UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EARLE A. PARTINGTON,	)	
Plaintiff,	)	
v.	)	Civil No. 10-1962(HHK)
VICE ADMIRAL JAMES W. HOUCK, JAGC, USN, et al.,	)	
Defendants.	)	

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN PART AND MOTION TO DISMISS IN PART

Defendants hereby move to dismiss this action in part, pursuant to Rules 12(b)(4), (5) and (6) of the Federal Rules of Civil Procedure, and on qualified immunity grounds. In the alternative, and additionally, defendants move for summary judgment pursuant to Rule 56. The Court is respectfully referred to the accompanying memorandum in support of this motion. A proposed order consistent with the relief requested is attached for the Court's consideration.

Respectfully Submitted,

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United States Attorney
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RUDOLPH CONTRERAS
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By: */s/ Marina Utgoff Braswell*

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DEFENDANTS' STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE ISSUE

Pursuant to Local Civil Rule 7(h), defendant hereby submits his statement of material facts as to which there is no genuine issue:

1. On or about April 29, 2006, Plaintiff Earle Partington, an attorney licensed to practice in Hawaii, entered an appearance as a civilian defense counsel in the General Court-Martial of AM1 Stewart Toles, II, a U.S. Navy sailor stationed in Hawaii. Compl. ¶¶ 1, 9; Administrative Record ("AR") 736.

2. Plaintiff is also licensed to practice in California, the Northern Mariana Islands, Oregon (inactive), the District of Columbia (inactive), Zimbabwe, and multiple federal courts including the United States Court of Appeals for the Armed Forced ("CAAF"). Compl. ¶ 1. 2.

3. Pursuant to the "Court-Martial Notice of Appearance" that he signed, adopted and submitted to the military trial

court, plaintiff voluntarily agreed "to abide by all Rules for Courts-Martial and Military Rules of Evidence set forth in the current editions of the Manual [for] Courts-Martial, United States, JAG Instruction 5803.1 series (Professional Conduct of Attorneys Practicing Under the Supervision of the Judge Advocate General),..." Compl. ¶ 9; AR 1238-39 (emphasis added).

4. Plaintiff also advised the Military Judge that he was "certified under Article 27(b)" of the Uniform Code of Military Justice ("UCMJ"). AR 736-737.

5. On or about July 24-26, 2006, after pleading guilty to various charges and specifications, pursuant to a pre-trial agreement negotiated by plaintiff on behalf of his client, AM1 Toles was found guilty and sentenced to a bad conduct discharge and five years confinement. Compl. ¶¶ 12, 23; AR 872-1120.

6. AM1 Toles also retained plaintiff to represent him during the automatic appeal of Toles' court-martial conviction. Compl. ¶ 24.

7. On or about March 23, 2007, the appellate brief drafted by plaintiff on behalf of his client was filed with the United States Navy-Marine Corps Court of Criminal Appeals ("NMCCA"). Compl. ¶ 24; AR 596-619.

8. On October 30, 2007, the NMCCA issued its written decision affirming AM1 Toles' conviction. Compl. ¶¶ 31, 32; AR 572-78.

9. In its decision the NMCCA expressed concern "with the unsavory tactics by [Plaintiff]," and found various arguments proffered by plaintiff in his appellate brief to be "disingenuous," "clear misrepresentations of the record", and/or "wholly unsupportable by the record." Compl. ¶ 34; AR 575.

10. The NMCCA stated that it was "forwarding this opinion to the Judge Advocate General of the Navy and the Navy's Rules Counsel for review and appropriate action." AR 575, n.5.

11. On September 22, 2008, the Clerk of the NMCCA forwarded the opinion to the Assistant Judge Advocate General, citing Navy JAG Instruction 5803.1C. AR 291-92, 318-25, 365-66.

12. On October 10, 2008, plaintiff was advised that a complaint had been filed with the Navy Rules Counsel by the NMCCA. Compl. ¶¶ 41, 42; AR 365-66.

13. Plaintiff was provided a copy of the complaint and advised that he could submit written matters to the Rules Counsel for consideration, which he did on October 26, 2008. Compl. ¶ 45; AR 365-371.

