THE EXHAUSTION COMPONENT OF THE *MINDES* JUSTICIABILITY TEST IS NOT LAID TO REST BY *DARBY V. CISNEROS*

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I. Introduction

It has long been established among a majority of federal courts of appeals that, before a service member may bring a suit against the government challenging an internal military decision, he must first demonstrate that his claim is justiciable pursuant to the multi-faceted test announced by the Fifth Circuit in 1971 in *Mindes v. Seaman*.[2] An integral part of the *Mindes* justiciability test is the requirement that a service member exhaust his intramilitary remedies—a requirement that serves separation of powers concerns, preserves the primacy of the comprehensive system of military justice provided by Congress, avoids judicial confrontation of sensitive military issues that defy the application of judicially manageable standards of review, and protects vital interests that affect military readiness.

The Supreme Court's 1993 decision in *Darby v. Cisneros*[3] may be read as casting doubt on the continuing validity of the exhaustion component of the *Mindes* test in the context of claims brought by service members under the Administrative Procedure Act (APA)[4]—the statutory remedy invoked by service members who seek relief other than money damages on the ground that the military violated their regulatory, statutory,

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2. 453 F.2d 197 (5th Cir. 1971). In this article, the term "justiciability" is interchangeable with the term "reviewability" and connotes limitations—of a constitutional or prudential nature—on a court's power to review the merits of a claim.

3. 509 U.S. 137 (1993).

4. 5 U.S.C. §§ 701-706 (2000).

or constitutional rights. In *Darby*, which arose in the civilian context, the Court held that, unless exhaustion is required by statute or agency rule as a prerequisite to judicial review, the APA divests courts of discretion to require a plaintiff to exhaust administrative remedies prior to seeking judicial review of "final" agency action. In other words, where the agency decisionmaker reaches a definitive position on an issue that inflicts actual, concrete injury on a party, that decision is subject to APA review, and courts are "not free to impose an exhaustion requirement as a rule of judicial administration."[5]

This article examines the *Mindes* decision and its widespread acceptance among federal courts. Next, this article examines the *Darby* decision, and then reviews several cases that have applied *Darby*—with inconsistent results—to service members' APA claims. Finally, this article considers whether *Darby* should be extended to the military context, thereby absolving service members from exhausting their intramilitary remedies prior to seeking APA relief. This inquiry is resolved in the negative.

That *Darby*'s interpretation of the APA does not apply in the military context is consistent with the *Feres* rule of statutory construction, which provides that statutes of general applicability should not, by inference, be construed as applying to the same extent, if at all, to service members' claims challenging service-related decisions, because the routine adjudication of such claims will threaten the effective performance of vital military functions. Moreover, retaining the exhaustion component of *Mindes* test for APA claims brought by service members will prevent premature judicial review of service members' claims, which would marginalize and supplant the comprehensive system of intramilitary remedies enacted by Congress pursuant to its explicit and plenary constitutional authority to regulate the military. In this regard, the exhaustion component of the *Mindes* justiciability test serves the same important interests as does the primary jurisdiction doctrine, from which the exhaustion component in *Mindes* actually evolved.

Exhaustion of intramilitary remedies should, therefore, continue to be the rule for APA claims brought by service members. The *Darby* decision itself seems to have signaled this result when it observed that federal courts remain free in APA suits "to apply, where appropriate, other prudential doctrines of judicial administration to limit the scope and timing of judicial

5. *Darby*, 509 U.S. at 144, 153-54.

review."[6] The *Mindes* justiciability test in its integrated entirety—including its exhaustion component—constitutes one such doctrine that should continue to limit the timing and scope of judicial review of service members' APA claims.

II. The Origin and Widespread Acceptance of the *Mindes* Justiciability Test

A. The *Mindes* Test

Nearly three decades ago, the Fifth Circuit in *Mindes v. Seaman*[7] established a multi-factor test for determining the reviewability of claims challenging internal military decisions. The need for a justiciability doctrine limiting the types of claims that service members could bring arose from judicial (1) reluctance to second-guess professional military judgments, (2) apprehension that courts would be inundated with service members' complaints, and, most important, (3) concern that unrestricted review of claims brought by service members would impair the military in the performance of its vital mission.[8]

After canvassing Supreme Court and appellate precedent, the Fifth Circuit distilled the following principles. Federal courts are empowered to review internal military decisions to determine if an official exceeded his scope of authority or rendered a decision in violation of a constitutional, statutory, or regulatory right.[9] Courts are restricted, however, in their ability to review decisions that implicate military discretion and expertise or affect core military functions. The types of challenges that raise these types of concerns include—but obviously are not limited to—service members' claims challenging suitability decisions, promotions, duty assignments, command assignments, transfer decisions, and orders related to specific military functions.[10] Finally, courts routinely require service members to exhaust intramilitary remedies before seeking judicial relief.[11]

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6. *Id.* at 146.
7. 453 F.2d 197 (5th Cir. 1971).
8. *Id.* at 199.
9. *Id.* at 199-201.
10. *Id.* at 199-202.
11. *Id.* at 200. In support of its inclusion of an exhaustion component in the *Mindes* justiciability test, the court relied on *In re Kelly*, 401 F.2d 211 (5th Cir. 1968), and *Tuggle v. Brown*, 362 F.2d 801 (5th Cir. 1966) — both which held that a service member must

From these principles, the Fifth Circuit formulated an integrated justiciability test, consisting of a threshold two-prong procedural component, followed by a four-factor balancing component. First, a service member's claim challenging a military decision will be deemed non-justiciable unless he has (1) exhausted available intramilitary remedies, and (2) alleged the deprivation of a constitutional, statutory, or regulatory right.[12] If the service member satisfies these threshold requirements, the court will then determine the reviewability of the claim by balancing the following factors: (1) the nature and strength of the member's challenge; (2) the potential injury to the member if review is denied; (3) the type and degree of interference with the military function if review is permitted; and (4) the extent of military expertise or discretion that is involved in the challenged decision.[13]

B. A Majority of Courts of Appeals Have Adopted Either the *Mindes* Test or an Analogous Reviewability Test that Includes an Exhaustion Component

In the nearly thirty years since the Fifth Circuit announced the *Mindes* test, the Supreme Court has not expressed a view on it. Although the Court has adjudicated the merits of service members' claims without applying (or discussing) the *Mindes* test,[14] this should not be viewed as a rejection of *Mindes*. Such a conclusion would ignore the venerable principle that questions that lurk behind the record, not brought to a court's attention or ruled upon, lack precedential value.[15] As the Ninth Circuit stated, the Supreme Court's failure to apply the *Mindes* justiciability test in *Goldman v. Weinberger*,[16] for example, should not be construed as evincing disap-

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11. (continued) exhaust his administrative remedies before seeking judicial review. Notably, in *Tuggle*, the Fifth Circuit relied on *McCurdy v. Zuckert*, 359 F.2d 491 (5th Cir. 1966), which equated the exhaustion requirement in the military context with the primary jurisdiction doctrine. Thus, in light of its origin, the exhaustion component in *Mindes* may more aptly be characterized as the primary jurisdiction component. *See infra* text accompanying notes 128-38.

12. *Mindes*, 453 F.2d at 201.

