

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO.

86-319

TITLE

JOHN R. VAN DRASEK, Petitioner V. JAMES H. WEBB, JR.,
SECRETARY OF THE NAVY, ET AL.

PLACE

Washington, D. C.

DATE

April 29, 1987

PAGES

1 - 38

1
2
3
4
5
6
7
8
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10
11
12
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14
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16
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IN THE SUPREME COURT OF THE UNITED STATES

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JOHN R. VAN DRASEK, :

Petitioners :

v. : No. 86-319

JAMES, H. WEBB, JR., SECRETARY :

OF THE NAVY, ET AL. :

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Washington, D.C.

Wednesday, April 29, 1987

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 12:59 o'clock p.m.

APPEARANCES:

STEPHEN G. MILLIKEN, ESQ., Washington, D.C.;

on behalf of the Petitioner.

MICHAEL K. KELLOGG, Assistant to the

Solicitor General, Department of Justice,

Washington, D.C.; on behalf of the

Respondent.

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20
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24
25

C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
STEPHEN G. MILLIKEN, ESQ.,	
on behalf of the Petitioner	3
MICHAEL K. KELLOGG, ESQ.,	
on behalf of the Respondent	24
<u>REBUTTAL ARGUMENT OF</u>	
STEPHEN G. MILLIKEN, ESQ.,	
on behalf of the Petitioner	36

1
2
3
4
5
6
7
8
9
10
11
12
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14
15
16
17
18
19
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P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear arguments first this afternoon in No. 86-319, John R. Van Drasek v. James H. Webb.

Mr. Milliken, you may proceed whenever you're ready.

ORAL ARGUMENT OF STEPHEN G. MILLIKEN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. MILLIKEN: Mr. Chief Justice, and may it please the Court.

The question presented in this case is whether military personnel should be denied judicial review when seeking only equitable relief for constitutional, statutory, or regulatory violations committed by their superior officers.

The question is whether Federal courts will ensure that military services will comply with the commands of the Constitution, of acts of Congress, and of their own regulations.

QUESTION: Mr. Milliken, you're not contending that the district court didn't review the constitutional issue on this case, are you?

MR. MILLIKEN: We contend that the district court more or less commented on the issue, but did not, in the context of this whistle-blower case, give

1 significant protection to the speech engaged in by
2 Captain Van Drasek, and did not employ the independent
3 scrutiny of the entire record requiring -- required in
4 First Amendment cases, as this Court said in Bose v.
5 Consumers Union --

6 QUESTION: Well, you're really complaining
7 that he didn't rule in your favor, which isn't the same
8 thing as to say that you got no judicial review.

9 MR. MILLIKEN: Mr. Chief Justice, the district
10 court failed not only to apply a proper First Amendment
11 scrutiny to the whistle-blower aspect of the case; the
12 district court failed to review at all the substantive
13 elements of the Article 138 complaint brought by Captain
14 Van Drasek, and failed to acknowledge that the district
15 court did have the power to review under the
16 Administrative Procedures Act.

17 Thus, it is our contention that indeed Captain
18 Van Drasek was denied review of the entire record, by
19 the district court's refusal to review the 138 record,
20 to review the allegations of command influence, and the
21 failures of investigations upon those complaints.

22 The district court, indeed, denied Captain Van
23 Drasek jurisdiction over a core element of his claim,
24 and thus, as the BCNR had done, the Board for Correction
25 of Naval Records, did not perform the independent review

1 required where there are matters of protected speech
2 addressing matters of public concern that have been
3 raised by a service member which result in that service
4 member losing the military career to which he has
5 devoted his life.

6 QUESTION: Will you make some comment,
7 counsel, about whether the case is or is not moot?

8 MR. MILLIKEN: This case is not moot because,
9 John Van Drasek, although he is medically disably
10 retired, serves in his retirement as a Captain, at the
11 rank of Captain.

12 The relief we seek is a return to the Board
13 for Correction of Naval Records with instruction that
14 that body undertake the review of the Article 138
15 investigation; and that the Federal court remain open to
16 protect the First And Fifth Amendment claims arising on
17 this record; and that then John Van Drasek would be
18 entitled, following that review, to be put before new
19 promotion boards with deletion of the retaliatory
20 material, in order that he could be properly considered
21 for promotion to major.

22 And thus the claim is not moot.

23 QUESTION: But may I ask you, in that inquiry,
24 can the review involve any matters that happened after
25 his second failure to be promoted?

1 I gather the first one back in April of '82.

2 MR. MILLIKEN: The first promotion passover
3 occurred in April of 1982, and that promotion
4 consideration occurred immediately following what it has
5 been uncontested was a killer fitness report, an
6 all-grade-B fitness report given to John Van Drasek by
7 his commanding colonel, Colonel Cooper.

8 QUESTION: But he had not yet -- at that time
9 he hadn't even started to serve on this review board at
10 the officers' candidate school, had he?

