

INDEX TO APPENDICES

APPENDIX A – U.S. Court of Appeals Order dated March 27, 2024 (p. 1)

APPENDIX B – U.S. District Court Notice of Voluntary Dismissal 1 (p. 4)

APPENDIX C – U.S. District Court FCR dated December 9, 2022 (p. 7)

APPENDIX D – U.S. District Court Response & Objection to FCR (p.17)

APPENDIX E – U.S. District Court Order dated January 3, 2023 (p. 28)

APPENDIX F – U.S. District Court Plaintiff's Objection to Order (p. 33)

APPENDIX G – U.S. District Court FCR dated August 10, 2023 (p. 38)

APPENDIX H – U.S. District Court Notice of Voluntary Dismissal 2 (p. 47)

APPENDIX I – U.S. Court of Appeals Order dated May 2, 2024 (p. 54)

APPENDIX J – U.S. Court of Appeals Order dated June 5, 2024 (p. 56)

APPENDIX A**United States Court of Appeals
for the Fifth Circuit**

William L. Mitchell, Jr.,
Petitioner

v.

Frank Kendall, III, Secretary of the Air Force,
Respondent

23-11035

Appeal from the U.S. District Court
for the Northern District of Texas in
No. 22-cv-00443, Judge Mark T. Pittman

Decided August 11, 2023

William L. Mitchell, Jr.,
Plaintiff Pro Se Litigant

This appeal is from a second voluntary dismissal, by Plaintiff, in a case involving the same claim. Under Federal Rules of Civil Procedure 41(a)(1)(A) and (B), the "Effect" of a second voluntary dismissal "acts as an adjudication on the merits." The U.S. Court of Appeals for the Fifth Circuit gave the second voluntary dismissal a disposition of "without prejudice" and denied the appeal based on appellate jurisdiction. However, no opinion was provided. Initial Denial below.

United States Court of Appeals
for the Fifth Circuit

No. 23-11035

United States Court of Appeals
Fifth Circuit

FILED

March 27, 2024

Lyle W. Cayce
Clerk

WILLIAM L. MITCHELL, JR.,

Plaintiff—Appellant,

versus

FRANK KENDALL, III, *Secretary of the Air Force,*

Defendant—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:22-CV-443

UNPUBLISHED ORDER

Before JONES, SOUTHWICK, and HO, *Circuit Judges.*

PER CURIAM:

William L. Mitchell, Jr. appeals several interlocutory rulings and orders from the magistrate judge and the district court. However, prior to the district court adopting or rejecting the magistrate judge's latest recommendations, Mitchell filed a voluntary dismissal without prejudice.

Under 28 U.S.C. § 1291, this court must review "final decisions of the district courts." A plaintiff's voluntary dismissal of a case without prejudice is not a final appealable order. *See Griggs v. S.G.E. Mgmt., L.L.C.*, 905 F.3d

No. 23-11035

835, 840 (5th Cir. 2018). Thus, this court lacks appellate jurisdiction to consider any of Petitioner's appeals.

IT IS ORDERED that Petitioner's appeals are dismissed.

APPENDIX B**United States Court of Appeals
for the Fifth Circuit**

William L. Mitchell, Jr.,
Petitioner

v.

Frank Kendall, III, Secretary of the Air Force,
Respondent

23-11035

Appeal from the U.S. District Court
for the Northern District of Texas in
No. 22-cv-00443, Judge Mark T. Pittman

Decided August 11, 2023

William L. Mitchell, Jr.,
Plaintiff Pro Se Litigant

U.S. District Court Notice of Voluntary
Dismissal dated November 18, 2014 below.

Original
ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

FILED
U.S. DISTRICT COURT
NORTHERN DIST. OF TX
FT. WORTH DIVISION

2014 NOV 18 PM 1:44

CLERK OF COURT

WILLIAM L. MITCHELL, JR.,

*

VS.

*

DEPARTMENT OF AIR FORCE, et al.

*

*

*

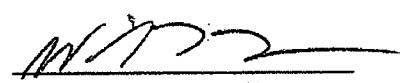
CIVIL ACTION NO. 4:14-CV-847-O

NOTICE OF VOLUNTARY DISMISSAL WITHOUT PREJUDICE

Pursuant to Federal Rule of Civil Procedure 41(a), Plaintiff, William L. Mitchell, Jr., hereby requests the above captioned action be dismissed, without prejudice.

Respectfully submitted,

Dated: November 18, 2014


William L. Mitchell, Jr.
Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date, a copy of the foregoing document was served in accordance with Federal R. Civ. P. 5(A) and 5(D) upon the defendant DEPARTMENT OF AIR FORCE, et al., by first class mail addressed to: Department of Air Force, Attn: Secretary Deborah Lee James, 1690 Air Force Pentagon, Washington, D.C. 20330-1670 and U.S. Department of Veterans Affairs, Attn: Secretary Robert A. McDonald, 810 Vermont Avenue NW, Washington, D.C. 20420

Dated at Fort Worth, Texas this 18th day of November, 2014.



William L. Mitchell, Jr.

APPENDIX C**United States Court of Appeals
for the Fifth Circuit**

William L. Mitchell, Jr.,
Petitioner

v.

Frank Kendall, III, Secretary of the Air Force,
Respondent

23-11035

Appeal from the U.S. District Court
for the Northern District of Texas in
No. 22-cv-00443, Judge Mark T. Pittman

Decided August 11, 2023

William L. Mitchell, Jr.,
Plaintiff Pro Se Litigant

U.S. District Court Findings, Conclusions, and Recommendations of
Magistrate Judge Jeffrey L. Cureton dated December 9, 2022 below.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

WILLIAM L. MITCHELL, JR., §
Plaintiff, §
§
VS. § CIVIL ACTION NO. 4:22-CV-443-P-BJ
§
FRANK KENDALL, III, §
United States Secretary of the Air Force §
Defendant. §

**FINDINGS, CONCLUSIONS, AND RECOMMENDATION REGARDING
DEFENDANT'S MOTION TO DISMISS**

Pending before the Court is Defendant Frank Kendall, III, United States Secretary of the Air Force (“Defendant” or “Secretary”)’s Motion to Dismiss (“Def.’s Mot.”) [doc. 37]. After reviewing the motion, the related briefs, and the applicable law, the Court RECOMMENDS that Defendant’s Motion to dismiss be GRANTED and that all claims against him be DISMISSED.

I. BACKGROUND¹

Plaintiff *pro se* William Mitchell, Jr. (“Plaintiff” or “Mitchell”) filed this lawsuit on May 24, 2022, alleging in his complaint that while serving as a member of the United States Air Force in 2002, he was subject to racial discrimination. Mitchell claims that he was not allowed to file a formal complaint about this discrimination at that time and, in retaliation for his attempt to report it, he was subject to a Letter of Reprimand (“Reprimand”). From then on, Mitchell continued his attempts to report the discrimination. A subsequent investigation by the Air Force Inspector General concluded that he should not have been denied the ability to file an original report; however, the Inspector General closed the matter because it also determined that no further investigation was needed. Although Mitchell then complained that the Reprimand constituted

¹ The factual background is taken from Plaintiff’s complaint (“Pl.’s Compl.”) [doc. 1]. For the purposes of this order, the Court presumes that all of Mitchell’s well-pleaded factual allegations are true.

retaliation, the Air Force took no further action. After receiving a second Reprimand, Mitchell retired from the military. He then sought to clear his military record of the two Reprimands, but the Evaluation Reports Appeal Board (“Appeal Board”) denied his application. In October 2014, Mitchell sued the Air Force and Department of Veteran Affairs in federal court (“2014 suit”), alleging violations of the United States Constitution, Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e), and 10 U.S.C. § 1034 arising out of the alleged discrimination and the Reprimands in his record. *See Mitchell v. Dep’t of Air Force*, No. 4:14-CV-847-O, 2015 WL 12754905 (N.D. Tex. Dec. 4, 2015) (O’Connor, J.). The Court dismissed Mitchell’s claims for lack of subject-matter jurisdiction. Mitchell then filed again with the Appeal Board to have his record cleared. He also requested similar review and relief from the Office of the Secretary of the United States Air Force. This application was referred to the Air Force Board for Correction of Military Records (“Board for Correction”). Both applications were denied.

Then, in 2021, Mitchell sued the Secretary (“2021 suit”). *See Mitchell v. Dep’t of Air Force*, No. 4:21-CV-912-Y (N.D. Tex. May 3, 2022) (Means, J.). In his 2021 suit, Mitchell alleged that the failure to allow him to file a complaint of racial discrimination violated his rights under the Fifth Amendment and 42 U.S.C. § 1983, and the issuance of the two Reprimands violated the Administrative Procedures Act (“APA”) and the Whistleblower Protections Act under 10 U.S.C. § 1034. He further claimed that the denial of his application to remove these Reprimands violated the APA. In his 2021 suit, Mitchell effectively sought to overturn the Board for Correction’s decision under the APA based on its failure to inform him of his right to file suit as part of the appeal process or, alternatively, its failure to “appreciate” his claims under 10 U.S.C. § 1034. On May 3, 2022, the Court granted the Secretary’s Motion to Dismiss and found that (1) under the

Feres doctrine,² the Court lacked subject-matter jurisdiction to hear Mitchell's claims that sought to overturn the Reprimands in his military personnel file and (2) that Mitchell failed to state a claim under the APA for the Board for Correction's review of his record. A final judgment in the 2021 suit was entered the same day.