13. *Id.*

14. *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503 (1986); Chappell v. Wallace, 462 U.S. 296 (1983); Rostker v. Goldberg, 453 U.S. 57 (1981).

15. Webster v. Fall, 266 U.S. 507, 511 (1925); *cf.* Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 119 (1984) (noting that when question of jurisdiction has been passed upon in prior case without discussion, court is not bound when subsequent case raises that issue).

16. 475 U.S. 503 (1986).

proval, because had the Court intended to express a view on *Mindes*, "it would surely have made some reference to [it]."[17]

The following seven circuits have adopted the *Mindes* test in its entirety: the First,[18] the Fourth,[19] the Fifth,[20] the Eighth,[21] the Ninth,[22] the Tenth,[23] and the Eleventh.[24] The Sixth Circuit has cited the *Mindes* decision with approval,[25] and it has recognized the importance of requiring service members to exhaust their intramilitary remedies prior to seeking judicial review.[26] The Second Circuit has not expressed a view on the *Mindes* test, but it has recognized that challenges to discretionary decisions by military officials acting within their authority are generally not justiciable.[27] Moreover, it has held that service members seeking to challenge military decisions must ordinarily exhaust their intramilitary remedies.[28]

In contrast, the D.C. Circuit, Third Circuit, and Seventh Circuit have declined to adopt the balancing component of the *Mindes* test. Instead, the D.C. Circuit[29] and the Third Circuit[30] apply traditional standards of justiciability to service members' claims, while the Seventh Circuit applies a

17. Khalsa v. Weinberger, 787 F.2d 1288, 1289 n.1 (9th Cir. 1986).

18. Nava v. Gonzalez Vales, 752 F.2d 765 (1st Cir. 1985); Penagaricano v. Llenza, 747 F.2d 55 (1st Cir. 1984).

19. Guerra v. Scruggs, 942 F.2d 270 (4th Cir. 1991); Williams v. Wilson, 762 F.2d 357 (4th Cir. 1985).

20. NeSmith v. Fulton, 615 F.2d 196 (5th Cir. 1980); West v. Brown, 558 F.2d 757 (5th Cir. 1977).

21. Nieszner v. Mark, 684 F.2d 562 (8th Cir. 1982).

22. Barber v. Widnall, 78 F.3d 1419 (9th Cir. 1996); Christoffersen v. Washington State Air Nat'l Guard, 855 F.2d 1437 (9th Cir. 1988); Sebra v. Neville, 801 F.2d 1135 (9th Cir. 1986); Khalsa v. Weinberger, 779 F.2d 1393 (9th Cir.), *reaff'd*, 787 F.2d 1288 (1986); Helm v. California, 722 F.2d 507 (9th Cir. 1983); Gonzalez v. Dep't of the Army, 718 F.2d 926 (9th Cir. 1983).

23. Clark v. Widnall, 51 F.3d 917 (10th Cir. 1995); Costner v. Oklahoma Army Nat'l Guard, 833 F.2d 905 (10th Cir. 1987); Rich v. Sec'y of the Army, 735 F.2d 1220 (10th Cir. 1984); Lindenau v. Alexander, 663 F.2d 68 (10th Cir. 1981).

24. Stinson v. Hornsby, 821 F.2d 1537 (11th Cir. 1987); Rucker v. Sec'y of the Army, 702 F.2d 966 (11th Cir. 1983).

25. Dunlap v. Tennessee, 514 F.2d 130, 133 (6th Cir. 1975).

26. Seepe v. Dep't of the Navy, 518 F.2d 760, 762-65 (6th Cir. 1975).

27. Jones v. New York State Div. of Mil. and Nav. Affairs, 166 F.3d 45, 52, 54 (2d Cir. 1999); Kurlan v. Callaway, 510 F.2d 274, 280 (2d Cir. 1974).

28. Guitard v. Sec'y of the Navy, 967 F.2d 737, 740 (2d Cir. 1992).

29. Kreis v. Sec'y of the Navy, 866 F.2d 1508, 1511-12 (D.C. Cir. 1989); Emory v. Sec'y of the Navy, 819 F.2d 291, 293-94 (D.C. Cir. 1987); Dilley v. Alexander, 603 F.2d 914, 920 (D.C. Cir. 1979).

30. Dillard v. Brown, 652 F.2d 316, 323 (3d Cir. 1981).

unique and deferential justiciability test that inquires "whether the military seeks to achieve legitimate ends by means designed to accommodate the individual right at stake to an appropriate degree."[31] Significantly, each of these courts has recognized the importance of requiring service members to exhaust their intramilitary remedies.[32]

Finally, although the Federal Circuit's grant of jurisdiction does not extend to APA claims,[33] that court has favorably cited *Mindes*.[34] Moreover, the Federal Circuit has held that, at least in cases that do not implicate military pay issues, service members must pursue their intramilitary remedies in the first instance in order to "give the military decision-maker a chance to determine whether a complainant's pursuit in that particular case may be meritorious and, if not, a chance to say why."[35]

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31. Knutson v. Wisconsin Air Nat'l Guard, 995 F.2d 765, 768 (7th Cir. 1993).

32. Bois v. Marsh, 801 F.2d 462, 468 (D.C. Cir. 1986) ("[A] court should not review internal military affairs in the absence of . . . exhaustion of available intraservice corrective measures."); Jorden v. Nat'l Guard Bureau, 799 F.2d 99, 102 n.5 (3d Cir. 1986) (holding that a service member should be required to exhaust unless administrative remedy would be inadequate); Duffy v. United States, 966 F.2d 307, 311 (7th Cir. 1992) (holding that a service member ordinarily "will find the doors of the federal courthouse closed pending exhaustion of available administrative remedies").

33. Service members who invoke the Federal Circuit's jurisdiction, 28 U.S.C. § 1295, allege causes of action pursuant to the Tucker Act, 28 U.S.C. § 1491(a)(1), or the Little Tucker Act, 28 U.S.C. § 1346(a)(2), which authorize certain *damage* claims. In contrast, a service member may bring an APA action only where he seeks "relief other than money damages," and only in cases "for which there is no other adequate remedy in a court." 5 U.S.C. §§ 702, 704 (2000).

34. Dodson v. United States, 988 F.2d 1199, 1207 n.7 (Fed. Cir. 1993); Vogue v. United States, 844 F.2d 776, 781 n.7 (Fed. Cir. 1988); Maier v. Orr, 754 F.2d 973, 983 n.9 (Fed. Cir. 1985).

35. Williams v. Sec'y of the Navy, 787 F.2d 552, 559 (Fed. Cir. 1986). The Federal Circuit has held that exhaustion of intramilitary remedies is not required in military pay cases, because the six-year statute of limitations that governs such claims, 28 U.S.C. § 2501, is jurisdictional and therefore not susceptible to tolling during the pendency of administrative review. *See* Hart v. United States, 910 F.2d 815, 818-19 (Fed. Cir. 1990); Hurick v. Lehman, 782 F.2d 984, 987 (Fed. Cir. 1986); Heisig v. United States, 719 F.2d 1153, 1155 (Fed. Cir. 1983). As discussed *infra* Part IV.B, however, weighty separation of powers concerns underlie the application of the exhaustion doctrine in the military context. When these concerns militate in favor of exhaustion in timely filed cases involving pay claims, the Federal Circuit could require exhaustion consistent with Circuit precedent by staying the action and remanding to the military branch. In this regard, the Tucker Act provides that "[i]n any case within its jurisdiction, the court shall have the power to remand matters to any administrative or executive body or official with such direction as it may deem proper and just." 28 U.S.C. § 1491(1)(2).