11 MR. MILLIKEN: That is absolutely correct.
12 The second promotion passover which occurred by a board
13 sitting in May of 1983, did of course follow all of the
14 events raised in the 138 complaint by Captain Van
15 Drasek.

16 And thus, the second promotion passover, which
17 would trigger under the up-or-out rule, his separation
18 from the corps, needed to take cognizance of all of the
19 circumstances arising prior to the date of that second
20 promotion report.

21 It is further significant that indeed --

22 QUESTION: But is anything subsequent to the
23 date of the second passover relevant?

24 MR. MILLIKEN: We would submit that, yes, the
25 fact that Captain Van Drasek is retired from the Marine

1 Corps resulted from his medical disability discharge.

2 The medical disability discharge processing
3 occurred following a May 23rd letter mailed by Captain
4 Van Drasek's original civilian counsel, Mr. Steinberg,
5 to the services.

6 QUESTION: May of '83?

7 MR. MILLIKEN: May of '83. Within three weeks
8 of that letter being sent, at a time when it was
9 requested that the Article 138 proceedings be reviewed,
10 within three weeks, on June 14th, 1983, Captain Van
11 Drasek was ordered to submit to a medical fitness board.

12 And there is in the record the comment that he
13 was sent there by his commanding general because of --

14 QUESTION: But is it not true that if you do
15 not succeed in having the second passover reviewed or
16 corrected in some way, that then his failure to be
17 promoted to major was automatic? I mean, his discharge
18 was going to follow automatically.

19 MR. MILLIKEN: There was no question. And I
20 only raise the matter of the orders for Captain Van
21 Drasek to report to the medical fitness board as they
22 came so closely on the retention of civilian counsel, as
23 a further retaliatory event.

24 QUESTION: But even if you're right about
25 that, that didn't affect his military status.

1 MR. MILLIKEN: No, that is correct, Mr.
2 Justice Stevens. And I would suggest that there are
3 four very clear events which occurred starting in
4 October, 1981, when John Van Drasek first addressed the
5 question of the denial of equal employment opportunity
6 to pregnant Marines to his commanding colonel, and the
7 immediate following of the killer fitness report.

8 And it has been uncontested that the bright
9 line all-excellent fitness report was a killer report.
10 No outstanding marks for the first time. It was
11 aberrant in relationship to John Van Drasek's career.

12 That event was followed by John Van Drasek
13 having failed in the personal face-to-face meeting with
14 his commander to effect the equal employment opportunity
15 for pregnant Marines, in drafting a proposed order for
16 the Marine Corps Development and Education Command which
17 would permit -- and this was done after he had consulted
18 with OB/GYN experts to ensure that there was no medical
19 danger to pregnant Marines proceeding with the training
20 at the noncommissioned officers leadership school.

21 And immediately after the proposal of that
22 order, John Van Drasek received the second fitness
23 report, with a predominance of excellent marks.

24 But more significantly, within one month, he
25 was demoted from the director of the noncommissioned

1 officers leadership school, to a position as an
2 academics officer; from principal of the school to a
3 teacher.

4 And thereupon followed his assignment to the
5 administrative discharge board by his commanding
6 general, General Toomey.

7 When he voted in the third incident, with the
8 unanimous board, to retain a Marine, despite an alleged
9 drug abuse ~~problem~~, he was removed from the next
10 administrative discharge board by his commanding
11 colonel, Colonel Cooper, and that is in direct violation
12 of the orders from the commanding general, General
13 Toomey, who had placed him in that position.

14 There was no power within Colonel Cooper to
15 remove Captain Van Drasek from that administrative
16 discharge board.

17 When he voted, in the fourth incident, for an
18 honorable discharge to a Marine North, the very same day
19 as that vote occurred, he was transferred out of that
20 command entirely.

21 He was returned, after a face-to-face with his
22 commanding Colonel Cooper. Then he broke his leg
23 parachuting, and he was transferred, again demoted, to
24 the position of publications processor.

25 Thus the incidents, we would submit the

1 district court was wrong in just pointing to the two
2 fitness reports as giving rise to the demotion of
3 Captain Van Drasek.

4 Because on the fitness report brief, may it
5 please the Court, the fitness report the promotion
6 boards who consider captains rising to the rank of
7 major, see the marks they receive; but they also see
8 their duty assignments and their grades.

9 And thus, from the time John Van Drasek sat on
10 that administrative discharge board, his career -- and
11 all he did was vote his conscience; we're talking about
12 a situation where an executive officer who institutes
13 charges, if displeased by what a court does, then
14 summarily abuses or removes or takes unlawful action
15 against a court, this is a corruption of a tribunal by
16 command influence.

17 QUESTION: Mr. Milliken --

18 MR. MILLIKEN: Yes.

19 QUESTION: -- I'm having a hard time
20 understanding what legal issues you think we ought to
21 address here.

22 It isn't a bit clear to me. Is it -- are you
23 arguing that the courts have an obligation to review
24 Article 138 proceedings?

