not justiciable based on a lack of standing.

The Ninth Circuit noted that the Colonel filed this action in district court years after the Navy produced the responsive documents. It noted that an agency - no matter how late it responds to a FOIA request (and Americans know that FOIA requests linger and languish for years) moots the FOIA claim.

Papa v. United States, 281 F.3d 1004, 1013 (9th Cir. 2002). The point is the Navy only produced partial records in response to the FOIA requests.

What the United States government is saying in plain language to its citizens is: an agency can do **what** it wants – **when** it wants – and their belated action – no matter how late - moots any FOIA claims. Colonel Buckovetz gave his life to the United States Military and sacrificed by his service in the Vietnam war. His thoughtful methodical investigation into military officers, including a general, selling military memorabilia for cash, should be given the same deference of timeframe to bring action as a federal agency that takes decades to respond to a request for records. There is no statute of limitations implicated.

The Ninth Circuit also erred in stating that the Plaintiff's speculates that there may be additional documents that were either destroyed or concealed and states that nothing in the record supports a reasonable inference. This is in error.

First, the Navy's declarations were so flawed that the district court ordered the Navy to provide supplemental declarations identifying possible reasons why the Five Emails about the selling scheme were excluded from MCRD's production. The district court concluded that "declarations are not sufficiently detailed" to meet the Defendant's burden of proof to demonstrate an adequate search."

Those follow up declarations state directly that data could have been deleted. The declaration offered four possible reasons: (1) the end user deleted the data; (2) the end user moved the data to a local PST

file; (3) the data exists outside of the scope of the request, for example the data had been moved to a PST file and the request did not ask for those files to be acquired, or the data exists outside the timeframe requested; or (4) the data is not able to be located because the request specifies an exact set of search terms. A reasonable search is conducted when plaintiff provides “no evidence to contradict the various agency affidavits. *Reynolds v. United States*, No. 08-0826, 2009 WL 2959868 (2d Cir. Sept. 17, 2009) (unpublished disposition) (per curiam).

This alone undercuts the Ninth Circuit’s reading of the record. There is substantial evidence to contradict the declaration and moreover, the Navy’s own statement that records may have been deleted and that data may not be able to be located because of an exact set of search terms. Here, the Plaintiff himself was included on an email string of a General admitting to the selling of the coins. Exact search terms were irrelevant.

Colonel Buckovetz had standing at the time the case was filed and was entitled to a federal judicial forum. The constitutional requirements for standing under Article III require that the plaintiff has personally (1) suffered some actual or threatened injury; (2) that injury can fairly be traced to the challenged action of the defendant; and (3) that the injury is likely to be redressed by a favorable decision. *Valley Forge Coll. v. Americans United*, 454 U.S. 464, 472; *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

CONCLUSION

For these reasons, Petitioner Lt. Colonel Dennis M. Buckovetz respectfully asks this Court to grant this Petition for Writ of Certiorari and reverse the Ninth Circuit's decision.

Respectfully submitted,

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