In sum, federal courts of appeals are unanimous in recognizing that military-related claims brought by service members raise unique justiciability concerns of practical and constitutional significance, and such claims generally should not be reviewed if the service member (1) has not exhausted intramilitary remedies, or (2) challenges a military decision that is not suitable for judicial review. Although, as discussed above, the courts differ to some degree in their approach to the latter inquiry,[36] they are in substantial agreement that the reviewability inquiry should include the exhaustion component.[37]

III. The Supreme Court's Decision in *Darby* and How Courts Have Applied it to APA Claims Brought By Service Members

A. The *Darby* Decision

In *Darby v. Cisneros*,[38] the Department of Housing and Urban Development (HUD) administratively sanctioned petitioners after concluding that they had improperly circumvented federal rules in order to receive federal mortgage insurance for their multi-family development projects.[39] Petitioners appealed to an administrative law judge, who reduced the administrative sanctions in light of certain mitigating factors, and this decision became final agency action when neither party elected to seek further administrative review.[40]

Petitioners filed an APA action in federal district court, arguing that the sanctions imposed by HUD were not in accordance with law and thus

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36. *Compare, e.g.*, *Mindes* balancing test (cases cited *supra* notes 18-24) *with* standard justiciability test (cases cited *supra* notes 29 & 30) *and* modified justiciability test (case cited *supra* note 31).

37. Of course, in those instances where a service member is able to demonstrate that his interest in immediate judicial review outweighs the countervailing institutional interests favoring exhaustion, a court has discretion to excuse a service member from exhausting. *See* McCarthy v. Madigan, 503 U.S. 140 (1992); McKart v. United States, 395 U.S. 185 (1969).

38. 509 U.S. 137 (1993).

39. *Id.* at 140-41.

40. The HUD's regulation provided that the decision of the Administrative Law Judge is final unless "the Secretary or his designee, within 30 days of receipt of a request decides as a matter of discretion to review the finding of the hearing officer. . . . Any party may request such a review writing within 15 days of receipt of the hearing officer's determination." *Id.* at 141 (quoting 24 C.F.R. § 24.314(c)).

violated the APA.[41] The HUD moved to dismiss, claiming that petitioners—by forgoing the opportunity to seek review by the secretary pursuant to 24 C.F.R. § 24.314(c)[42]—failed to exhaust administrative remedies. The district court rejected HUD's exhaustion argument and entered summary judgment for petitioners.[43] The court of appeals reversed, holding that petitioners' action should have been dismissed for failure to exhaust.[44]

The Supreme Court granted certiorari to consider "whether federal courts have the authority to require that a plaintiff exhaust available administrative remedies before seeking judicial review under the [APA], where neither the statute nor agency rules specifically mandate exhaustion as a prerequisite to judicial review."[45] The critical inquiry was whether Congress had spoken to the issue of exhaustion, because courts lack discretion to impose an exhaustion requirement on plaintiffs where Congress has directed otherwise. The *Darby* court concluded that Congress had spoken directly to the exhaustion requirement in 5 U.S.C. § 704, which provides:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. . . . Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.[46]

Applying the plain language in section 704, the *Darby* court held that courts may require exhaustion in the context of APA claims "only when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review. Courts are not free to impose an exhaustion requirement as a

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41. *Id.* at 142 (citing 5 U.S.C. § 706(2)(A)).
42. *See supra* note 40.
43. *Darby*, 509 U.S. at 142.
44. *Id.*
45. *Id.* at 138.
46. *Id.* (quoting 5 U.S.C. § 704).

rule of judicial administration where the agency action has already become 'final' under [section 704]."[47]

B. The Lower Courts Have Been Inconsistent in Applying *Darby* to APA Claims Brought by Service Members

In the seven years since *Darby* was decided, the lower courts have rendered inconsistent or inconclusive decisions as to whether *Darby* extends to APA claims brought by service members. The D.C. Circuit in two unpublished decisions applied *Darby* to excuse service members from exhausting their intramilitary remedies prior to seeking APA review.[48] On the other hand, in another unpublished decision, the D.C. Circuit—without mentioning *Darby*—summarily held that a former service member, who appeared to be advancing an APA claim, may not "seek injunctive relief prior to exhausting available administrative remedies."[49] Because these decisions are not published, they may not be cited as precedent pursuant to D.C. Circuit Rule 28(c).

In at least two cases in the Ninth Circuit, the issue of whether *Darby* applies to service members' APA claims has been briefed,[50] but the Ninth Circuit has declined to address the issue—although its disposition in both cases suggests that the exhaustion component of the *Mindes* test remains unaffected by *Darby.* In one case, where a service member was challenging the lawfulness of his separation proceedings and the constitutionality of the regulations that required his discharge, the court acknowledged that "strict application of exhaustion requirement in military discharge cases helps maintain the balance between military authority and federal court intervention,"[51] but it refused to require exhaustion on grounds of futility.[52] In another discharge case, where a service member contended that the military erred in failing to diagnose his service-related disability, the court held in an unpublished decision that the exhaustion rule should

47. *Id.* at 154.

48. Ostrow v. Sec'y of the Air Force, 48 F.3d 562, 1995 WL 66752 (D.C. Cir. 1995) (table); Dowds v. Clinton, 18 F.3d 953, 1994 WL 85040 (D.C. Cir. 1994) (table).

49. Jones v. Sullivan, 1995 WL 551256 (D.C. Cir. 1995).

50. *See* Brief for the Appellees, Kennedy v. Sec'y of the Army, No. 99-15214, at 22-24 (served Mar. 31, 1999); Brief for the Appellants, Meinhold v. United States Dep't of Defense, No. 93-55242, at 17-18 (served July 29, 1993).

51. Meinhold v. United States Dep't of Defense, 34 F.3d 1469, 1473-74 (9th Cir. 1994).

52. *Id.* at 1474.

be strictly applied in military discharge cases, and that plaintiff had not shown that an exception to this rule was warranted in his case.[53]

Two district courts in the Seventh Circuit have held that *Darby* absolves service members from exhausting their intramilitary remedies. In *St. Clair v. Secretary of the Navy,*[54] a former service member brought an APA claim arguing that the characterization of his discharge should be upgraded from "general" to "honorable." The government argued that the member's claim should be dismissed because he had not yet exhausted his intramilitary remedies—that is, had not sought relief from the Board for Correction of Naval Records—as required by Seventh Circuit case law.[55] The district court for the Central District of Illinois noted that the Seventh Circuit case law cited by the government preceded the decision in *Darby,* and that *Darby* no longer required exhaustion for plaintiffs seeking APA remedies unless exhaustion is "expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review."[56] Because "neither the applicable statute, 10 U.S.C. § 1552, nor regulations, 32 C.F.R. Part 723-24, expressly require appeal to the [Board for Correction of Naval Records] before judicial review," the court held that exhaustion was not required.[57]

Similarly, in *Perez v. United States*,[58] the district court for the Northern District of Illinois held that, after *Darby,* a service member need not exhaust intramilitary remedies prior to pursuing an APA remedy. In *Perez,* a service member who had been administratively discharged from the Navy for the commission of a serious offense sought a judicial declaration that his discharge was void and an order compelling the Navy to reinstate him.[59] The government moved to dismiss, arguing that *Darby* should not be extended to the unique military context.[60] The district court rejected this argument, holding that if APA claims brought by service members are

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53. Kennedy v. Sec'y of the Army, 191 F.3d 460, 1999 WL 710317 (9th Cir. 1999) (table).