Roughly three weeks after the resolution of his 2021 suit, Mitchell filed this suit before the Court ("2022 suit"), with the Secretary as the sole Defendant. The claims in Mitchell's 2022 suit mirror those in his 2021 suit, nearly verbatim.³ The Secretary filed his Motion to Dismiss [doc. 31], arguing that Mitchell's claims are barred by both *res judicata* and the *Feres* doctrine and that Mitchell fails to plead a waiver of sovereign immunity or a claim for relief. (Def.'s Mot. at 7-9.) Mitchell filed his response ("Pl.'s Resp.") [doc. 37] and the Secretary filed his reply brief ("Def.'s Reply") [doc. 42]. The Secretary's Motion to Dismiss is now ripe.

II. LEGAL STANDARD

A. Rule 12(b)(1)

Federal courts are courts of limited jurisdiction and possess only that power authorized by the Constitution and statute. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Parties "may neither consent to nor waive federal subject matter jurisdiction." *Simon v. Wal-Mart Stores, Inc.*, 193 F.3d 848, 850 (5th Cir. 1999). Federal Rule of Civil Procedure 12(b)(1) "allow[s] a party to challenge the subject matter jurisdiction of the district court to hear a case." *Ramming v.*

² The *Feres* doctrine provides the Government sovereign immunity and "immunize[s] the United States and members of the military from any suit that might intrude upon military affairs, second-guess military decisions, or impair military discipline." *Miller v. United States*, 42 F.3d 297, 302 (5th Cir. 1995) (cleaned up) (citing *Feres v. United States*, 340 U.S. 135 (1950)). It is broadly applied, barring claims under the Federal Torts Claims Act, *Bivens*, Section 1983, and Title VII claims. *Walch v. Adjutant Gen.'s Dep't of Tex.*, 533 F.3d 289, 294-95 (5th Cir. 2008) (citing *Feres*, 340 U.S. 135.)

³ Mitchell asks the Court for the following relief: removal of reprimand letters from 2022, rank promotion for purposes of retired pay, and "back-pay and retirement pay" based on his "correct retirement rank." (Pl.'s Compl. at 2.)

United States, 281 F.3d 158, 161 (5th Cir. 2001). “The burden of establishing subject matter jurisdiction [and resisting dismissal under Rule 12(b)(1)] rests upon the party asserting jurisdiction.” *Volvo Trucks N. Am., Inc. v. Crescent Ford Truck Sales, Inc.*, 666 F.3d 932, 935 (5th Cir. 2012); *see also Settlement Funding, L.L.C. v. Rapid Settlements, Ltd.*, 851 F.3d 530, 537 (5th Cir. 2017). “If the record does not contain sufficient evidence to show that subject matter jurisdiction exists, ‘a federal court does not have jurisdiction over the case.’” *Settlement Funding*, 851 F.3d at 537 (quoting *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 916 (5th Cir. 2001)).

B. 12(b)(6)

The standard for a Motion to Dismiss under Rule 12(b)(6) Federal Rule of Civil Procedure 12(b)(6) authorizes courts to dismiss complaints when they fail “to state a claim upon which relief can be granted.” FED. R. CIV. P. 12(b)(6). To defeat a Rule 12(b)(6) motion to dismiss, a plaintiff must plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (citing *Twombly*, 550 U.S. at 556). The Court is not bound to accept legal conclusions as true. *Iqbal*, 556 U.S. at 678–79. Only a complaint that states a plausible claim for relief survives a motion to dismiss.⁴

⁴ Because Mitchell is a *pro se* litigant, the Court has a duty to liberally construe the pleadings and motions in his favor. Thus, his papers are held to a less stringent standard than formal pleadings drafted by attorneys. *See Haines v. Kerner*, 404 U.S. 519, 520–21 (1972) (per curiam).

III. ANALYSIS

A. Applicability of Res Judicata

The threshold issue before the Court is whether Mitchell's claims are barred by the doctrine of *res judicata*.⁵ Simply put, "res judicata prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties." *Brown v. Felsen*, 442 U.S. 127, 131 (1979) (emphasis added) (quoting *Chicot Cnty. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 378 (1940)). This protection extends to available claims/defenses "regardless of whether they were asserted or determined in the prior proceeding." *Id.* Additionally, the doctrine "may be pleaded as a bar not only as respects matters actually presented . . . 'but also as respects any other available matter which might have been presented to that end.'" *Chicot*, 308 U.S. at 378 (quoting *Grubb v. Pub. Utilities Comm'n*, 281 U.S. 470, 470 (1930)). *Res judicata*'s application varies depending on which party is successful in the previous lawsuit. If a party defending a claim prevails in the prior lawsuit, judgment acts as a bar to matters that could have been litigated in the original lawsuit. See *Barr v. Resolution Trust Corp. ex. rel. Sunbelt Fed. Sav.*, 837 S.W.2d 627, 628 (Tex. 1992) (emphasis added). In determining whether res judicata prevents a claim from continuing litigation, the Fifth Circuit employs a four-pronged test:

- (1) The parties are identical or in privity; (2) the judgment in the prior action was rendered by a court of competent jurisdiction; (3) the prior action was concluded by a final judgment on the merits; and (4) the same claim or cause of action was involved in both cases.

⁵ *Res judicata* is intertwined with the term "claim preclusion." See *Barr v. Resolution Trust Corp. ex. rel. Sunbelt Fed. Sav.*, 837 S.W.2d 627, 628 (Tex. 1992). The doctrine's policies "reflect the need to bring all litigation to an end, prevent vexatious litigation, maintain stability of court decisions, promote judicial economy, and prevent double recovery." *Id.* (quoting Zollie Seakley & Weldon U. Howell, Jr., Ruminations on Res Judicata, 28 Sw. L.J. 355, 358-59 (1974)).

Petro-Hunt, L.L.C. v. U.S., 365 F.3d 385, 395 (5th Cir. 2004); *see also In re Southmark Corp.*, 163 F.3d 925, 934 (5th Cir. 1999) (citing *Swate v. Hartwell*, 99 F.3d 1282, 1286 (5th Cir. 1996)).

The record before the Court conclusively establishes that prongs one, two, and three of the *res judicata* test are undisputed—the 2021 and 2022 suits both list the Secretary as Defendant, the 2021 suit’s judgment was rendered by a court of competent jurisdiction, and the 2021 suit’s judgement was final and on the merits. Accordingly, the Court will only address the fourth prong of the *res judicata* test.

1. Prong 4: Whether the Same Claim or Cause of Action are Involved in Both Lawsuits.

The remaining issue is whether the claims surrounding his Reprimands in Mitchell’s 2022 suit are the same claims he raised, or could have raised, in his 2021 suit and whether the lawsuits involve the same cause of action. The Court will examine (1) if Mitchell’s claims are, in fact, the same; and (2) if Mitchell could have brought the instant claims in his earlier lawsuit.

The Fifth Circuit utilizes the transactional test of Section 24 of the Restatement (Second) of Judgments. *See Restatement (Second) of Judgments, § 24; Petro-Hunt, LLC.*, 365 F.2d 295-96 (5th Cir. 2004). In its determination, rather than examine the type of relief requested or advanced theories, the Court must determine whether the two actions are based on “the same nucleus of operative facts.” *See Eubanks*, 977 F.2d at 171 (quoting *Matter of Howe*, 913 F.2d 1138, 1144-45 (5th Cir. 1990); *In re Air Crash at Dallas/Ft. Worth Airport*, 861 F.2d 814, 816 (5th Cir. 1988)). That is, whether a “grouping of facts” are related in time, space, origin, or motivation.” *Test Masters Educ. Serv. 's, Inc. v. Singh*, 428 F.3d 559, 571 (5th Cir. 2005) (quoting *Petro-Hunt*, 365, F.3d at 396). “The preclusive effect of a prior judgment extends to all rights the original plaintiff had ‘with respect to all or any part of the transaction, or series of connected transactions, out of

which the [original] action arose.”⁶ *In re Paige*, 610 F.3d 865, 872 (5th Cir. 2010) (quoting *Petro-Hunt*, 365, F.3d. at 395-6 (quoting Restatement (Second) of Judgments Sec. 24(a) (1982).).

In the 2021 suit, Mitchell claims that the failure to allow him to file a complaint of racial discrimination violated his rights under the Fifth Amendment and 41 U.S.C. § 1983, and the issuance of the two Reprimands violated the APA and the Whistleblower Protections act under 10 U.S.C. 1034. Further, he claims that the denial of his application to remove the Reprimands violated the APA. Mitchell essentially sought to overturn the Board for Correction’s decision under the APA based on its failure to inform him of his right to file suit as part of the appeal process or, alternatively, its failure to “appreciate” his claims under 10 U.S.C. § 1034.

The 2022 suit is a near mirror image of the 2021 suit. In his complaint, Mitchell directs the Court to the 2021 suit by referring to “[s]upporting documentation” within the 2021 suit. (Pl.’s Compl. at 4-5.) The “[s]upporting documentation” consists of Mitchell and the Secretary’s motions and related briefs, and certain administrative records. Mitchell re-incorporates the referenced 2021 “[s]upporting documentation” in the complaint before the Court, seemingly in an effort to convince the Court that the 2021 judgment was in error.

Should Mitchell have desired additional discovery or Court relief regarding his Reprimands, he could have litigated this in the 2021 lawsuit. *See Barr*, 837 S.W. 2d at 628. Considered together, all of Mitchell’s claims are related in time, space, origin and motivation in that they form a “convenient trial unit” that supports his end goal of reversing his military records and obtaining compensation. *See Test Masters*, 428 F.2d, at 571 (quoting Restatement (Second) of Judgments 24 § (2)). The Court therefore FINDS Mitchell has failed to meet his burden to

⁶ “[I]f a party can only win the suit by convincing the court that a prior judgment was in error, the second suit is barred.” *N.Y. Life Insur. Co. v. Gillispie*, 203 F.3d 384, 387 (5th Cir. 2000).

show that the causes of action in his 2021 suit and the 2022 suit are different. Accordingly, the Court **FINDS** the same claims and/or causes of action exists as to both the previous and current lawsuits and, thus, the fourth element of *res judicata* is satisfied as to the Secretary.