25 MR. MILLIKEN: Yes, Your Honor, in this

1 context, and not only under --

2 QUESTION: Is that what we're talking about,
3 the issue of whether Federal courts can review Article
4 138 proceedings?

5 MR. MILLIKEN: The issue under which that
6 review arises is the First and Fifth Amendment claims,
7 the whistle-blower claims, which --

8 QUESTION: Well, what if we think the courts
9 below solved the constitutional questions; they just
10 ruled against you. Then what's left?

11 MR. MILLIKEN: Independent of the retaliatory
12 action against Captain Van Drasek, there is jurisdiction
13 to review the 138 investigation under the Administrative
14 Procedures Act.

15 There is also jurisdiction to review the
16 Article 138 investigation under the Fifth Amendment,
17 where the military failed to follow its own regulations
18 in conducting the 138 investigation.

19 Thus --

20 QUESTION: You mean, all 138 proceedings?

21 MR. MILLIKEN: Absolutely not, Justice
22 Marshall. This Court has delineated very bright lines
23 as to when the courts may interfere, or may command the
24 military to obey either a statute or a constitutional
25 provision.

1 In Feres and in Chappell, the question of
2 damages was found to be inappropriate as it might
3 threaten order and discipline in the military.

4 But this Court has never held, and indeed, the
5 respondents concede at page 44 of their brief, that the
6 Federal courts remain open, indeed, to directly review
7 constitutional claims, and the decisions in Goldman,
8 Frontiero, Parker, Schlesinger, Huff, and in numerable
9 cases, this Court has said the Federal courts remain
10 open to ensure not only that the military obeys the
11 Constitution, but that they follow their own regulations
12 in carrying out their military responsibilities.

13 In this case there is no request by Captain
14 John Van Drasek, as he is now retired, to have this
15 Court or any Federal court do other than vindicate
16 constitutional precepts and military regulations.

17 He did not suggest any method or any way in
18 which a military superior should conduct the properly
19 and purely military activities within the command; he
20 only spoke in favor of upholding the law of equal
21 employment opportunity and in favor of having corruption
22 free tribunals.

23 And in that regard, those matters are properly
24 of public concern. And indeed, they should be
25 especially protected matters of speech because John Van

1 Drasek would have been in violation of the law had he
2 not spoken up.

3 And it is our contention that having spoken
4 up, as the law required him, to suppress dissolute and
5 immoral activities in the Corps that he perceived --

6 QUESTION: Mr. Milliken, I have to confess,
7 I'm a little bit puzzled about the procedural posture of
8 the case. As I understood there is really -- there are
9 two separate proceedings, the Article 138 proceeding and
10 the BCNR proceeding.

11 Is that correct, or am I wrong?

12 MR. MILLIKEN: This Court in Chappell -- that
13 is correct. This Court in Chappell v. Wallace said that
14 there were Intra-service remedies available to aggrieved
15 service members, and that Article 138 and BCNR, too --

16 QUESTION: Well, you will have to go a little
17 slower for me, because I am not as familiar with the
18 whole procedure as perhaps I should be.

19 But you say they are separate procedures, the
20 138 procedure and the BCNR procedure?

21 MR. MILLIKEN: Justice Stevens, they are
22 separate --

23 QUESTION: And is the BCNR procedure the one
24 that dealt with the fitness reports and his failure to
25 be promoted?

1 MR. MILLIKEN: The BCNR decision did. And it
2 also found that it did not have jurisdiction to review
3 the Article 138 proceedings.

4 QUESTION: All right. And you're asking us --
5 basically, you're asking for review of the Article 138
6 proceeding, as I understand it?

7 MR. MILLIKEN: In both forms. Certainly,
8 BCNR, by grant of Congress, 10 U.S. Code Section
9 15-52(a) said the boards for correction of military
10 records are empowered to correct any military record to
11 remove an injustice.

12 QUESTION: But if we should conclude that
13 there was enough evidence, and there was no procedural
14 defect in the BCNR proceeding dealing with the fitness
15 reports and the failed two pass-overs, doesn't that put
16 an end to the case insofar as we're dealing with his
17 military status?

18 And then there's a separate problem about
19 whether he had some kind of right to an apology and all
20 the rest of it under the 138 proceeding?

21 MR. MILLIKEN: Justice Stevens, I would say
22 no, only because it was not the grade B marks on the
23 fitness report alone which led to the promotion
24 passover.

25 John Van Drasek came --

1 QUESTION: Well, the BCNR agrees with you;
2 there were other things, that's right.

3 But they concluded that the passovers were
4 proper, as I understood it. But there were other
5 reasons. He had a couple of other situations in which
6 his commanding officer thought he would have preferred to
7 have a different person in the assignment.