54. 970 F. Supp. 645 (C.D. Ill. 1997).

55. *Id.* at 647.

56. *Id.* (quoting Darby v. Cisneros, 509 U.S. 137, 154 (1993)).

57. *St. Clair*, 970 F. Supp. at 648. The court opined that if the "Navy wishes to require an appeal to the BCNR before judicial review under these circumstances, it should include an express requirement in its regulations or ask Congress to include such an express requirement in the statute." *Id.*

58. 850 F. Supp. 1354 (N.D. Ill. 1994).

59. *Id.* at 1357.

60. *Id.* at 1360.

to be exempted from the *Darby* rule, such an exemption should come from the Supreme Court or Congress.[61]

District courts in the Ninth Circuit have reached inconsistent results regarding whether *Darby* applies to service members' APA claims. In *Watson v. Perry*,[62] a Naval officer challenged the constitutionality of a statute and its implementing regulations that mandated his discharge. Applying *Darby*, the district court for the Western District of Washington held that exhaustion is only a prerequisite to judicial review of final agency action when expressly required by statute, or when agency rule requires exhaustion and the administrative action is made inoperative pending administrative review.[63] Because resort to the Board for Correction of Naval Records was not mandated by statute or regulation, the court held that exhaustion of intramilitary remedies was not required.[64]

In contrast, the district court for the Southern District of California held that *Darby* does not relieve a service member from exhausting his intramilitary remedies prior to seeking APA relief. In *Saad v. Dalton*,[65] a discharged Naval officer challenged the constitutionality of her separation and sought reinstatement. The district court granted the government's motion to dismiss for failure to exhaust. The court observed that the Constitution vests the political branches with the responsibility for regulating and governing the military, and that the orderly functioning of government and the preservation of military readiness requires the judiciary scrupulously to avoid interfering in legitimate military matters.[66] In light of these concerns, service members must exhaust intramilitary remedies before pursuing judicial review, and *Darby*—which occurred in the civilian context—does not alter this conclusion, because "[r]eview of military personnel actions . . . is a unique context with specialized rules limiting judicial review."[67]

Finally, one district court in the Tenth Circuit refused to apply any portion of the *Mindes* justiciability test in light of *Darby*, but the Tenth Circuit reversed in an unpublished decision.[68] The Tenth Circuit held that the

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61. *Id.* at 1361.

62. 918 F. Supp. 1403 (W.D. Wash. 1996), *aff'd*, 124 F.3d 1126 (9th Cir. 1997). On appeal, the exhaustion issue was neither raised nor addressed.

63. *Id.* at 1411.

64. *Id.*

65. 846 F. Supp. 889 (S.D. Cal. 1994).

66. *Id.* at 891.

67. *Id.*

Mindes test still applies to APA claims brought by service members,[69] but it noted that it need not reach the question of the "viability of the exhaustion component of the first step of the *Mindes* test in light of *Darby* because there is no issue of failure to exhaust in this case."[70]

IV. *Darby* Does Not Require Deleting the Exhaustion Component of the *Mindes* Test for Service Members' APA Claims

A. Retaining the Exhaustion Component of the *Mindes* Test is Consistent with Congressional Intent

As shown above, no court of appeals has squarely resolved in a published opinion whether *Darby* extends to APA claims brought by service members. The unpublished decisions of the D.C. Circuit appear to be inconsistent in their application of the exhaustion doctrine to service members' APA claims. The Ninth Circuit has declined to address *Darby*, but appears to be continuing to apply the exhaustion component of the *Mindes* test to service members' APA claims. District courts that have considered the issue have reached differing conclusions.

Due regard for service members' rights, congressional intent, and military readiness demand that *Darby* be applied in a consistent, and therefore foreseeable, fashion. As this article now discusses, courts should con-

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68. Robertson v. United States, 145 F.3d 1346, 1998 WL 223159 (10th Cir. 1998) (table).

69. 1998 WL 223159, at *3.

70. *Id.* at *4 n.2.

71. *Darby* recognized that it remains open to Congress and agencies to take affirmative steps, in the form of legislation or regulation, to "mandate exhaustion as a prerequisite to [APA] judicial review." Darby v. Cisneros, 509 U.S. 137, 138 (1993). Such a legislative or regulatory response in the military context is feasible and has been explored in other articles. *See, e.g.*, Michael E. Smith, *The Military Personnel Review Act: Department of Defense's Statutory Fix For Darby v. Cisneros*, ARMY LAW., Feb. 1997, at 3; William T. Barto, *Judicial Review of Military Administrative Decisions After Darby v. Cisneros*, ARMY LAW., Sept. 1994, at 3. This article concludes, however, that—given the special rule of statutory construction that applies in the military context, as well as unique separation of powers concerns that are implicated when a service member uses the judicial forum to challenge an internal military decision—a legislative response is not necessary because *Darby*

clude that *Darby*'s holding is no bar to applying the exhaustion component of the *Mindes* test to service members' APA claims.[71]

In *Darby*, the Supreme Court's paramount concern was applying the APA "in a manner consistent with congressional intent."[72] Because the APA provides for judicial review of "final agency action,"[73] *Darby* held that courts may not, consistent with congressional intent, "impose an exhaustion requirement as a rule of judicial administration where the agency order has already become 'final' under § 10(c) [of the APA, 5 U.S.C. § 704]."[74]

However, applying the exhaustion component of the *Mindes* test to service members who use the APA to challenge internal military decisions is not a rule of judicial administration that serves to supplant the APA's finality requirement. Rather, it is a critical factor in an integrated, reviewability matrix that—like the political question doctrine[75] and the primary jurisdiction doctrine[76]—serves separation of powers concerns. Application of the doctrine results in channeling claims that are unsuitable for judicial review to the appropriate congressionally created review board, which will compile an administrative record, render findings of fact, and apply

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71. (continued) should not be read as extending to the military context.

72. *Darby*, 509 U.S. at 153.

73. 5 U.S.C. § 704 (2000).

74. *Darby*, 509 U.S. at 154.

75. The Ninth Circuit has analogized the *Mindes* reviewability test to the political question doctrine, observing that both doctrines serve to filter out claims that "may prove unsuitable for review by a court acting in its traditional judicial role." Khalsa v. Weinberger, 779 F.2d 1392, 1395-96 (9th Cir.), *reaff'd*, 787 F.2d 1288 (9th Cir. 1986). When a service member is permitted to seek judicial review without exhausting, courts encounter difficulty "finding judicially manageable standards to justify intervention into internal decisions grounded in military expertise . . . [o]wing to the distinctive role of the military and the exceptional nature of its organization and activities." 779 F.2d at 1395 n.1. *See* Stephen R. Brodsky, *Chappell v. Wallace: A Bivens Answer to a Political Question*, 35 NAVAL L. REV. 1, 25-40 (1986).