Specifically, the Court **FINDS** that the Secretary has met his burden of establishing all elements of his *res judicata* defense in the present case and that his Motion to Dismiss should be **GRANTED** and all claims against him **DISMISSED**.⁷

IV. CONCLUSION

For the reason set forth above, the Court **RECOMMENDS** that Motion to Dismiss [doc. 37] be **GRANTED** and the above-styled and numbered cause be **DISMISSED**.

NOTICE OF RIGHT TO OBJECT TO PROPOSED
FINDINGS, CONCLUSIONS AND RECOMMENDATION
AND CONSEQUENCES OF FAILURE TO OBJECT

Under 28 U.S.C. § 636(b)(1), each party to this action has the right to serve and file specific written objections in the United States District Court to the United States Magistrate Judge's proposed findings, conclusions and recommendation within fourteen (14) days after the party has been served with a copy of this document. The United States District Judge need only make a *de novo* determination of those portions of the United States Magistrate Judge's proposed findings, conclusions and recommendation to which specific objection is timely made. *See* 28 U.S.C. § 636(b)(1). Failure to file, by the date stated above, a specific written objection to a proposed factual finding or legal conclusion will bar a party, except upon grounds of plain error or manifest injustice, from attacking on appeal any such proposed factual findings and legal conclusions accepted by the United States District Judge. *See Douglass v. United Servs. Auto Ass'n*, 79 F.3d

⁷ Based on the above application and finding regarding the applicability of *res judicata*, the Court declines to address the Secretary's arguments regarding the *Feres* doctrine, sovereign immunity, and Mitchell's failure to state a claim for relief.

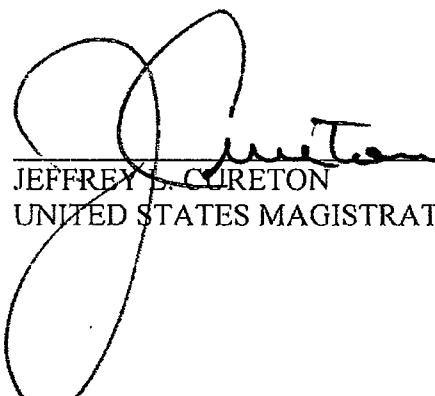
1415, 1428-29 (5th Cir. 1996), *modified by statute on other grounds*, 28 U.S.C. § 636(b)(1) (extending time to file objections to 14 days).

ORDER

Under 28 U.S.C. § 636, it is hereby **ORDERED** that each party is granted until **December 22, 2022**, to serve and file written objections to the United States Magistrate Judge's proposed findings, conclusions and recommendation. It is further **ORDERED** that if objections are filed and the opposing party chooses to file a response, the response shall be filed within seven (7) days of the filing date of the objections.

It is further **ORDERED** that the above-styled and numbered action, previously referred to the United States Magistrate Judge for findings, conclusions and recommendation, be and hereby is returned to the docket of the United States District Judge.

SIGNED December 9, 2022.


JEFFREY L. CURETON
UNITED STATES MAGISTRATE JUDGE

JLC/adh

APPENDIX D**United States Court of Appeals
for the Fifth Circuit**

William L. Mitchell, Jr.,
Petitioner

v.

Frank Kendall, III, Secretary of the Air Force,
Respondent

23-11035

Appeal from the U.S. District Court
for the Northern District of Texas in
No. 22-cv-00443, Judge Mark T. Pittman

Decided August 11, 2023

William L. Mitchell, Jr.,
Plaintiff Pro Se Litigant

U.S. District Court Plaintiff's Response and Objection to
Findings, Conclusions, and Recommendations of
Magistrate Judge Jeffrey L. Cureton dated
December 22, 2022 below.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

WILLIAM L. MITCHELL, JR.,

*

*

VS.

* CIVIL ACTION NO. 4:22-CV-00443-P-BJ

*

FRANK KENDALL III, SECRETARY OF
THE AIR FORCE

*

*

**PLAINTIFF'S RESPONSE AND OBJECTION TO "FINDINGS, CONCLUSIONS, AND
RECOMMENDATION REGARDING DEFENDANT'S MOTION TO DISMISS"**

To be clear, Plaintiff maintains all contentions and allegations specified in **MOTION
FOR STAY PENDING REVIEW** (ECF No. 35 dated November 2, 2022) which identified ethical violations on the part of this Court and the U.S. Attorney's Office; **PLAINTIFF'S
OBJECTION TO "DEFENDANT'S MOTION TO DISMISS"** (ECF No. 37 dated November 21, 2022); related responses, replies, and objections. That stated, Plaintiff provides *Response And Objection To "Findings, Conclusions, And Recommendation Regarding Defendant's Motion To Dismiss,"* ECF No. 46 dated December 9, 2022.

Response to I. BACKGROUND:

As identified in **PLAINTIFF'S RESPONSE IN SUPPORT OF MOTION FOR
DEFAULT JUDGMENT**, "Defense Council has suggested, due to the number of lawsuits filed by Plaintiff, it represents re-litigating matters already settled or decided by the Court, but this is not accurate. Most recent Dismissal was "without prejudice" and the merits of Plaintiff's case were not adjudicated. Dismissal was due primarily to the fact key evidence was not submitted as part of the original Complaint, though it was submitted in the course of litigation, so it became necessary to re-file and meet the standard identified by the Court. It is for this reason portions of

Plaintiff's claim [may] appear to mirror the previous filing" (ECF No. 13, p. 2, para. 1). Both Defense Counsel and the Magistrate Judge have mischaracterized and framed Plaintiff's **COMPLAINT** (ECF No. 1 dated May 24, 2022) to justify flawed defense arguments. Current action was in response to a Dismissal "without prejudice" where previous case was dismissed, in part, because key evidence was not submitted as part of the original COMPLAINT.

The evidence has now been incorporated into current COMPLAINT and is therefore in compliance with Judge Means' determination in previous action. Further, there is no re-litigation of matters settled in previous actions. Plaintiff clearly identifies instances where *Feres* doctrine precludes consideration of allegations given the circumstances, but rather justifies their inclusion by virtue of their "probative value."¹ Defense Counsel and the Magistrate Judge mistake allegations as being central to Plaintiff's claim, and proceed to present counter arguments based on a false premise. As a result, respective arguments have no basis.

Response to II. LEGAL STANDARD:

A. Rule 12(b)(I)

Federal Jurisdiction & Legal Basis: Under 28 U.S.C. § 1331, the district courts have jurisdiction over cases arising under the U.S. Constitution or federal laws or treaties. Frank Kendall, III inherited liability for violation of the following federal statutes:

- A. 5th Amendment to the United States Constitution, "Procedural Due Process"
- Title 10 U.S. Code 1552, Correction of Military Records: Claims Incident Thereto
- B. Title 5 U.S. Code 701 – 706, Administrative Procedure Act/Review or Appeal of Agency Decision
- Title 10 U.S. Code 1552, Correction of Military Records: Claims Incident Thereto
- Title 10 U.S. Code 1557, Timeliness Standards for Disposition of Applications Before Corrections Boards
- Title 10 U.S. Code 1034, Protected Communications; Prohibition of Retaliatory Personnel Actions (**COMPLAINT**: ECF No. 1 dated May 24, 2022, p. 2, para. II, items A & B).

¹**Summary of Violations** – The following is a summary of violations giving rise to Plaintiff's claim. Item numbers 1 – 4 (below) have substantial probative value, but due to the dates of their occurrence, they are time barred and not actionable in relation to current claim. In addition, they occurred incidental to Plaintiff's military service; thereby protected under FTCA and *Feres* doctrine. Items 8 – 12 reference Electronic Court Filings (ECF's) from *William L. Mitchell, Jr. v. Frank Kendall III, Secretary of the Air Force, CIVIL ACTION NO. 4:21-CV-00912-Y*: ECF No. 1 dated May 24, 2022, p. 6, para.1.

Plaintiff clearly identifies jurisdiction of Federal District Court and legal bases of claims in current complaint as sited above. 28 U.S.C. § 1331 is addressed in principle on page 1 and paragraph 1 of COMPLAINT: ECF No. 1 dated May 24, 2022. Dismissal “without prejudice” should also imply a certain degree of continuity to the extent arguments are picked up from where they were left off. To the contrary, the Magistrate Judge is suggesting, as is Defense Counsel, current action is a re-litigation of matters settled in the previous case. Issues involving subject matter jurisdiction to include Title 42 U.S.C. Section 1983 are being argued as if they are part of Plaintiff’s Complaint. But if subject matter jurisdiction were settled, disposition of Dismissal would not have been “without prejudice.” And though there is no Title 42 U.S.C. Section 1983 claim, Defense Counsel and the Magistrate Judge argue against its inclusion.

B. 12(b)(6)

Electronic Court Filings (ECF’s) from *William L. Mitchell, Jr. v. Frank Kendall III, Secretary of the Air Force, CIVIL ACTION NO. 4:21-CV-00912-Y* serve to establish dismissal was due to the fact documents proving the Board did not consider the evidence submitted had not been properly incorporated into Plaintiff’s complaint: ECF No. 46 dated May 3, 2022, p. 9, para. B(2) & Footnote⁴. Judge Means states, “Thus, Mitchell’s allegations contained in his response are not properly before the Court on this issue; but the documents referenced in his complaint from his motion to stay proceedings may be. . . . Accordingly, the only allegations the Court is considering are contained in Mitchell’s complaint and his motion to stay proceedings.”