8 MR. MILLIKEN: And indeed, the Board for
9 Correction of Naval Records held, and this is on page 19
10 of the Joint Appendix, that the evidence of record --
11 that there is substantial additional evidence of record
12 raising questions about the judgment and fairness of the
13 CO-OCS, that's Colonel Cooper.

14 And in that connection the Board finds the
15 evidence sufficient to establish that the CO-OCS may
16 well have allowed petitioner's voting on the
17 administrative discharge board to influence his decision
18 to seek petitioner's transfer.

19 Thus in the greater review --

20 QUESTION: Then they went on to and said it
21 wasn't critical to the decision, did they not?

22 MR. MILLIKEN: They said that because the
23 fitness report, the original fitness report prepared by
24 Colonel Cooper had excellent marks, that it was an
25 excellent fitness report.

1 It has been uncontested in the record of
2 evidence before that board that an all-excellent bright
3 line fitness report, where this individual had never
4 previously failed to have outstanding marks contained
5 within his fitness --

6 QUESTION: Where are you reading from? What
7 was the page cite?

8 MR. MILLIKEN: Page 19 of the Joint Appendix,
9 Justice Scalia, beginning on the second line with "the
10 board notes that the evidence" and continuing down to
11 the word nevertheless.

12 And I would suggest that it is the
13 presentation of this substantial evidence of record that
14 there was a causal connection between the retaliatory
15 action and this officer speaking out that gives rise to
16 the First Amendment standards of review that apply to a
17 whistle-blower case, just as in Connick v. Myers, in
18 Pickering, in Mt. Healthy v. Doyle.

19 And indeed, in Mt. Healthy v. Doyle, that once
20 that evidence is adduced --

21 QUESTION: Yes, but this is not on the
22 whistle-blower issue; this is on the command influence
23 issue.

24 MR. MILLIKEN: They are one. And the
25 independent review required of a Federal court must

1 embrace all of the cause and effect, the action-reaction
2 events, which lead to the separation of the employee, as
3 certainly his demotion from director of the
4 noncommissioned officers leadership school down to a
5 paper processor, publications officer, was such a marked
6 reversal of an otherwise outstanding career. And all of
7 those demotions --

8 QUESTION: Yes, but the last sentence in the
9 paragraph is, finally the board notes that neither of
10 these reports could have been influenced by petitioner's
11 voting on the ADB because he was not appointed to serve
12 on the ADB until after the reports had been submitted.

13 MR. MILLIKEN: Justice Stevens, there is
14 absolutely no question. And with regard to those
15 fitness reports, it is our contention that they were in
16 retaliation for John Van Drasek having spoken up and
17 complained that pregnant Marines were not getting equal
18 employment opportunities.

19 So there are two matters which John Van Drasek
20 addresses, both of them matters of public concern: EEO
21 violations, and command influence, that most pernicious
22 element which principally gave rise to the promulgation
23 of the United States -- the Uniform Code of Military
24 Justice.

25 And I would suggest that in retaliation for

1 speaking up on behalf of pregnant Marines, John Van
2 Drasek received retaliatory negative fitness reports, a
3 killer fitness report which led to his first promotion
4 passover.

5 But in the ensuing months, in the ensuing year
6 between that first promotion passover and the second
7 promotion passover, that Colonel Copper, in displeasure
8 at John Van Drasek's having done no more than any judge
9 should ~~do, and~~ that is, vote his conscience and pursue
10 his obligations as a member of a court, a board, as he
11 was ordered to do by his commanding general, then finds
12 himself demoted from the director of the school down to
13 a position pushing papers; demoted first to teacher,
14 then to publications processor.

15 In that circumstance, we would submit that the
16 court, the reviewing BCNR and then the reviewing Federal
17 court, should undertake the First and Fifth Amendment
18 review required in a whistle-blower case to look at the
19 entire record of events, all of the lawful actions taken
20 by John Van Drasek, everyone of them required of him by
21 law, and all of the unlawful retaliatory actions
22 undertaken against him, both in connection with the EEO
23 giving rise to the retaliatory fitness reports, and in
24 regard to the complaints about command influence giving
25 rise to his removal, transfer and demotions.

1 In that respect, we would submit that under
2 Mt. Healthy v. Doyle, that there is a shift in the
3 burden. And at that point -- and in that case Mr. Chief
4 Justice Rehnquist wrote that the burden shifts to the
5 employer to show that but for the matters of protected
6 speech, and any action taken as a result thereof, that
7 that individual would have been separated anyway.

8 There is no evidence in this record that any
9 of the disabling events in Captain Van Drasek's career
10 arose out of anything but retaliation for his lawful
11 activities.

12 Thus, you have a situation where someone
13 speaks out to support the law, and their career ends.

14 QUESTION: Well, Mr. Milliken, are you
15 suggesting that the same standard governs review of what
16 you describe as a whistle-blower claim within the
17 military as governs in a schoolteacher's claim as in Mt.
18 Healthy?