76. The D.C., Third, and Fifth Circuits have concluded that the exhaustion doctrine in the military context is analogous to the primary jurisdiction doctrine—a power-allocation doctrine that determines whether certain claims should be resolved in an administrative or judicial forum. *See infra* text accompanying notes 130-49. Indeed, the exhaustion component in the *Mindes* test is derived from Fifth Circuit precedent that held that a service member's failure to exhaust renders an action premature pursuant to the primary jurisdiction doctrine. *See supra* note 11; *infra* text accompanying notes 131-38. In addition to being related to the primary jurisdiction doctrine, the exhaustion doctrine is related to the doctrines of abstention and ripeness, which also "govern the timing of federal court decisionmaking." McCarthy v. Madigan, 503 U.S. 140, 144 (1992).

particularized expertise in interpreting and applying relevant military regulations and policies.[77]

Equally important, retaining the exhaustion component of the *Mindes* test conforms with congressional intent. It is well established that "congressionally uninvited intrusion into military affairs by the judiciary is inappropriate."[78] This is true because (1) the Constitution vests Congress, not the judiciary, with explicit and plenary authority over the military,[79] (2) Congress has exercised its authority and provided service members with a "special and exclusive system of military justice,"[80] and (3) civilian courts are "ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have."[81] A civilian court must therefore "hesitate long before entertaining a suit which asks the court to tamper with the established relationship [between service members, which] is at the heart of the necessarily unique structure of the Military Establishment."[82]

These compelling concerns, which are unique to the special military context, have animated the creation of a rule of statutory construction that, when applied to the APA, demonstrates that Congress did not intend courts to relieve service members from exhausting their intramilitary remedies prior to seeking APA relief. Specifically, to avoid "congressionally uninvited intrusion"[83] by the judiciary into internal military affairs, the Supreme Court has long adhered to a rule of statutory construction—the *Feres* principle—whereby courts will not, absent an express and unequivocal declaration of congressional intent, construe a statute as authorizing judicial interference in military matters.

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77. For a discussion of the comprehensive and highly reticulated intramilitary remedies that Congress has provided for service members, see *infra* text accompanying notes 109-24.

78. United States v. Stanley, 483 U.S. 669, 683 (1987).

79. Chappell v. Wallace, 462 U.S. 296, 301 (1983).

80. *Id.* at 300.

81. *Stanley*, 483 U.S. at 683; *accord* Gilligan v. Morgan, 413 U.S. 1, 10 (1973).

82. *Chappell*, 462 U.S. at 300. In light of Congress' plenary constitutional authority to regulate the military, and the civilian judiciary's lack of competence in this field, "[o]rderly government requires that the judiciary be as scrupulous not to interfere with legitimate [military] matters as the [military] must be scrupulous not to intervene in judicial matters." *Id.* at 301 (quoting Orloff v. Willoughby, 345 U.S. 83, 94 (1953)).

83. *Stanley*, 483 U.S. at 683.

The *Feres* principle derives from *Feres v. United States*[84] and its progeny.[85] *In Feres*, service members or their survivors attempted to bring claims for service-related injuries under the Federal Tort Claims Act (FTCA). Had the Supreme Court applied conventional rules of statutory construction that apply in the civilian context, it unquestionably would have construed the FTCA as providing a remedy for service members, because the Court was "confronted with an explicit grant of congressional authority [in the FTCA] for judicial involvement that was, on its face, unqualified."[86] However, cognizant that adjudication of military-related claims may implicate serious separation of powers concerns and impair the military in the performance of its vital mission, the Court held that the FTCA "should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent, and equitable whole."[87] Not wishing, in the absence of an "express congressional command,"[88] to disturb the "comprehensive system"[89] of intramilitary remedies created by Congress, and seeking to avoid unauthorized judicial interference in military matters that might impair military readiness, the Court declined to impute to Congress an intent to extend FTCA remedies to service members for injuries incident to military service.

The *Feres* principle has evolved into a "judicial doctrine leaving matters incident to service to the military, in the absence of congressional direction to the contrary."[90] This rule of statutory construction preserves "the proper relation between the courts, Congress and the military,"[91] and courts frequently have applied this rule to foreclose service members from

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84. 340 U.S. 135 (1950).

85. United States v. Stanley, 483 U.S. 669 (1987); United States v. Johnson, 481 U.S. 681 (1987); United States v. Shearer, 473 U.S. 52 (1985); Chappell v. Wallace, 462 U.S. 296 (1983).

86. *Stanley*, 483 U.S. at 681; *see Feres*, 340 U.S. at 138-39.

87. *Feres*, 340 U.S. at 139.

88. *Id.* at 146.

89. *Id.* at 140.

90. Stauber v. Cline, 837 F.2d 395, 399 (9th Cir. 1988). As the Supreme Court has stated, "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military . . . affairs." Dep't of the Navy v. Egan, 484 U.S. 518, 530 (1988).

91. *Stauber*, 837 F.2d at 399.

using remedial statutes of general applicability to seek relief for service-related injuries.[92]

As the D.C. Circuit explained in *Bois v. Marsh*,[93] when it applied the *Feres* principle to reject a service member's attempt to use 42 U.S.C. § 1985(3) to seek redress for service-related injuries:

> *Feres* itself represents a refusal to read statutes with their ordinary sweep. The unique setting of the military led the *Feres* Court to resist bringing the armed services within the coverage of a remedial statute in the absence of an express congressional command. Moreover, *Feres* principles were invoked by the Court in *Chappell* to foreclose assertion of constitutional rights. Taken together, *Feres* and *Chappell* powerfully suggest that the obvious effects on military discipline, which animated the Court in both of those cases, counsel against an expansive interpretation of another remedial statute so as to encompass military personnel.[94]