In response, Plaintiff argues in his *Motion For Reconsideration*, “The issue involves violation of due process from the standpoint of Plaintiff’s right to appeal to SECDEF as part of the Board’s review process outlined in AFI 36-2603: Air Force Board For Correction Of Military Records. The Board did not review information to the extent they did not recognize application

involved whistleblower protections. What makes the oversight so glaring are the contents of related correspondence which explicitly identify the application as one involving Title 10 U.S. Code 1034: Statute governing the military's Whistleblower Protection Directive [ECF No's. 41-1 and 42, dated January 6, 2022 and January 10, 2022 respectively, *Plaintiff's Response To "Reply In Support Of Defendant's Motion To Dismiss Plaintiff's Second Amended Complaint"* and *"Motion For Leave To File A Surreply" (Additional Attachments)*].

As referenced previously, AFI 36-2603, para. 5.1 – 5.4 outline the procedures the Board is to follow for applications involving whistleblower protections. The Board not only violated those procedures, but obstructed Plaintiff's appeal to SECDEF. Plaintiff has provided AFBCMR Executive Director Nicole D. Jackson's response on behalf of SECDEF Austin (ECF No. 39, pp. 26 – 28, *Plaintiff's Objection In Response To 'Defendant's Motion To Dismiss 2ndAmended Complaint And Brief In Support'* dated December 23, 2021). It was not appropriate and not in accordance with procedure. By default, previous decisions rendered by the Board were arbitrary, capricious, and not in accordance with the law. Therefore, the APA claim has been stated" (*William L. Mitchell, Jr. v. Frank Kendall III, Secretary of the Air Force, CIVIL ACTION NO. 4:21-CV-00912-Y*: ECF No. 48 dated May 10, 2022, p. 5, para. 3 – p. 6, para. 1 and 2).

Judge Means responds to Plaintiff's *Motion For Reconsideration* stating, "In his motion for reconsideration, Mitchell argues that that the *Feres* doctrine does not bar his claim under the APA; the Court agrees now, as it did in the order granting the motion to dismiss. . . . Allegations and documentation submitted in Mitchell's responsive briefing was not properly before the Court to determine whether his complaint stated a plausible claim. See *Leal v. McHugh*, 731 F.3d 405, 407 n.2 (5th Cir. 2013). Therefore, Mitchell's argument for reconsideration of his APA claim's dismissal must fail" (ECF No. 49 dated May 13, 2022, p. 1, para. 1 and p. 2, para. 1).

In **DEFENDANT'S MOTION TO DISMISS** (ECF No. 31 dated October 31, 2022)

there is no mention of key documents which led to re-filing of suit and current action. However,

APPENDIX TO DEFENDANT'S MOTION TO DISMISS (ECF No. 32 dated October 31,

2022, App. 021 - 026) provides comprehensive outline. The following is abbreviated for review:

January 6, 2022 - MOTION FOR LEAVE TO FILE A SURREPLY

February 1, 2022 - ORDER DENYING LEAVE TO FILE SURREPLY

May 3, 2022 - ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

May 3, 2022 - FINAL JUDGMENT

May 10, 2022 - MOTION FOR RECONSIDERATION

May 13, 2022 - ORDER DENYING MOTION FOR RECONSIDERATION

May 17, 2022 - MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT

May 18, 2022 - ORDER DENYING MOTION FOR LEAVE TO AMEND COMPLAINT

The above filings from *William L. Mitchell, Jr. v. Frank Kendall III, Secretary of the Air Force, CIVIL ACTION NO. 4:21-CV-00912-Y* played a significant role in Plaintiff's ultimate determination to re-file rather than appeal the Court's ruling. On January 6, 2022, Plaintiff filed for leave to file a surreply for the purpose of including evidence to meet or exceed the threshold of the "Plausibility Standard." The motion was denied February 1, 2022, Defendant's motion to dismiss was granted, and the case was Dismissed "without prejudice" May 3, 2022. Because Judge Means established the new evidence needed to be incorporated into the original complaint, in response to motion for reconsideration, Plaintiff filed motion for leave to amend complaint May 17, 2022. The motion was also denied, so Plaintiff weighed his options and determined the best outcome of filing appeal through the 5th Circuit likely would have been remand of the case back to the District Court, so he chose to re-file directly through the District Court May 24, 2022.

The following are excerpts from current action which serve to identify violations beginning with incidents from Plaintiff's military service through most recent processing of applications through the Board of Corrections. Initial statement simply identifies liability inherited by Defendant by virtue of his appointment as Secretary of the Air Force. Violations are then listed to provide background on the facts alleged to have caused damages claimed:

Statement of Claim: Violations 1 – 12 (below) identify liability inherited by Frank Kendall, III by virtue of his appointment to the Office of Secretary of the Air Force: ECF No. 1 dated May 24, 2022, p. 2, para. III.

Violations – The following violations (1 – 12) state the facts alleged to have caused damages claimed. Violations 4 – 12 reference Electronic Court Filings (ECF's) from *William L. Mitchell, Jr. v. Frank Kendall III, Secretary of the Air Force, CIVIL ACTION NO. 4:21-CV-00912-Y*: ECF No. 1 dated May 24, 2022, p. 3, para. 1.

The violations are then summarized and put into proper context where it is clearly identified which violations are time barred, and therefore not actionable. The same violations the Magistrate Judge and Defense Counsel frame arguments against to disqualify current action. FTCA and *Feres* doctrine protections are acknowledged in relation to these items, but they are included due to their "probative value."

Summary of Violations – The following is a summary of violations giving rise to Plaintiff's claim. Item numbers 1 – 4 (below) have substantial probative value, but due to the dates of their occurrence, they are time barred and not actionable in relation to current claim. In addition, they occurred incidental to Plaintiff's military service; thereby protected under FTCA and *Feres* doctrine. Items 8 – 12 reference Electronic Court Filings (ECF's) from *William L. Mitchell, Jr. v. Frank Kendall III, Secretary of the Air Force, CIVIL ACTION NO. 4:21-CV-00912-Y*: ECF No. 1 dated May 24, 2022, p. 6, para. 1.

It is then in the conclusion portion of the complaint Plaintiff reiterates and identifies violations which are actionable - violations of "Timeliness Standards" and "Whistleblower Protections" during the processing of respective applications - the U.S. Constitution and the APA are identified as the statutes which give rise to current claim:

Subsequent to SAF James' violation, SECDEF Ashton B. Carter referred the matter to the Board. Two applications were processed: an initial application and a reconsideration application. Both were denied, but adjudication of most recent application's final decision set the stage for current claim. The Air Force Board For Correction Of Military Records (AFBCMR) rendered a decision June 2021 which was not in compliance with "Timeliness Standards" under Title 10 U.S. Code 1557, failed to process application as one involving whistleblower protections (Title 10 U.S. Code 1034) and as a result, appeal was not properly elevated to the Office of the Secretary of Defense (SECDEF). Instead, AFBCMR Executive Director Nicole D. Jackson provided response on behalf of SECDEF Austin which was not in accordance with Air Force Instruction (AFI) 36-2603, para. 5.1 – 5.4 . . . "Decisions in Cases Under the Military Whistleblowers Protection Act." This claim therefore rises out of the 5th Amendment to the U.S. Constitution by virtue of Title 5 U.S. Code 701 – 706, Administrative Procedure Act/Review or Appeal of Agency Decision: ECF No. 1 dated May 24, 2022, p. 8, para. 4.

Response to III. ANALYSIS:

A. Applicability of Res Judicata

In Latin, *res judicata* means "the thing has been decided" and translates to "a matter judged." In short, matters to which the doctrine applies are regarded as "claim preclusive" and not subject to further adjudication. However, according to Rule 41 of the Federal Rules of Civil Procedure (FRCP), the following are not claim preclusive and are not considered "adjudication on the merits:" 1. A lack of jurisdiction, 2. Improper venue, 3. Failure to join a party when required to do so under FRCP 19 (aka "Mandatory Joinder"), 4. Voluntary dismissals, and 5. If the dismissal order does not state otherwise (i.e. a decision made "without prejudice").

In the matter of *William L. Mitchell, Jr. v. Frank Kendall III, Secretary of the Air Force, CIVIL ACTION NO. 4:21-CV-00912-Y*, Dismissal was "without prejudice" (ECF No. 46 dated May 3, 2022, p. 12, para. 2, *Conclusion*); therefore, the doctrine of *res judicata* does not apply.

1. Prong 4: Whether the Same Claim or Cause of Action are Involved in Both Lawsuits.

Plaintiff has established the doctrine of *res judicata* does not apply; accordingly, neither does the associated "four-pronged test." If the dismissal order does not state otherwise (i.e. a

decision made “without prejudice”), the matter is not claim preclusive. The previous action was Dismissed “without prejudice” May 3, 2022. The primary purpose of re-filing current action was to incorporate key evidence into complaint in compliance with Judge Means’ determination at that time. Plaintiff makes reference to the correspondence in paragraph 1 of his conclusion:

Conclusion: This claim goes back to June 3, 2016, less than six years after the filing of current civil action. On April 14, 2016, Plaintiff received Evaluation Reports Appeal Board’s (ERAB’s) response on behalf of Secretary James dated April 8, 2016. This is significant because the response served to confirm SAF did not conduct review in accordance with Air Force Instruction 36-2603, para. 5.1 as Title 10 U.S. Code 1034 assertion was inherent to Plaintiff’s original complaint through federal district court dated October 17, 2014. Therefore, SAF James’ failure to conduct review as prescribed constitutes violation of Title 10 U.S. Code 1552 and Amendment 5 to the U.S. Constitution. Plaintiff provides this information in a letter to AFBCMR Executive Director John K. Vallario, dated June 3, 2016, identifying key correspondence referenced on initial application (attached). See also **Violation 12** attachments 1 – 13 above: ECF No. 1 dated May 24, 2022, p. 8, para. 3.