19 MR. MILLIKEN: Mr. Chief Justice, there is not
20 the same test of review, but it is similar. And a
21 combination of those cases and the military cases that
22 have been decided by this Court reveals their
23 similarity, and reveals the adjustment necessary to
24 protect the independence, the deference which the
25 civilian world must show to the military to preserve

1 order and discipline.

2 In the case of a whistle-blower case arising
3 in a government agency, there is a balancing which has
4 been written to require an evaluation of the degree of
5 speech, the protection to be accorded it, and the degree
6 of intrusion in the service which the agency is
7 providing.

8 In the military's case, it would be
9 appropriate in that balancing to ensure that the Judges,
10 to quote from *Orloff v. Willoughby*, are not given the
11 task of running the Army.

12 There can be no determination by a court as to
13 how properly a weapon is to be handled, or other
14 particularly military determinations.

15 However, here we're talking about equal
16 employment opportunity. We're talking about command
17 influence, corruption of a court.

18 Who better than a court to decide that a court
19 should not be corrupted by the executive --

20 QUESTION: So what difference is there in the
21 standard of review in the case of your client as opposed
22 to Mr. Doyle in the Mt. Healthy case?

23 MR. MILLIKEN: The difference in the standard
24 of review is that where there is a determination made
25 that interference in a purely military determination

1 will hinder the orderly functioning of the military
2 services and its combat readiness, that the court
3 shouldn't interfere.

4 But where there are constitutional, statutory
5 and regulatory violations, and all the court is asked to
6 do is to have the military obey the law --

7 QUESTION: Well, you say, in effect, there's
8 no difference then? Because I take it in any of these
9 kind of whistle-blower claims, as you describe them,
10 there is a constitutional claim?

11 MR. MILLIKEN: Mr. Chief Justice, in the case
12 of Parker v. Levy, this Court undertook to determine the
13 constitutional vagueness of statutes in the military,
14 and determined that the peculiarly important element of
15 a military officer following the requirements of his
16 service required that the Court not determine that a
17 statute was unconstitutionally vague, even if it might
18 have been so determined in a civilian forum.

19 That's the best example I can think of where a
20 court can separate the requirements of a military
21 officer from the normal lawful requirements that the
22 military obey its own laws and the laws of the United
23 States.

24 QUESTION: Well, I think that a schoolteacher
25 has a tiny bit more of the right of freedom of speech

1 than a military private has; am I right?

2 MR. MILLIKEN: The Court may be right. And
3 this Court's decision --

4 QUESTION: I didn't say the Court. I said am
5 I right?

6 MR. MILLIKEN: I cannot disagree with that
7 proposition. And certainly --

8 QUESTION: Well, then, there is a difference.
9 Well, why don't you recognize that there's a difference?

10 MR. MILLIKEN: There is a difference, and
11 certainly this Court has held that the approval, prior
12 approval by commanders of circulating petitions to
13 Congress, and that the ability to say, for example, as
14 was said in the Parker case by this doctor, to all black
15 officers, you should not go and serve in Vietnam because
16 it's a racist war, that that was found to be properly
17 subject to court martial proceedings and the statute not
18 unconstitutionally vague, because you cannot have an
19 individual counselling individuals who are involved in
20 the service against going to war; that the military can
21 determine what wars to fight and how to fight them, and
22 you can't have somebody expressing dissidence which
23 undermines that authority.

24 Nothing in what John Van Drasek said or did
25 during the course of his career addressed a policy

1 determination or an executive function of the military.

2 All he spoke to was the following of the Navy
3 regulations and the Marine Corps EEO manual in regard to
4 allowing pregnant Marines to attend the school he was
5 made director of.

6 And all he spoke about in concern over the
7 tribunals was that the commander cannot dissuade
8 subordinates from testifying in trials, that the
9 commander cannot tell reviewing courts that they are to
10 accept, without fact finding, specific pieces of
11 evidence.

12 Thus, where you have the bright line
13 separation between a prohibition against damages action,
14 there is no prohibition -- and this Court has never
15 held, and should not now hold -- that equitable relief
16 is unavailable to a member of the military service in
17 the civilian courts.

18 Additionally, where as in Gilligan --

19 QUESTION: Mr. Milliken?

20 MR. MILLIKEN: Yes, Justice Scalia.

21 QUESTION: The Administrative Procedure Act
22 excludes from judicial review -- it says, agency means
23 each authority of the government of the United States,
24 but does not include courts martial and military
25 commissions.

1 Now, why would Congress not want us to review
2 courts martial and military -- either one of these
3 bodies, would you consider either one of them a military
4 commission?

5 MR. MILLIKEN: Certainly, not, and this Court
6 held --

7 QUESTION: Well, why would Congress -- I
8 presume that the decisions that can be made by court
9 martials and military commissions are even more
10 significant than the decisions that can be made by this
11 body, by these bodies?