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92. *See, e.g.*, Coffman v. Michigan, 120 F.3d 57 (6th Cir. 1997) (applying *Feres* principle to hold that Americans with Disabilities Act, 42 U.S.C. § 1201, does not extend to service members); Wright v. Park, 5 F.3d 586 (1st Cir. 1993) (applying *Feres* principle to hold that 42 U.S.C. § 1983 and federal whistleblower statute, 5 U.S.C. §§ 2301-2302, do not extend to service-related injuries); Farmer v. Mabus, 940 F.2d 921 (5th Cir. 1991) (applying *Feres* principle to hold that 42 U.S.C. § 1983 does not extend to service-related injuries); Lovell v. Heng, 890 F.2d 63 (8th Cir. 1989) (same); Watson v. Arkansas Nat'l Guard, 886 F.2d 1004 (8th Cir. 1989) (same); Roper v. Dep't of the Army, 832 F.2d 247 (8th Cir. 1987) (applying *Feres* principle to hold that Title VII, 42 U.S.C. § 2000e, does not extend to service members); Bois v. Marsh, 801 F.2d 462 (D.C. Cir. 1986) (applying *Feres* principle to hold that 42 U.S.C. § 1985(3) does not extend to service-related injuries); Crawford v. Texas Army Nat'l Guard, 794 F.2d 1034 (5th Cir. 1986) (applying *Feres* principle to hold that 42 U.S.C. §§ 1983 and 1985(2) do not extend to service-related injuries); Martelon v. Temple, 747 F.2d 1348 (10th Cir. 1984) (applying *Feres* principle to hold that 42 U.S.C. § 1983 does not extend to service-related injuries); Brown v. United States, 739 F.2d 362 (8th Cir. 1984) (applying *Feres* principle to hold that 42 U.S.C. §§ 1981 and 1983 do not extend to service-related injuries); Gonzalez v. Dep't of the Army, 718 F.2d 926 (9th Cir. 1983) (applying *Feres* principle to hold that Title VII, 42 U.S.C. § 2000e, does not extend to service members); Mollnow v. Carlton, 716 F.2d 627 (9th Cir. 1983) (applying *Feres* principle to hold that 42 U.S.C. §§ 1985(1) does not extend to service-related injuries). *See* E. Roy Hawkens, *The Justiciability of Claims Brought by National Guardsmen Under the Civil Rights Statutes for Injuries Suffered Incident to Military Service*, 125 MIL. L. REV. 99, 105-10, 122-27 (1989) (discussing *Feres* principle and its application to suits by service members who seek to invoke remedial statutes of general applicability for service-related injuries).

93. 801 F.2d 462 (D.C. Cir. 1986).

94. *Id.* at 469-70 n.13.

The *Feres* principle thus eschews judicial intrusion into internal military matters in the absence of an express congressional command. Notably, the APA does not mandate that claims by service members and civilians be treated identically for purposes of determining justiciability, and Congress could rationally conclude that they should be treated differently. The military's special constitutional function to wage and win wars should the occasion arise renders it a "specialized society separate from civilian society [that has] by necessity developed laws and traditions of its own during its long history."[95] These special military laws have no counterpart in civilian society, and their application in the unique military context is beyond the common experience of civilian jurists. Because "it is difficult to conceive of an area of governmental activity in which the courts have less competence,"[96] Congress could reasonably expect the judiciary to "hesitate long"[97] before accepting a service member's invitation to entertain a suit that challenges an internal military decision that has not been reviewed in the first instance by the intramilitary remedial system established by Congress.

Because there can be no doubt that the APA does not divest courts of their unquestionable authority to avoid premature, unnecessary, or inappropriate judicial incursion into legitimate military matters, and because the APA does not command courts to facilitate the ability of service members to circumvent the comprehensive system of military justice that Congress has provided, courts may, pursuant to the *Feres* principle, continue to apply the exhaustion component of the *Mindes* justiciability test to service members' APA claims and be confident that they are applying the APA "in a manner consistent with congressional intent"[98] and, thus, consistent with *Darby.*[99]

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95. Parker v. Levy, 417 U.S. 733, 743 (1974).

96. Gilligan v. Morgan, 413 U.S. 1, 10 (1973).

97. Chappell v. Wallace, 462 U.S. 296, 300 (1983). *See* James M. Hirschhorn, *The Separate Community: Military Uniquenes and Servicemen's Constitutional Rights*, 62 N.C. L. REV. 177, 186-204 (1984).

98. Darby v. Cisneros, 509 U.S. 137, 153 (1993).

99. Congress has enacted a comprehensive system of intramilitary justice, *see infra* text accompanying notes 109-24, that maintains the delicate balance between the rights of service members and the needs of the military. *See* Weiss v. United States, 510 U.S. 163, 177 (1994); The Honorable Sam Nunn, *The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases*, 29 WAKE FOREST L. REV. 557, 563-65 (1994). It is rational to conclude that Congress did not, by implication, intend the APA to serve as an alternative to its carefully crafted system of intramilitary relief.

It might be argued that, under the *Feres* principle, service members ought never be permitted to invoke the remedial provisions of the APA even if they satisfy the *Mindes* justiciability test, because the APA contains no explicit congressional command authorizing its use by service members for service-related claims. However, the Supreme Court stated in *Chappell* that decisions regarding the correction of military records are subject to judicial review under the APA "and can be set aside if they are arbitrary, capricious, or not based on substantial evidence."[100] This statement "casts serious doubt" on an argument that service members' APA claims are never reviewable.[101] Moreover, courts have relied upon the Supreme Court's statement in *Chappell* as authority for reviewing service members' APA claims.[102] A principled adherence to precedent should therefore compel courts to reject the Draconian argument that would lock the court house doors to all APA claims brought by service members.[103] It is, after all, the "function of the courts to make sure . . . that the men and women constituting our Armed Forces are treated as honored members of society whose rights do not turn on the charity of a military commander."[104]

Judicial review of exhausted and otherwise justiciable APA claims brought by service members will not, in any event, encroach on military prerogatives or result in second-guessing of military judgments. Rather, as discussed below, exhaustion permits congressionally constituted remedial boards to review sensitive military issues in the first instance, exercise their expertise, compile an administrative record, issue findings of fact, interpret and apply military regulations, and provide a rationale for any decision that may ultimately be the object of judicial review. Exhaustion thus preserves the primacy of Congress' intramilitary remedies and minimizes the risk of undue judicial interference in military matters, because a court is simply called upon—aided by an administrative record and guided by an administrative rationale—to perform its traditional judicial function

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100. *Chappell*, 462 U.S. at 303. The solicitor general consistently has taken the position in the Supreme Court that BCMR decisions are subject to APA review. *See, e.g.*, Brief for the Federal Respondent in Opposition to Certiorari, Mier v. Van Dyke, No. 95-816 at 11-12 (Feb. 1996).

101. Kries v. Sec'y of the Air Force, 866 F.2d 1508, 1513 (D.C. Cir. 1989).

102. *Id.* at 1512.

103. The policy of adhering to precedent, or *stare decisis*, "promotes the even-handed, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." Payne v. Tennessee, 501 U.S. 808, 827 (1991).

104. Winters v. United States, 89 S. Ct. 57, 59-60 (Douglas, Circuit Justice 1968). *Accord* Chief Justice Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181, 188 (1962).

of applying the deferential standards of APA review to an administrative decision.[105]

B. Separation of Powers Concerns Strongly Support Retaining the Exhaustion Component of the *Mindes* Test, Which Is Also Aptly Viewed As the Primary Jurisdiction Component

The Framers of the Constitution vested Congress with exclusive authority "To raise and support Armies"; "To provide and maintain a Navy"; and "to make Rules for the Government and Regulation of the Land and naval Forces."[106] Congress, thus, has "primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military."[107] Congress has

> exercised its plenary constitutional authority over the military, has enacted statutes regulating military life, and has established a comprehensive internal system of justice to regulate military life, taking into account the special patterns that define the military structure. The resulting system provides for the review and remedy of [service members'] complaints.[108]

Examples of intramilitary remedies provided by Congress include a statutory right for any service member who believes himself wronged by his commanding officer, and who is refused redress by the commanding officer, to bring the complaint to the attention of any superior commissioned officer. The superior officer shall forward the complaint to the officer exercising general court-martial jurisdiction over the putative offender, and that officer shall investigate the matter, take appropriate corrective action, and inform the secretary of the entire matter.[109] Service members also have the statutory right to communicate grievances to members of Congress or an inspector general without incurring retaliatory action.[110]