There is also no re-litigation of arguments from previous claim or any mention of Title 42 U.S.C. Section 1983 as Defense Counsel and Magistrate Judge argue. The new evidence was not incorporated in the 2021 suit as the Magistrate Judge contends. Notwithstanding, there are portions of the 2021 suit which remain relevant, but context for those portions of the complaint have been explained as ‘violations listed to provide background on the facts alleged to have caused damages claimed (p. 4, para. 1 above).’ Finally, Plaintiff references key documentation in support of his APA claim in the final paragraph of his conclusion:

Additional arguments in support of claim are contained in Plaintiff’s “Motion For Stay Pending Review” dated August 9, 2021 (ECF No.’s. 7 – 7-7): *William L. Mitchell, Jr. v. Frank Kendall III, Secretary of the Air Force, CIVIL ACTION NO. 4:21-CV-00912-Y*. Background of attempted appeal through SECDEF and direct rebuttal arguments to the Board’s adjudication of the case, as well as Executive Director Jackson’s related responses are all contained in these documents. Rebuttal arguments further establish the “arbitrary and capricious” standard of Plaintiff’s APA claim. Primary documents include “Applicant’s Closing Arguments” and “Summary For Caseworker.” They help identify the fact the Board did not review the information submitted and their decision was a foregone conclusion from the outset. . . . ECF No. 1 dated May 24, 2022, p. 8, para. 5.

Because the doctrine of *res judicata* has no application in this case, no viable arguments have been presented to contest Plaintiff's claim. Regarding the implication arguments involving the *Feres* doctrine, sovereign immunity, and failure to state a claim for relief are viable, Plaintiff has addressed the fact violations incidental to his service have been included primarily for their probative value. There is an inherent waiver of sovereign immunity by virtue of the APA, and the Defendant has the authority to mitigate damages incurred by virtue of Title 10 U.S.C. 1552.

Response to IV. CONCLUSION:

The Defendant, Secretary Frank Kendall, III, has not met his burden of establishing all elements of the *res judicata* defense. Further, the doctrine has no application in this case. The Defendant's Motion to Dismiss should therefore be **DENIED** for the reasons set forth above.

**Response to NOTICE OF RIGHT TO OBJECT TO PROPOSED
FINDINGS, CONCLUSIONS AND RECOMMENDATION
AND CONSEQUENCES OF FAILURE TO OBJECT:**

Plaintiff objects to "de *nova* determination" and defers to **OBJECTION TO ORDER**
DENYING MOTION FOR RECONSIDERATION (ECF No. 47 dated December 20, 2022).

Response to ORDER:

The Magistrate Judge, with complicity of the District Judge, has prejudiced these entire proceedings to the unfair advantage of the Defendant. Contents of **ORDER** reflect the same.

Respectfully submitted,

Dated: December 22, 2022

/s/William L. Mitchell, Jr.

William L. Mitchell, Jr.,

Plaintiff Pro Se Litigant

2810 Turnberry Drive #915

Arlington, TX 76006

Telephone: 817-642-5440

Facsimile: 817-458-9990

E-mail: wil45@att.net

CERTIFICATE OF SERVICE

On December 22, 2022, I electronically submitted the foregoing document with the clerk of the court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all parties electronically or by certified mail, methods authorized by Federal Rule of Civil Procedure 5(b)(2).

Dated at Fort Worth, Texas this 22nd day of December, 2022.

s/William L. Mitchell, Jr.
William L. Mitchell, Jr.,
Plaintiff Pro Se Litigant

APPENDIX E**United States Court of Appeals
for the Fifth Circuit**

William L. Mitchell, Jr.,

Petitioner

v.

Frank Kendall, III, Secretary of the Air Force,

Respondent

23-11035

Appeal from the U.S. District Court
for the Northern District of Texas in
No. 22-cv-00443, Judge Mark T. Pittman

Decided August 11, 2023

William L. Mitchell, Jr.,
Plaintiff Pro Se Litigant

U.S. District Court Order by Federal District Court
Judge Mark T. Pittman dated January 3, 2023 below.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

WILLIAM L. MITCHELL, JR.,

Plaintiff,

v.

No. 4:22-CV-00443-P

FRANK KENDALL, III,

Defendant.

ORDER

Before the Court is Defendant's Motion to Dismiss. ECF No. 31. The United States Magistrate Judge issued Findings, Conclusions, and Recommendations ("FCR") on Defendant's Motion. For the reasons stated below, the Court **REJECTS** the reasoning of the Magistrate Judge's FCR (ECF No. 46) and **GRANTS** Pro Se Plaintiff's objection.

BACKGROUND

Pro Se Plaintiff sued Defendant on May 4, 2022. ECF No. 1. This is not Plaintiff's first time in court. Nor is it his first time suing this Defendant.

In 2014, Plaintiff sued the United States Air Force and the Department of Veteran Affairs, alleging violations of the Constitution, Title VII of the Civil Rights Act of 1964, and 10 U.S.C. § 1034. *Mitchell v. Dep't Air Force*, No. 4:14-CV-847-O, 2015 WL 12754905 (N.D. Tex. Dec. 4, 2015) (O'Connor, J.). Plaintiff alleged that he was subject to racial discrimination related to reprimands on his service record. *Id.* The Court dismissed the case for lack of subject matter jurisdiction. *Id.*

In 2021, Plaintiff sued the United States Air Force and the above-named Defendant related to the same operative facts as the 2014 suit—this time under a different theory. *See Mitchell v. Dep't of Air Force*, No. 4:21-CV-912-Y (N.D. Tex. May 3, 2022) (Means, J.). In this suit, Plaintiff alleged violations of the Fifth Amendment, 42 U.S.C. § 1983, the

Administrative Procedure Act (“APA”), and the Whistleblower Protections Act under 10 U.S.C. § 1034. *Id.* This case was dismissed without prejudice due to a lack of subject-matter jurisdiction. *Id.*

Plaintiff brought this action three weeks after the 2021 suit’s dismissal and asserts nearly identical claims—this time only against one Defendant. ECF No. 1 at 1. Defendant moved to dismiss for multiple reasons, including that res judicata requires this Court to dismiss the case. The United States Magistrate Judge’s FCR on Defendant’s Motion recommended dismissal based solely on the grounds of res judicata. ECF No. 46 at 8. Plaintiff timely objected. ECF No. 48.

LEGAL STANDARD

A. Review of Magistrate Judge’s Recommendation

A Magistrate Judge’s FCR on a dispositive matter is reviewed de novo if a party timely objects. FED. R. CIV. P. 72. But if all or part of the Magistrate Judge’s disposition is not objected to, the FCR is reviewed for plain error. *Id.* Because Plaintiff timely objected (ECF No. 48), the Court reviews the Magistrate Judge’s FCR de novo.

B. Motion to Dismiss

To survive a motion to dismiss for “failure to state a claim upon which relief can be granted,” Fed. R. Civ. P. 12(b)(6), a plaintiff’s complaint “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face,’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Court accepts all well-pleaded facts as true, drawing all inferences in favor of and viewing all facts in the light most favorable to the nonmoving party. *Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 194 (5th Cir. 2009).

ANALYSIS

A. Res Judicata

Res judicata requires four elements: (1) the same parties or privity; (2) a judgment rendered by a court of competent jurisdiction; (3) a final judgment on the merits; and (4) the same claim or cause of action was

involved in both cases. *Petro-Hunt v. United States*, 365 F.3d 385, 395 (5th Cir. 2004). If these elements are met, a plaintiff is prohibited “from raising any claim . . . in the later action that was or *could have been* raised in support of . . . the cause of action asserted in the prior action.” *United States v. Shanbaum*, 10 F.3d 305, 310 (5th Cir. 1994).

The Court only considers the third element in rejecting the application of res judicata to Pro Se Plaintiff’s claims.

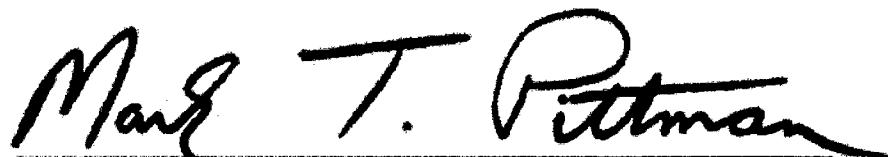
The Magistrate Judge’s analysis of this element states that “the 2021 suit’s judgement [sic] was final and on the merits.” ECF No. 46 at 6. Pro Se Plaintiff objects to this reasoning and argues that the previous dismissal “was without prejudice and the merits of Plaintiff’s case were not adjudicated.” ECF No. 48 at 1 (internal quotations omitted).

Pro Se Plaintiff is correct—the Court did not adjudicate the case on the merits because the dismissal was without prejudice. *See Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505 (2001) (“An adjudication upon the merits is the opposite of a dismissal without prejudice.”); *see also Nilsen v. City of Moss Point*, 701 F.2d 556, 562 (5th Cir. 1983) (*en banc*) (holding that in a res judicata context “[d]ismissals for want of jurisdiction are not decisions on the merits.”). The functional meaning of a dismissal without prejudice “is dismissal without barring the plaintiff from returning later, to the same court, with the same underlying claim.” *Id.*; *see also Rolls-Royce Corp. v. Heros, Inc.*, 576 F. Supp. 2d 765, 776 (N.D. Tex. 2008) (finding that a dismissal without prejudice does not have res judicata effect).