12 MR. MILLIKEN: Courts martial have review
13 independent of the military through the Court of
14 Military Appeals, which was specially created so that
15 there would be a civilian review of criminal
16 prosecutions, criminal determinations made within the
17 military services.

18 And in regard to --

19 QUESTION: What about commissions?

20 MR. MILLIKEN: Military commissions have been
21 determined by this Court, and by all the commentators
22 that I have been able to find, to be exclusively the war
23 courts.

24 In that case of Madsen v. Kinsella, the
25 determination was so made, and that was a military

1 commission in Germany.

2 QUESTION: I'm just curious as to why you
3 think this is reviewable in Article III courts, and yet
4 Congress saw fit to exclude courts martial and military
5 commissions from Article III courts, which are very --
6 you know, I assume that review in an Article III court
7 is more significant than review anywhere else. And --

8 MR. MILLIKEN: That's correct.

9 QUESTION: -- it's been excluded specifically
10 for courts martial and military commissions. Yet you
11 say that these kind of determinations can be for a
12 whistle blower, never mind for someone who's been court
13 martialed, can be trotted off to Article III courts.

14 It just seems strange to me.

15 MR. MILLIKEN: The administrative -- Justice
16 Scalia, the Administrative Procedures Act was enacted in
17 1947. The Uniform Code of Military Justice, which
18 embraces 10 U.S. Code 938, the complaint of wrongs
19 enabling provision in this case, was promulgated in
20 1951.

21 Congress knew, by sending to the Secretary of
22 the Navy, that the -- of all Article 138 complaints for
23 final review by the Secretary of the Navy, that it would
24 come within the Administrative Procedures Act, or it
25 would have made it specifically unreviewable, as it did

1 in the case of --

2 QUESTION: There's no "s" in that, by the
3 way. It's the Administrative Procedure Act.

4 MR. MILLIKEN: Thank you, Justice Scalia.

5 QUESTION: I have a special love for that.
6 And when people say it wrong, it gets me.

7 MR. MILLIKEN: My point is simply that
8 Congress knew exactly what it was doing in those two
9 statutes, and specifically excluded review. And the
10 very specific exclusion of review, under this Court's
11 determination in Lindahl, includes in those matters not
12 specifically left out.

13 And this Court would have to legislate if it
14 were to exclude that matter.

15 I would ask to reserve what little time I have
16 left for rebuttal.

17 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
18 Milliken.

19 We'll hear now from you, Mr. Kellogg.

20 ORAL ARGUMENT OF MICHAEL K. KELLOGG, ESQ.,
21 ON BEHALF OF THE RESPONDENT

22 MR. KELLOGG: Mr. Chief Justice, and may it
23 please the Court.

24 As the preceding colloquy indicates, there is
25 some uncertainty as to the precise question presented in

1 this case.

2 In his petition, petitioner stated the
3 question at issue to be, whether citizens should be
4 barred from all redress in civilian courts for
5 constitutional wrong suffered in the course of military
6 service.

7 Now we explained in our brief why we felt that
8 question was not in fact presented here. The reason is
9 simple, ~~as~~ Chief Justice Rehnquist pointed out in the
10 preceding colloquy, the district court did entertain and
11 decide petitioner's constitutional claims.

12 Essentially, he raised two claims. First, he
13 charged that the military's processing of his Article
14 138 complaint violated his Fifth Amendment due process
15 rights.

16 The district court specifically considered and
17 rejected that claim, in its opinion at page A6 of the
18 petition, the court said, the court finds that the
19 processing of plaintiff's Article 138 complaint comports
20 with constitutional requirements. The investigation,
21 report of findings, and remedial action, satisfied the
22 minimum standards of procedural due process.

23 That finding was in turn affirmed by the Court
24 of Appeals, and petitioners offered no reason to think
25 that it is in any way incorrect.

1 He has in fact failed to specify any
2 procedural defect in the Article 138 proceeding.

3 Petitioner's second constitutional claim was
4 that his First Amendment rights were violated. That
5 claim was also considered and rejected by the district
6 court on the same page of its opinion, when it said,
7 plaintiff's allegations of First Amendment violations
8 similarly do not warrant relief.

9 Now, in his reply brief, petitioner appears to
10 acknowledge that his constitutional claims were decided
11 by the district court. He argues, however, that the
12 court didn't scrutinize the record, the entire record,
13 before deciding those constitutional claims.

14 Now the basis for that claim is not altogether
15 clear, but he appears to rely on the fact that the court
16 declined to review the Article 138 proceeding for
17 substantive correctness, and draws from that the
18 conclusion that the court must therefore have truncated
19 its review of the constitutional claims by ignoring any
20 facts relevant to the Article 138 proceeding.

21 In other words, the court shut its eyes to
22 crucial facts underlying the constitutional claims
23 before it decided those claims.

24 Now there's no basis for that argument
25 whatsoever in the record. The district court

1 specifically stated that it was reviewing the record for
2 constitutional violations, and that it found none.