Additionally, pursuant to legislative requirement, each military branch has established a board to review the discharge or dismissal (other

105. *See Chappell*, 462 U.S. at 303; *Kries*, 866 F.2d at 1511-15.
106. U.S. CONST. art. I, § 8, cls. 12-14. *See also Chappell*, 462 U.S. at 301.
107. Weiss v. United States, 510 U.S. 163, 177 (1994).
108. *Chappell*, 462 U.S. at 302.
109. 10 U.S.C. § 938 (2000).
110. *Id.* § 1034.

than by sentence of a general court-martial) of any former service member upon either the board's motion or the former member's request.[111] The board may, subject to secretarial review, change a discharge or dismissal, or issue a new discharge to reflect its findings.[112] The board's decision shall be based on military records and any relevant evidence, and the board is authorized to conduct hearings and obtain testimony from witnesses in person or through affidavits.[113]

Congress also has required the service secretaries to establish boards to review claims by service members who contend that they have been improperly retired or released from active duty without pay for physical disability.[114] These boards have the "same powers as the board whose findings and decisions are being reviewed."[115] Thus, the petitioning service member may appear before the board in person, by counsel, or by an accredited representative, and the board shall compile a record that includes extant military records, as well as any other evidence that the board deems relevant, including witness testimony in person or by affidavit.[116] The board then sends its findings to the secretary, who submits them to the President for approval.[117]

Finally, a clearly significant intramilitary remedy for purposes of the exhaustion component of the *Mindes* test is the Board for Correction of Military Records (BCMR). Congress has required each service secretary, acting through a BCMR, to correct any "error" or "injustice" identified by an aggrieved service member.[118] The BCMR's review authority is expansive, extending to any "document or record" that pertains to a service member, as well as "any other military matter affecting a member or former member."[119] Pursuant to procedures established by the relevant service secretary and approved by the Secretary of Defense, service members are entitled, with the assistance of legal counsel, to submit all relevant records, evidence, and arguments to the BCMR, which in turn may grant hearings and consider any regulatory, legislative, or constitutional griev-

111. *Id.* § 1553(a).
112. *Id.* § 1553(b).
113. *Id.* § 1553(c).
114. *Id.* § 1554.
115. *Id.* § 1554(b). The boards whose findings and decisions are subject to challenge under this statute include retiring boards, boards of medical survey, and disposition boards. *Id.* § 1554(a).
116. *Id.* § 1554(c).
117. *Id.* § 1554(b).
118. *Id.* § 1552(a)(1).
119. *Id.* § 1552(g).

ance advanced by the service member.[120] The BCMR compiles an administrative record,[121] and then exercises its broad remedial authority to grant appropriate relief, which may consist of correcting a military record, reinstating a member in the military, or awarding back pay or other pecuniary benefits.[122] Congress has also enacted statutes establishing timeliness standards for disposition of claims considered by the BCMR[123] and protecting the procedural rights of service members who seek relief from the review boards.[124]

It defies logic, as well as the *Feres* principle,[125] to conclude that Congress, by enacting the APA, implicitly intended service members to circumvent the comprehensive system of military justice that it so carefully crafted to fit the special needs of the military. Indeed, if *Darby* is extended to service members' APA claims, the BCMR's function and utility would be vitiated in derogation of congressional intent. Little incentive would exist for service members to seek administrative relief from an agency that they perceive has already harmed them when they could, instead, seek immediate judicial review of their claim.[126]

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120. *See* 32 C.F.R. pt. 865 (2000) (Air Force Board for Correction of Military Records); 32 C.F.R. pt. 581 (Army Board for Correction of Military Records); 32 C.F.R. pt. 723 (Naval Board for Correction of Naval Records).

121. For example, the Air Force BCMR is required to compile an administrative record that includes: (1) the name and vote of each board member; (2) the service member's petition for relief; (3) briefs and written arguments; (4) documentary evidence; (5) a hearing transcript if a hearing is held; (6) advisory opinions obtained from any Air Force organization or official; (7) the service member's response to advisory opinions; (8) the findings, conclusions, and recommendations of the board; (9) minority reports, if any; and (10) any other information necessary to show a true and complete history of the proceedings. 32 C.F.R. § 865.4(m).

122. 10 U.S.C. § 1552(a)-(d) (2000).

123. *Id.* § 1557.

124. *Id.* § 1556.

125. *See supra* Part IV.A.

126. The Federal Circuit, in holding that a service member must seek relief from the BCMR before seeking judicial review, stated:

> Congress having provided the extensive and elaborate system designed to achieve justice within the military, no warrant appears for judicial end-running of that system. . . . If the rush to the federal courthouse and bypassing the congressionally created system attempted by [plaintiff] were permissible, Congress would be well advised to dismantle the military justice system as no longer required.

Williams v. Sec'y of the Navy, 787 F.2d 552, 560 (Fed. Cir. 1986).

Requiring service members to exhaust their internal administrative remedies before pursuing APA claims will, on the other hand, preserve the primacy of Congress' system of military justice, thus ensuring that (1) service members continue to utilize the intramilitary channels provided by Congress through which their grievances can be considered and fairly settled,[127] and (2) judicial remedies do not marginalize and supplant intramilitary remedies, thus arrogating authority vested in the executive branch by the legislative branch.

In this regard, exhaustion serves the important interests protected by the primary jurisdiction doctrine. Like the exhaustion doctrine, the primary jurisdiction doctrine:

> is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. "Exhaustion" applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. "Primary jurisdiction," on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which . . . have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.[128]

Where an action, properly cognizable in court, contains an issue within the special competence of an administrative agency, the primary jurisdiction doctrine requires the court to refer the issue to the agency "to give the parties reasonable opportunity to seek an administrative ruling. . . . Referral of the issue to the administrative agency does not deprive the court of jurisdiction; it has discretion either to retain jurisdiction or, if the

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127. Chappell v. Wallace, 462 U.S. 296, 301 (1983). As the Supreme Court stated: "It is clear that the Constitution contemplated that the Legislative Branch has plenary control over rights, duties, and responsibilities in the framework of the military establishment, including regulations, procedures, and remedies related to military discipline; and Congress and the courts have acted in conformity with that view." *Id.*

128. United States v. Western Pac. R.R. Co., 352 U.S. 59, 63-64 (1956). *See also* 2 K. DAVIS & R. PIERCE, ADMINISTRATIVE LAW TREATISE §§ 14.1-14.6 (3d ed. 1994); Bernard Schwartz, *Timing of Judicial Review—A Survey of Recent Cases*, 8 ADMIN. L.J. AM. U. 261, 262-84 (1994); Louis L. Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1037, 1037-38 (1964).

parties would not be unfairly disadvantaged, to dismiss the case without prejudice."[129]

The Ninth Circuit has indicated that the primary jurisdiction doctrine is applicable when the following four factors are present: (1) the need to resolve an issue, (2) that has been placed by Congress within the jurisdiction of an administrative body having regulatory authority, (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory scheme, (4) that requires expertise or uniformity in administration.[130] Each of these factors is usually, if not invariably, present when a service member seeks judicial review of an internal military decision without first seeking relief from the BCMR. Thus, as discussed below, the D.C., Third, and Fifth Circuits have recognized that application of the exhaustion requirement to service members' claims can comfortably be characterized as an application of the primary jurisdiction doctrine.