So, while Plaintiff’s claims are similar—and nearly identical in many instances—res judicata does not apply because the previous dismissal without prejudice does not constitute a final judgment on the merits. Defendant’s briefing gives other arguments for dismissal that have merit, but the FCR does not address them.

The Court thus **REJECTS** the reasoning of the Magistrate Judge’s FCR (ECF No. 46) and **GRANTS** Pro Se Plaintiff’s objection. The Court further **REFERS** this Motion and related filings back to United States Magistrate Judge Jeffrey Cureton for full consideration of Defendant’s briefing on his motion.

SO ORDERED on this 3rd day of January 2023.



MARK T. PITTMAN
UNITED STATES DISTRICT JUDGE

APPENDIX F**United States Court of Appeals
for the Fifth Circuit**

William L. Mitchell, Jr.,
Petitioner

v.

Frank Kendall, III, Secretary of the Air Force,
Respondent

23-11035

Appeal from the U.S. District Court
for the Northern District of Texas in
No. 22-cv-00443, Judge Mark T. Pittman

Decided August 11, 2023

William L. Mitchell, Jr.,
Plaintiff Pro Se Litigant

U.S. District Court Plaintiff's Objection to Order
dated January 4, 2023 below.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

WILLIAM L. MITCHELL, JR.,

*

*

VS.

* CIVIL ACTION NO. 4:22-CV-00443-P

*

*

FRANK KENDALL III, SECRETARY OF
THE AIR FORCE

*

PLAINTIFF'S OBJECTION TO "ORDER"

Plaintiff is in receipt of **ORDER** (ECF No. 49 dated January 3, 2023). While Plaintiff is in agreement with the Court's **GRANTING** of related objection(s), the Defendant was also afforded '7 days from the filing date of the objections to submit a response:' **FINDINGS**.

CONCLUSIONS, AND RECOMMENDATION REGARDING DEFENDANT'S MOTION TO DISMISS (ECF No. 46 dated December 9, 2022, p. 9, **ORDER**). The Defendant elected not to respond in light of Plaintiff's objections, which directly addressed the implication of additional arguments referred to in the Magistrate Judge's FCR (ECF No. 46): **PLAINTIFF'S RESPONSE AND OBJECTION TO "FINDINGS, CONCLUSIONS, AND RECOMMENDATION REGARDING DEFENDANT'S MOTION TO DISMISS"** (ECF No. 48 dated December 22, 2022, p. 9, para. 1). Plaintiff therefore maintains original objection of referral of this case to Magistrate Judge Jeffrey L. Cureton.

Further, in previous filings, Plaintiff identified disposition of prior Dismissal was "without prejudice" due to the fact key evidence had not been incorporated into original complaint. The suit has since been re-filed (May 24, 2022) and evidence has now been incorporated into current complaint in compliance with Judge Means' determination. The

information provides proof the Board did not consider the evidence submitted. As a result, respective standards have been met to allow current action to move forward. The following identifies why both the APA's "arbitrary and capricious" standard, and therefore the "Plausibility Standard" thresholds have been met:

1. Violation of "Timeliness Standards" was more significant than meets the eye. There were two standards at play which were addressed in correspondence to Secretary of the Air Force (SAF) Barbara M. Barrett. The following information was initially shared with Attorney Joseph D. Galli of Gary Myers, Daniel Conway & Associates Attorneys-At-Law in an e-mail communication dated September 15, 2020:

Timeliness Standard: Title 10 USC 1557

- 10 to 18 mos (90% adjudicated within 10 months, 100% adjudicated within 18 months)
- AFBCMR Appeal received June 13, 2019. **Deadline: December 14, 2020**
- Bar To Re-enlistment received August 20, 2019. **Deadline: February 22, 2021**

Precise Deadline Windows:

AFBCMR Appeal: Deadline between April 3, 2020 (10 month deadline) and December 13, 2020 (18 month deadline)

Bar To Re-enlistment: Deadline between June 20, 2020 (10 month deadline) and February 20, 2021 (18 month deadline)

2. However, because applications involved Whistleblower Protections, they were to be processed within 180 days (6 months) with direct appeal to SECDEF inherent (90 day review). The two applications were each processed in excess of 2 years, and the entire span of processing initial application and reconsideration was in excess of 5 years. So violation of Timeliness Standards was gross and egregious given what should have been

accomplished between 1 year at a minimum, and 2 years at the most, took in excess of 5 years resulting in back to back denials because the Board did not recognize and process applications as those involving Whistleblower Protections.

In conclusion, Plaintiff maintains original objection of referral of this case to Magistrate Judge Jeffrey L. Cureton. The Defendant chose not to respond within the window afforded him by the Magistrate Judge in light of Plaintiff's objections, which directly addressed the implication of additional arguments referred to in the Magistrate Judge's FCR (ECF No. 46).

In addition, the idea of a "*de novo* determination" would potentially serve to discount disposition of Judge Means' Dismissal of original suit. Therefore, Plaintiff maintains his objection on the basis such determination would preclude proceedings from picking up from where they were left off. Further, the Defendant has not met his burden required for dismissal because the arguments presented have no basis and due to the APA's inherent waiver of sovereign immunity. However, the Defendant, Frank Kendall, III, does have the authority to mitigate damages incurred by virtue of Title 10 U.S.C. 1552, and the Defendant's Motion to Dismiss should therefore be **DENIED** for that reason as well as for those set forth above.

Respectfully submitted,

Dated: January 4, 2023

/s/William L. Mitchell, Jr.

William L. Mitchell, Jr.,
Plaintiff Pro Se Litigant
2810 Turnberry Drive #915
Arlington, TX 76006
Telephone: 817-642-5440
Facsimile: 817-458-9990
E-mail: wil45@att.net

CERTIFICATE OF SERVICE

On January 4, 2023, I electronically submitted the foregoing document with the clerk of the court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all parties electronically or by certified mail, methods authorized by Federal Rule of Civil Procedure 5(b)(2).

Dated at Fort Worth, Texas this 4th day of January, 2023.

s/William L. Mitchell, Jr.
William L. Mitchell, Jr.,
Plaintiff Pro Se Litigant

APPENDIX G**United States Court of Appeals
for the Fifth Circuit**

William L. Mitchell, Jr.,
Petitioner

v.

Frank Kendall, III, Secretary of the Air Force,
Respondent

23-11035

Appeal from the U.S. District Court
for the Northern District of Texas in
No. 22-cv-00443, Judge Mark T. Pittman

Decided August 11, 2023

William L. Mitchell, Jr.,
Plaintiff Pro Se Litigant

U.S. District Court Second Findings, Conclusions, and
Recommendations of Magistrate Judge Jeffrey L. Cureton
dated August 10, 2023 below.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

WILLIAM L. MITCHELL, JR., §
Plaintiff, §
§
VS. § CIVIL ACTION NO. 4:22-CV-443-P-BJ
§
FRANK KENDALL, III, §
United States Secretary of the Air Force §
Defendant. §

**SECOND FINDINGS, CONCLUSIONS, AND RECOMMENDATION REGARDING
DEFENDANT'S MOTION TO DISMISS**

Pending before the Court is Defendant United States Secretary of the Air Force Frank Kendall, III (“Defendant” or “Secretary Kendall”)’s Motion to Dismiss [doc. 31], filed October 31, 2022. The undersigned previously issued his first Findings, Conclusions, and Recommendation Regarding Defendant’s Motion to Dismiss (“FCR”) [doc. 46], recommending dismissal of all *pro se* Plaintiff William L. Mitchell, Jr. (“Plaintiff” or “Mitchell”)’s claims against Defendant on December 9, 2022. Mitchell timely filed his objections to the Court’s FCR and United States District Judge Mark Pittman rejected the undersigned’s FCR on January 3, 2023 [doc. 49]. Judge Pittman referred Defendant’s Motion to Dismiss [doc. 31] back to the undersigned for further consideration of Defendant’s briefing. Having again reviewed the motion, parties’ briefs, and all applicable law, the Court **RECOMMENDS** that Defendant’s Motion to Dismiss [doc. 31] be **GRANTED** and that all claims against him be **DISMISSED**.

I. BACKGROUND¹

Pro se Mitchell filed the instant lawsuit on May 24, 2022, alleging various “Constitutional violations under the 5th Amendment” during his enlistment with the Department of the Air Force. (Pl.’s Compl. at 1.) Mitchell has previously sued this Defendant twice before. In 2014, he sued the United States Air Force and Department of Veteran Affairs for alleged violations of Title VII of Civil Rights Act of 1964, 10 U.S.C. § 1034, and various other Constitutional provisions. *See Mitchell v. Dep’t Air Force*, No. 4:13-CV-847-O, 2015 WL 12754905 (N.D. Tex. Dec. 4, 2015) (O’Connor, J.). The case was dismissed for lack of subject-matter jurisdiction.