3 In the course of its opinion, it canvassed all
4 the relevant facts.

5 Now admittedly, its discussion of the
6 constitutional claims was brief. But there's a very
7 simple explanation for that. The district court
8 discussed in some detail, in the context of the review
9 of the BCNR proceedings, petitioner's claims that his
10 fitness reports were biased, and that he was improperly
11 passed over for promotion.

12 The district court discussed those claims in
13 detail, and affirmed them in finding that the BCNR's
14 decision was supported by substantial evidence.

15 So when it came to the constitutional claims,
16 the underlying factual basis for those claims had
17 already been eliminated.

18 QUESTION: May I just ask you this, Mr.
19 Kellogg, what do you make of the Roman numeral I in the
20 district court's opinion: This court lacks jurisdiction
21 to review the merits of plaintiff's Article 138 claim?

22 Isn't there some tension between that and
23 going ahead and reviewing the merits and deciding them?

24 MR. KELLOGG: We understand that -- what the
25 district court meant by that was that you do not get APA

1 review of an Article 138 proceeding for substantive and
2 procedural correctness, as if it were the decision of
3 any other Federal agency, for example, to determine
4 whether the investigation was carried out in accordance
5 with military regulations, whether the investigating
6 officer interviewed enough witnesses, whether he weighed
7 the credibility of the witnesses properly and reached
8 proper results.

9 What the district court did in the course of
10 discussing Article 138 specifically address the
11 constitutional claims. It declined only to address the
12 substance of the Article 138 proceeding.

13 QUESTION: Well, do you agree that the
14 district court did have jurisdiction to review the
15 constitutional claims asserted in the 138 proceeding?

16 MR. KELLOGG: Well, in fact, no. In fact we
17 think --

18 QUESTION: So in other words, the portions of
19 the opinion on the merits that you rely on are portions
20 that he shouldn't have written under your view; is that
21 right?

22 MR. KELLOGG: In effect. Our position would
23 be that under this Court's precedents, the only cases
24 that a military serviceman can bring directly to Federal
25 court are cases involving statutes that are alleged to

1 be unconstitutional on their face.

2 But when he's arguing that he particularly, in
3 the circumstances of his case, was subjected to
4 unconstitutional retaliation, that he's required to
5 exhaust his administrative remedies prior to doing so.

6 And that therefore, the district court should
7 have confined itself to reviewing the decision of the
8 BCNR, which knocked out the factual underpinnings of his
9 constitutional claims.

10 QUESTION: Except that the BCNR, as I remember
11 it, didn't really deal with the whistle-blower claims.
12 Am I wrong on that? It's hard to keep all this straight.

13 MR. KELLOGG: Well, it's necessary to sort of
14 separate out the three sets of events.

15 QUESTION: Before you do that, could you tell
16 me whether you think the BCNR dealt with the
17 whistle-blower claims?

18 MR. KELLOGG: Yes.

19 QUESTION: You think they did?

20 MR. KELLOGG: Two-thirds of them. The
21 petitioner claims that he was wronged in three different
22 ways.

23 First, that his first two fitness reports, and
24 his first promotion passover, were in retaliation for
25 his complaints that he made about sex discrimination at

1 the officers candidates school.

2 Second, he claims that he was transferred out
3 of the officers candidate school, and removed from the
4 administrative discharge board in retaliation for his
5 votes as a member of the administrative discharge board.

6 Third, he claims that his second promotion
7 passover was in retaliation for having filed the Article
8 138 complaint.

9 Now, the BCNR specifically addressed and
10 rejected the first and the third of those claims. In
11 other words, it found that the fitness reports were not
12 biased, and the first promotion passover was not in
13 anyway improper.

14 And it found that the second promotion
15 passover was not in retaliation for the filing of the
16 Article 138 complaint.

17 With respect to the transfer out of OCS and
18 the removal of petitioner from the administrative
19 discharge board, the BCNR commented upon those events,
20 in the course of its discussion, but those events were
21 not specifically relevant to the claims that he was
22 wrongfully passed over for promotion.

23 So in other words, the BCNR addressed them as
24 sort of background material perhaps coloring --

25 QUESTION: He probably couldn't have presented

1 those to the board, could he?

2 MR. KELLOGG: No, because they wouldn't be
3 reflected in his service record in that respect.

4 QUESTION: Yes, yes. So this -- that
5 particular claim was just going to go unreviewed, even
6 administratively.

7 MR. KELLOGG: Well, I suppose -- I'm not
8 exactly sure --

9 QUESTION: Your argument about exhausting
10 administrative remedies, that claim was exhausted.

11 MR. KELLOGG: As far as the --

12 QUESTION: Transfer.

13 MR. KELLOGG: The transfer? Yes, that that
14 was exhausted.

15 QUESTION: And so why he can't he have that
16 action reviewed?

17 MR. KELLOGG: Because it's now moot.

18 QUESTION: Suppose it weren't?

19 MR. KELLOGG: Then under this Court's decision
20 in Orloff v. Willoughby, the propriety of duty
21 assignments is not a fit matter for judicial review.