Indeed, the exhaustion component of the *Mindes* justiciability test itself derived from Fifth Circuit precedent that characterized the exhaustion requirement in the military context as the application of the primary jurisdiction doctrine.[131] The exhaustion component of *Mindes* may thus correctly be viewed as amounting to the application of the primary jurisdiction doctrine. So viewed, the exhaustion component of *Mindes* is—and should be treated as—unaffected by *Darby*, which states that federal courts remain free in APA suits to "apply, where appropriate, other prudential doctrines of judicial administration to limit the scope and timing of judicial review."[132]

In *McCurdy v. Zuckert*,[133] a Fifth Circuit progenitor of the exhaustion component in *Mindes*, a service member sought to challenge a finding of unfitness by an administrative discharge board and enjoin his imminent discharge. The district court, inter alia, denied the service member's request for a temporary injunction and directed the member to seek relief from the Air Force BCMR.[134] The service member appealed, arguing that he was entitled to temporary injunctive relief pending proceedings before the BCMR to avoid irreparable harm. The court of appeals disagreed, holding that the service member would not suffer irreparable harm pending

129. Reiter v. Cooper, 507 U.S. 258, 268-69 (1993).
130. United States v. Gen. Dynamics Corp., 828 F.2d 1356, 1362 (9th Cir. 1987).
131. *See supra* note 11; *infra* text accompanying notes 133-38.
132. Darby v. Cisneros, 509 U.S. 137, 146 (1993).
133. 359 F.2d 491 (5th Cir. 1966).
134. 359 F.2d at 493.

exhaustion of his intramilitary remedy and that the primary jurisdiction doctrine rendered his suit premature. The court stated that the "remedies available to the [service member], should he . . . ultimately prevail on the merits [before the BCMR], amount to complete retroactive restoration; he could hardly ask for more. This being true, the district court lacked primary jurisdiction [and] the action is premature."[135]

Thereafter, in *Tuggle v. Brown*[136]—a case that the court in *Mindes* cited in support of the exhaustion requirement[137]—the Fifth Circuit relied on the primary jurisdiction doctrine rationale from *McCurdy* to affirm the district court's dismissal of a service member's suit. In *Tuggle*, a service member appealed the district court's denial of his request that the military be temporarily enjoined from separating him with an undesirable discharge. The Fifth Circuit held that because the service member "has yet to exhaust available post-discharge administrative remedies, following our recent decision in *McCurdy v. Zuckert* [which equated the exhaustion requirement in the military context with the primary jurisdiction doctrine], we hold that resort to the district court was premature."[138]

The D.C. Circuit in *Sohm v. Fowler*[139] likewise has concluded that the exhaustion doctrine and the primary jurisdiction doctrine are supported by similar rationales and serve the identical function when applied in the military context. In *Sohm*, a Coast Guard officer who had a petition pending before the BCMR brought suit seeking to enjoin his retirement and compel his promotion on grounds of due process.[140] The district court held that the officer need not exhaust his pending administrative petition, and it entered judgment on the merits for the government.[141]

The D.C. Circuit reversed with directions that the district court stay the case pending exhaustion before the BCMR.[142] The D.C. Circuit held that exhaustion was particularly advisable here, because the BCMR proceedings may relieve the court from having to adjudicate the officer's difficult constitutional claims.[143] Moreover, the court held that the factual

135. *Id.* at 494-95.
136. 362 F.2d 801 (5th Cir. 1966) (per curiam).
137. Mindes v. Seaman, 453 F.2d 197, 200 (1971). *See supra* note 11.
138. *Tuggle*, 362 F.2d at 801 (citation omitted).
139. 365 F.2d 915 (D.C. Cir. 1966).
140. *Id.* at 916.
141. *Id.* at 916-17.
142. *Id.* at 919.
143. *Id.* at 918.

questions raised by the officer should be decided by the BCMR in the first instance, because resolution of these issues depended on an understanding of Coast Guard "regulations and practice. Not only is the Board better equipped to decide these questions, but also considerations of uniformity in interpretation suggest that we first allow the Coast Guard an opportunity to construe their own regulations."[144] Notably, the court stated that "[t]hese rationales of expertise, uniformity and ripeness also underlie the doctrine of primary jurisdiction. Thus if the case were analyzed under this rubric rather than that of exhaustion, the proper disposition would still be for the court to stay its hand pending resort to the administrative process."[145]

Finally, the Third Circuit in *Sedivy v. Richardson*[146] similarly concluded that a service member who failed to exhaust his intramilitary remedies was foreclosed from seeking judicial relief, noting that "in the context of district court-military court relations [the exhaustion requirement] is more closely analogous to the doctrine of primary jurisdiction."[147] Although *Sedivy* involved a service member who failed to exhaust military *judicial* remedies, the rationale applies equally to situations where service members fail to seek *administrative* relief from the BCMR. Application of the primary jurisdiction doctrine in *both* circumstances reflects a proper judicial appreciation for the "special deference [that] is due the military decision-making process . . . because of a concern for the effect of judicial intervention on morale and military discipline, and because of the civilian judiciary's general unfamiliarity with the [military justice system] which ha[s] no analogs in civilian jurisprudence."[148] Moreover, challenges to internal military decisions will often be fact-intensive and turn on matters of judgment or regulatory interpretation—subjects as to which the expertise of the BCMR is singularly relevant, and as to which its judgment is indispensably informative for any eventual review by a civilian court.[149]

As the Supreme Court has counseled, civilian courts ought not intervene into military life without the guidance of the military tribunal to

144. *Id.* at 918-19.

145. *Id.* at 919 n.10 (citations omitted).

146. 485 F.2d 1115 (3rd Cir. 1973).

147. *Id.* at 1121 n.8.

148. *Id. See* Seepe v. Dep't of the Navy, 518 F.2d 760, 764 (6th Cir. 1975) (relying on Schlesinger v. Councilman, 420 U.S. 738 (1975), for conclusion that policy requiring exhaustion of military *judicial* remedies where court-martial proceedings were pending also required exhaustion of military *administrative* remedies where service member failed to seek BCMR relief).

which Congress has confided primary responsibility for the review of military claims.[150]

V. Conclusion

Pursuant to the *Feres* principle of statutory construction, the APA should not be construed as absolving service members from exhausting their intramilitary remedies prior to pursuing APA claims. Whether the exhaustion component of the *Mindes* test is characterized as an essential component of an integrated justiciability test or as the application of the primary jurisdiction doctrine, neither congressional intent nor the language or rationale of *Darby* bars courts from continuing to use this well-established doctrine to limit the timing and scope of judicial review of APA claims brought by service members.

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149. *See* Schlesinger v. Councilman, 420 U.S. 738 (1975) (holding that federal civilian court should not exercise equitable jurisdiction to intervene in pending court martial proceeding); Gusik v. Schilder, 340 U.S. 128 (1950) (holding that habeas corpus petition from military prisoner should not be entertained in federal civilian court until all available remedies within military court system have been invoked in vain).

150. Noyd v. Bond, 395 U.S. 683, 695 (1969).