Mitchell again sued the United States Air Force in 2021, alleging the same facts but employing a different legal theory than in his 2014 suit. *See Mitchell v. Dep’t of Air Force*, No. 4:21-CV-912-Y (N.D. Tex. May 3, 2022) (Means, J.). In his 2021 suit, Mitchell alleges Fifth Amendment, 42 U.S.C. § 1983, Administrative Procedure Act (“APA”), and Whistleblower Protections Act violations. *Id.* Like his 2014 suit, the 2021 suit was also dismissed for lack of subject-matter jurisdiction. Less than one month after the dismissal of his 2021 suit, Mitchell filed the instant lawsuit, naming Secretary Kendall as the sole Defendant. The current lawsuit asserts nearly identical claims as his 2021 suit, though Mitchell added a new claim for violation of due process by Air Force Board for the Correction of Military Records (“AFBCMR”) Executive Director Nicole D. Jackson (“Jackson”). (Pl.’s Compl. at 7.) Mitchell now claims, in addition to all the claims contained in his 2021 suit, that Jackson violated the Fifth Amendment’s Due Process Clause by responding on the Secretary of Defense’s behalf to Mitchell’s AFBCMR appeal. *Id.* Secretary Kendall argues he should prevail over Mitchell’s claims under the *Feres* doctrine, because Mitchell has failed to meet his burden to identify a valid waiver of sovereign immunity,

¹ The factual background is taken from Plaintiff’s complaint (“Pl.’s Compl.”) [doc. 1]. For the purposes of this order, the Court presumes that all of Mitchell’s well-pleaded factual allegations are true.

and because he “offers no well-pleaded factual allegations showing any entitlement to [] relief.” (Defendant’s Motion to Dismiss (“Def.’s Mot.”) at 6, 8, 9.)

II. LEGAL STANDARD

A. Rule 12(b)(1)

Federal courts are courts of limited jurisdiction and possess only that power authorized by the Constitution and federal statute. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Parties “may neither consent to nor waive federal subject matter jurisdiction.” *Simon v. Wal-Mart Stores, Inc.*, 193 F.3d 848, 850 (5th Cir. 1999). Federal Rule of Civil Procedure 12(b)(1) “allow[s] a party to challenge the subject matter jurisdiction of the district court to hear a case.” *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). “The burden of establishing subject matter jurisdiction [and resisting dismissal under Rule 12(b)(1)] rests upon the party asserting jurisdiction.” *Volvo Trucks N. Am., Inc. v. Crescent Ford Truck Sales, Inc.*, 666 F.3d 932, 935 (5th Cir. 2012); *see also Settlement Funding, L.L.C. v. Rapid Settlements, Ltd.*, 851 F.3d 530, 537 (5th Cir. 2017). “If the record does not contain sufficient evidence to show that subject matter jurisdiction exists, ‘a federal court does not have jurisdiction over the case.’” *Settlement Funding*, 851 F.3d at 537 (quoting *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 916 (5th Cir. 2001)).

B. Rule 12(b)(6)

The standard for a Motion to Dismiss under Rule 12(b)(6) Federal Rule of Civil Procedure 12(b)(6) authorizes courts to dismiss complaints when they fail to state claims upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). To defeat a Rule 12(b)(6) motion to dismiss, a plaintiff must plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable

for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (citing *Twombly*, 550 U.S. at 556). The Court is not bound to accept legal conclusions as true. *Iqbal*, 556 U.S. at 678–79. Only a complaint that states a plausible claim for relief survives a motion to dismiss.²

III. ANALYSIS

A. Feres Doctrine

Secretary Kendall argues Mitchell’s claims are barred by the *Feres* doctrine because his claims relate to his military service.³ (Def.’s Mot. at 7.) Under the *Feres* doctrine, the government cannot be held liable for personal injuries that are incident to military service. *Feres v. United States*, 340 U.S. 135, 146 (1950). If the *Feres* doctrine applies, the court does not have subject-matter jurisdiction over the case and must dismiss it. *Stanley v. Cent. Intel. Agency*, 639 F.2d 1146, 1157 (5th Cir. 1981). The Fifth Circuit has broadly applied the *Feres* doctrine to 1983 claims that are incident to military service and Title VII claims that originate from military status. *Crawford v. Tex. Army Nat'l Guard*, 794 F.2d 1034, 1035-36 (5th Cir. 1986); *Brown v. United States*, 227 F.3d 295, 299 (5th Cir. 2000). The purpose of the *Feres* doctrine is to “immunize the United States and members of the military from any suit which may ‘intrude in military affairs,’ ‘second-guess[] military decisions,’ or ‘impair[] military discipline.’” *Miller v. United States*, 42 F.3d 297, 302 (5th Cir. 1995) (quoting *Stauber v. Cline*, 837 F.2d 395, 398 (9th Cir.)).

In his latest suit before the Court, Mitchell complains that his due process rights were violated when he appealed the AFBCMR’s findings to the the Secretary of Defense and Jackson, the Executive Director of the AFBCMR, “usurped the [Secretary of Defense’s] authority and

² Because Mitchell is a *pro se* litigant, the Court has a duty to liberally construe the pleadings and motions in his favor. Thus, his papers are held to a less stringent standard than formal pleadings drafted by attorneys. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (per curiam).

³ The Court will not address the 2021 suit’s claims that were previously dismissed under the *Feres* doctrine, despite their repeated presence in the instant lawsuit. Accordingly, the Court will focus on Mitchell’s new, additional due process violation claim against Jackson.

provided [a] response on [the Secretary of Defense's] behalf.” (Pl.’s Compl. at 7.) He claims “[t]his action was not in accordance with Air Force Instruction 36-2603 [of the Whistleblowers Protection Act] and is therefore in violation of the APA.” (*Id.* (internal citations omitted)) The Air Force Instruction Mitchell relies on states, in pertinent part, as follows:

5.1. Decisions in Cases Under the Military Whistleblowers Protection Act. The Secretary will issue decisions on such cases within 180 days after receipt of the case and will, unless the full relief requested is granted, inform applicants of their right to request review of the decision by the Secretary of Defense.

United States Dep’t of Air Force Instruction 36-2603, ¶ 5.1 (Mar. 1, 1996).

The undersigned finds *Feres* is applicable here and that this Court does not have subject-matter jurisdiction to hear Mitchell’s claim for violation of due process. Mitchell’s latest claim is incident to his military service, as he seeks to rectify alleged discrimination and reprimands in his record. “[D]ue process claims . . . invite judicial second-guessing of military actions and tend to overlap the remedial structure created within each service, which . . . provide an exclusive remedy subject to review only under the arbitrary and capricious standard.” *Crawford*, 794 F.2d 1034 at 1036 (quoting *Chappell v. Wallace*, 462 U.S. 305 (1983)). In sum, the Air Force Instruction and the described actions of Jackson do not give rise to a Constitutional claim that may be heard by this Court, as the personnel actions set forth are integrally related to the military’s unique structure. *See Mier v. Owens*, 57 F.3d 747, 750 (9th Cir. 1995). Similarly, in Mitchell’s 2014 case the court found that “[t]here is no private right of action under 10 U.S.C. 1034,” and that, accordingly, the court lacked subject-matter jurisdiction to hear any such claim. *Mitchell*, 2015 WL 12754905, at *1-2 (quoting *Acquisto v. United States*, 70 F.2d 1010, 1011 (8th Cir. 1995)).

Based on the foregoing, the Court **FINDS** it lacks federal subject-matter jurisdiction under Rule 12(b)(1) to hear this case and, accordingly, that Secretary Kendall’s Motion to Dismiss [doc. 31] on this matter should be **GRANTED** and all claims against him be **DISMISSED**.

B. Claims for Damages

Secretary Kendall argues, “[i]n addition to the jurisdictional bar imposed by the *Feres* doctrine, Mitchell’s complaint is also subject to dismissal to the extent it seeks money damages because no waiver of sovereign immunity would allow such relief in this Court.” (Def.’s Mot. at 8.) It is well-established that waivers of sovereign immunity must be “unequivocally expressed.” *Lane v. Peña*, 518 U.S. 187 (1996) (finding the statute in question did not with sufficient clarity waive the federal government’s sovereign immunity from monetary damages and holding that the Secretary of Transportation therefore was not liable for such damages). However, the Tucker Act permits certain claims against the federal government, including, *inter alia*, noncontractual claims where a plaintiff asserts he is entitled to payment by the government in excess of \$10,000. 28 U.S.C. § 1491. The Tucker Act gives the *United States Court of Federal Claims* the following exclusive jurisdiction:

[T]o render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

Id.

In his Complaint, Mitchell asks the Court to award him \$1,000,000 damages to “account[] for the overall damage to [his] reputation, his career, and its impact on his family.” (Pl.’s Compl. at 9.) The Court finds it does not have jurisdiction to award damages against the federal government to Mitchell in this lawsuit, as Mitchell has wholly failed to plead any waiver of sovereign immunity. Further, as stated above, Tucker Act jurisdiction lies with the *Court of Federal Claims*. To the extent Mitchell seeks recovery from Secretary Kendall individually, it is well established that military personnel cannot sue superior officers to recover damages for alleged constitutional violations because the “relationship between enlisted military personnel and their

superior officers . . . is at the heart of the necessarily unique structure of the Military Establishment.” *Mier*, 57 F.3d at 750 (quoting *Chappel*, 462 U.S. at 300.).

Accordingly, the Court **FINDS** Secretary Kendall’s Motion to Dismiss [doc. 31] on this jurisdictional basis should also be **GRANTED**.

IV. CONCLUSION

For the reason set forth above, the Court **RECOMMENDS** that Secretary Kendall’s Motion to Dismiss [doc. 31] be **GRANTED** pursuant to Federal Rule of Civil Procedure 12(b)(1) and that the above-styled and numbered cause be **DISMISSED**.

**NOTICE OF RIGHT TO OBJECT TO PROPOSED
FINDINGS, CONCLUSIONS AND RECOMMENDATION
AND CONSEQUENCES OF FAILURE TO OBJECT**

Under 28 U.S.C. § 636(b)(1), each party to this action has the right to serve and file specific written objections in the United States District Court to the United States Magistrate Judge’s proposed findings, conclusions and recommendation within fourteen (14) days after the party has been served with a copy of this document. The United States District Judge need only make a *de novo* determination of those portions of the United States Magistrate Judge’s proposed findings, conclusions and recommendation to which specific objection is timely made. *See* 28 U.S.C. § 636(b)(1). Failure to file, by the date stated above, a specific written objection to a proposed factual finding or legal conclusion will bar a party, except upon grounds of plain error or manifest injustice, from attacking on appeal any such proposed factual findings and legal conclusions accepted by the United States District Judge. *See Douglass v. United Servs. Auto Ass’n*, 79 F.3d 1415, 1428–29 (5th Cir. 1996), *modified by statute on other grounds*, 28 U.S.C. § 636(b)(1) (extending time to file objections to 14 days).