22 QUESTION: And it -- what would it be, a
23 jurisdictional thing?

24 MR. KELLOGG: It would be more a --

25 QUESTION: Or just not a cause of action?

1 MR. KELLOGG: It would be more a question of
2 prudence rather than power of the court.

3 QUESTION: So the complaint is filed, and you
4 say, sorry, but this isn't for us?

5 MR. KELLOGG: In effect, that the settled
6 reluctance of the courts to intervene in internal
7 military affairs makes the propriety of the duty
8 assignment not an appropriate consideration.

9 QUESTION: Of course, if you win on that -- if
10 that's true, what about the other claims?

11 MR. KELLOGG: The other claims, he could
12 obtain review ordinarily on review of a BCNR decision,
13 and in fact he did so in this case.

14 QUESTION: And he did.

15 MR. KELLOGG: The district court affirmed the
16 findings of the board as supported by substantial
17 evidence, and the Court of Appeals in turn affirmed
18 that, and petitioner did not seek certiorari on the
19 question of whether the board's decision was in fact
20 supported by substantial evidence.

21 So Justice Stevens' point during the earlier
22 colloquy, that in effect, those claims are out of the
23 case now, is correct. The fitness reports, the
24 promotion passovers, are no longer relevant to these
25 proceedings.

1 That leaves his claims that he was improperly
2 transferred out of the officers candidate school, and
3 removed from the administrative discharge board.

4 But as we explained, those claims are moot,
5 because petitioner is no longer a member of the
6 Marines. He has received a retirement disability --

7 QUESTION: And they aren't reviewable anyway?

8 MR. KELLOGG: Pardon?

9 QUESTION: And they aren't reviewable anyway?

10 MR. KELLOGG: And they aren't reviewable
11 anyway.

12 In sum, therefore, petitioner now acknowledges
13 that the question upon which the Court granted
14 certiorari is no longer presented in this case.

15 The question which he has tried to put in its
16 place is fact bound, and in any event, depends upon a
17 misreading of the opinion below.

18 Furthermore, there's no longer a justiciable
19 controversy before the Court.

20 Under the circumstances, we would recommend
21 that the petitioner for writ of certiorari be dismissed
22 as improvidently granted.

23 Unless the Court has any further questions --

24 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
25 Kellogg.

1 Mr. Milliken, you have three minutes remaining.

2 REBUTTAL ARGUMENT OF STEPHEN G. MILLIKEN, ESQ.,

3 ON BEHALF OF THE PETITIONER

4 MR. MILLIKEN: Mr. Chief Justice, and may it
5 please the Court.

6 Captain Van Drasek has had his claim parsed by
7 the BCNR, by the district court, by the officer of the
8 Solicitor General. And what he seeks is merely to have
9 his ~~First~~ and Fifth Amendment claims reviewed on one
10 whole factual record, in one court, at one time.

11 Whether this Court would grant relief by
12 returning John Van Drasek to the Board for Correction of
13 Naval Records, with instructions that the Board for
14 correction of Naval Records is empowered to review the
15 elements of the 138 investigation which pertain to his
16 separation from the Marines, or whether that power lies
17 in the district court, it is the petitioner's contention
18 that to bar First Amendment whistle-blower cases from
19 review is to effectively close the doors to the
20 military.

21 And where relief is only sought of an
22 equitable nature, that then this Court would not have
23 constitutional power exercised by the Federal courts
24 over the military.

25 Captain Van Drasek asks that the matter be

1 returned to the BCNR or the district court. Captain Van
2 Drasek in both courts made very clear that the
3 appointment by General Carey of Colonel Lawson to
4 interpret the complaints against Colonel Cooper, the
5 appointment of a peer in the same command, was violative
6 of the JAG manual; was a procedural impropriety which
7 made the 138 investigation void from the outset; that
8 the failure to do a formal hearing, that the failure to
9 appoint counsel, indeed, to tell John Van Drasek, that
10 he could talk to a JAG lawyer, but he couldn't establish
11 an independent attorney-client relationship with a
12 lawyer; all of those procedural irregularities have been
13 pled by the petitioner throughout.

14 Thus, he has done nothing other than by the
15 law. He has gone to every court which this Court
16 suggested in Chappell v. Wallace. He has come before
17 this Court, and been granted an opportunity once again
18 to say that he would like to have his claim heard in its
19 entirety under the Constitution at one time in one
20 place.

21 Thank you very much.

22 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
23 Milliken.

24 The case is submitted.

25 (Whereupon, at 1:40 p.m., the case in the

above-entitled matter was submitted.)

John A. Rish
(REPORTER)

CERTIFICATION

Anderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#86-319 - JOHN R. VAN DRASEK, Petitioner V. JAMES H. WEBB, JR., SECRETARY
OF THE NAVY, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)

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