ORDER

Under 28 U.S.C. § 636, it is hereby **ORDERED** that each party is granted until **August 24, 2023**, to serve and file written objections to the United States Magistrate Judge's proposed findings, conclusions and recommendation. It is further **ORDERED** that if objections are filed and the opposing party chooses to file a response, the response shall be filed within seven (7) days of the filing date of the objections.

It is further **ORDERED** that the above-styled and numbered action, previously referred to the United States Magistrate Judge for findings, conclusions and recommendation, be and hereby is returned to the docket of the United States District Judge.

SIGNED August 10, 2023.

JEFFREY L. CURETON
UNITED STATES MAGISTRATE JUDGE

APPENDIX H**United States Court of Appeals
for the Fifth Circuit**

William L. Mitchell, Jr.,

Petitioner

v.

Frank Kendall, III, Secretary of the Air Force,

Respondent

23-11035

Appeal from the U.S. District Court
for the Northern District of Texas in
No. 22-cv-00443, Judge Mark T. Pittman

Decided August 11, 2023

William L. Mitchell, Jr.,
Plaintiff Pro Se Litigant

U.S. District Court Second Notice of Voluntary
Dismissal dated August 11, 2023 below.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

WILLIAM L. MITCHELL, JR.,

*

*

VS.

* CIVIL ACTION NO. 4:22-CV-00443-P-BJ

*

FRANK KENDALL III, SECRETARY OF
THE AIR FORCE

*

*

PLAINTIFF'S NOTICE OF VOLUNTARY DISMISSAL

Pursuant to FRCP 41(a)(1), Plaintiff Voluntarily Dismisses the above entitled action against Secretary of the Air Force Frank Kendall, III. Given the disposition of a Stay of Proceedings, Plaintiff reached out to President Biden, and White House Staff promptly referred the matter to Department of the Air Force for processing (related documents attached). All issues and related concerns have been identified and submitted for direct review by Secretary Kendall and General Brown. Secretary Kendall is not directly responsible for damages incurred by Plaintiff, but inherited liability by virtue of his role and official capacity as Secretary of the Air Force. "Title 10 U.S. Code 1552 vests his position with the authority to change records." Plaintiff has identified and outlined relief requested in correspondence submitted for review.

Respectfully submitted,

Dated: August 11, 2023

/s/William L. Mitchell, Jr.

William L. Mitchell, Jr.,

Plaintiff Pro Se Litigant

2810 Turnberry Drive #915

Arlington, TX 76006

Telephone: 817-642-5440

Facsimile: 817-458-9990

E-mail: wil45@att.net

CERTIFICATE OF SERVICE

On August 11, 2023, I electronically submitted the foregoing document with the clerk of the court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all parties electronically or by certified mail, methods authorized by Federal Rule of Civil Procedure 5(b)(2).

Dated at Fort Worth, Texas this 11th day of August, 2023.

s/William L. Mitchell, Jr.
William L. Mitchell, Jr.,
Plaintiff Pro Se Litigant

ATTACHMENTS

1. White House Confirmation
2. SAF/LL Privacy Release Form

THE WHITE HOUSE
WASHINGTON, DC 20500

RECEIVED
WHITE HOUSE COMMUNICATIONS
AGENCY
2025 J STREET NW
WASHINGTON, DC 20500
JULY 12 1973
10:00 AM
[Signature]

William L. Mitchell Jr.
2810 Turnberry Drive, Apartment 915
Arlington, Texas 76006-2342

[REDACTED]



THE WHITE HOUSE
WASHINGTON

August 3, 2023

William L. Mitchell Jr.
Arlington, Texas

Dear William,

Thank you for taking the time to write the Biden-Harris Administration. White House staff reviewed your correspondence and forwarded it to the appropriate Federal agency for further action. For additional information about the Federal government in the meantime, please visit www.usa.gov or call 1-800-FED-INFO.

Sincerely,

The White House

SAF/LL
Privacy Release Form

Due to the restrictions of the Privacy Act of 1974, a signed consent form must be returned to allow for the viewing of any personal files and information. The information includes, but is not limited to, medical records relative to the inquiry.

To begin processing your request, please complete the following information:

CONSTITUENT NAME: William L. Mitchell, Jr.

ADDRESS 1: 2810 Turnberry Drive

ADDRESS 2: Apartment 915

CITY: Arlington STATE: Texas ZIP: 76006 COUNTY: Tarrant

PHONE NUMBER: HOME: (817) 642-5440 CELL: (817) 642-5440

EMAIL: wil45@att.net

SSN: 227-92-7679 DOB: January 5, 1965

SIGNATURE: DATE August 9, 2023

Please briefly describe the issue you're experiencing:

With administrative avenues exhausted, I am directly petitioning Secretary Kendall for the
correction of my military record and removal of negative evaluations identified on respective
applications. The fact applications involved Whistleblower Protections was overlooked.

Please provide contact, if any, with other agencies, or any additional information that would help us resolve your issue:

The Office of Ms. Opal Lee and Yvanna Cancela of the White House Office of Public
Engagement (W.H.O.P.E.). Ms. Lee's office was provided background information and
Ms. Cancela was recruited to liaise efforts between Ms. Lee and the White House.

APPENDIX I**United States Court of Appeals
for the Fifth Circuit**

William L. Mitchell, Jr.,
Petitioner

v.

Frank Kendall, III, Secretary of the Air Force,
Respondent

23-11035

Appeal from the U.S. District Court
for the Northern District of Texas in
No. 22-cv-00443, Judge Mark T. Pittman

Decided August 11, 2023

William L. Mitchell, Jr.,
Plaintiff Pro Se Litigant

This appeal is from a second voluntary dismissal, by Plaintiff, in a case involving the same claim. Under Federal Rules of Civil Procedure 41(a)(1)(A) and (B), the “Effect” of a second voluntary dismissal “acts as an adjudication on the merits.” The U.S. Court of Appeals for the Fifth Circuit gave the second voluntary dismissal a disposition of “without prejudice” and denied the appeal based on appellate jurisdiction. However, no opinion was provided. Denial of Plaintiff’s “Motion For Reconsideration” below.

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

No. 23-11035

FILED
May 2, 2024

Lyle W. Cayce
Clerk

WILLIAM L. MITCHELL, JR.,

Plaintiff—Appellant,

versus

FRANK KENDALL, III, *Secretary of the Air Force,*

Defendant—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:22-CV-443

UNPUBLISHED ORDER

Before JONES, SOUTHWICK, and Ho, *Circuit Judges.*

PER CURIAM:

This panel previously DISMISSED the appeals for lack of jurisdiction. The panel has considered Appellant's opposed motion for reconsideration.

IT IS ORDERED that the motion is DENIED.

APPENDIX J**United States Court of Appeals
for the Fifth Circuit**

William L. Mitchell, Jr.,

Petitioner

v.

Frank Kendall, III, Secretary of the Air Force,

Respondent

23-11035

Appeal from the U.S. District Court
for the Northern District of Texas in
No. 22-cv-00443, Judge Mark T. Pittman

Decided August 11, 2023

William L. Mitchell, Jr.,
Plaintiff Pro Se Litigant

This appeal is from a second voluntary dismissal, by Plaintiff, in a case involving the same claim. Under Federal Rules of Civil Procedure 41(a)(1)(A) and (B), the “Effect” of a second voluntary dismissal “acts as an adjudication on the merits.” The U.S. Court of Appeals for the Fifth Circuit gave the second voluntary dismissal a disposition of “without prejudice” and denied the appeal based on appellate jurisdiction. However, no opinion was provided. Denial of “Petition For Rehearing *En Banc*” below.

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

No. 23-11035

FILED
June 5, 2024

Lyle W. Cayce
Clerk

WILLIAM L. MITCHELL, JR.,

Plaintiff—Appellant,

versus

FRANK KENDALL, III, *Secretary of the Air Force,*

Defendant—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:22-CV-443

ON PETITION FOR REHEARING EN BANC

UNPUBLISHED ORDER

Before JONES, SOUTHWICK, and Ho, *Circuit Judges.*

PER CURIAM:

Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

CERTIFICATE OF COMPLIANCE

No. _____

William L. Mitchell, Jr.,
Petitioner

v.

Frank Kendall, III, Secretary of the Air Force,
Respondent

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 1,353 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 3rd day of September, 2024.

/s/William L. Mitchell, Jr.
William L. Mitchell, Jr.,
Plaintiff Pro Se Litigant

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

William L. Mitchell, Jr. — PETITIONER
(Your Name)

VS.

Frank Kendall, III (Sec. of AF) — RESPONDENT(S)

PROOF OF SERVICE

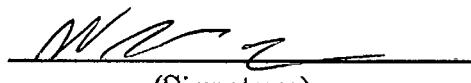
I, William L. Mitchell, Jr., do swear or declare that on this date, September 3, 2024, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

1. Brian W. Stoltz, AUSA, 1100 Commerce Street, Third Floor, Dallas, TX 76242-1699
2. Solicitor General of the United States, Room 5614, Department of Justice,
950 Pennsylvania Avenue North West, Washington, D.C. 20530-0001

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 3, 2024


(Signature)