14. On June 18, 2009, the Rules Counsel appointed CAPT Robert Porzeinski, JAGC, USNR, to conduct a Preliminary Inquiry into the allegations of professional misconduct by plaintiff. Compl. ¶ 46; AR 308-09.

15. On June 29, 2009, CAPT Porzeinski advised plaintiff of the Preliminary Inquiry to determine whether plaintiff had

violated Rule 3.3 of JAGINST 5803.1C. AR 310. CAPT Porzeinski also advised plaintiff of the evidence that would be considered, as well as plaintiff's right to submit a written statement and any written materials for consideration. Id.

16. CAPT Porzeinski requested plaintiff's response no later than July 10, 2009. Id.

17. On July 16, 2009, having received no response from plaintiff, CAPT Porzeinski completed the Preliminary Inquiry and submitted it to the Rules Counsel for action. AR 276-371.

18. CAPT Porzeinski found that plaintiff violated Rules 3.1 and 3.3 of JAGINST 5803.1C, and recommended that a formal ethics investigation be convened. AR 305-07.

19. On July 22, 2009, CAPT Prozeinski received plaintiff's response to CAPT Prozeinski's June 29, 2009 letter. Compl. ¶ 49; AR 288.

20. CAPT Porzeinski responded, again requesting any written submissions from plaintiff by August 14, 2010. Compl. ¶ 50; AR 289-90.

21. On August 22, 2009, having received no response from plaintiff, CAPT Porzeinski submitted his "Supplemental Report" to the Rules Counsel. AR 286-90.

22. After CAPT Porzeinski submitted his report, he received plaintiff's response. Compl. ¶ 51; AR 282-84.

23. On September 8, 2009, CAPT Porzeinski then submitted his "Second Supplemental Report" in which he made additional "Findings of Fact" and "Opinions". AR 278-81.

24. On October 6, 2009, the Rules Counsel appointed CAPT Robert Blazewick, JAGC, USN, to conduct a formal ethics investigation into the allegations of professional misconduct by plaintiff. Compl. ¶¶ 52, 53; AR 116.

25. On October 6, 2009, plaintiff received notification of the commencement of the investigation, a list of the professional conduct violations he had allegedly committed, a copy of CAPT Porzeinski's "Preliminary Inquiry," and was advised of his right to request a hearing before the Investigative Officer, the right to inspect all evidence, the right to present written or oral statements or materials, and the right to call witnesses and be assisted by counsel. AR 111-12.

26. Plaintiff was advised to respond by October 14, 2009, with his decision as to whether he desired a hearing. Id.

27. On October 22, 2009, CAPT Blazewick contacted plaintiff requesting a decision as to whether he wanted a hearing. AR 212-14.

28. From October 29, 2009, to January 11, 2010, plaintiff and CAPT Blazewick exchanged numerous letters and emails regarding the Ethics Investigation and plaintiff's right to a hearing. Compl. ¶ 92; AR 216-70.

29. Pursuant to his January 6, 2010, letter, plaintiff clearly expressed that he had "no intention in participating" in any hearing. Compl. ¶¶ 94, 99; AR 250.

30. On January 11, 2010, CAPT Blazewick advised plaintiff that a hearing would still be held on January 19, 2010, where plaintiff could present evidence, witness testimony and/or a statement for consideration. AR 237, 271.

31. Plaintiff did not attend the hearing. AR 271.

32. On February 19, 2010[1], CAPT Blazewick submitted his Ethics Investigation to the Rules Counsel. Compl. ¶ 95; AR 79-274.

33. CAPT Blazewick found by clear and convincing evidence that plaintiff had violated Rules 3.1 and 3.3 of JAGINST 5803.1C, and recommended that the Ethics Investigation be forwarded to the Navy JAG for further action. See Compl. ¶ 110; AR 109-10.

34. On March 31, 2010, plaintiff submitted a response to the Rules Counsel. AR 74.

35. On April 5, 2010, the Rules Counsel forwarded the Ethics Investigation to the Navy JAG for action. AR 68-73.

36. On May 17, 2010, VADM James Houck, JAGC, USN, the Navy Judge Advocate General ("JAG"), indefinitely suspended plaintiff

[1] CAPT Blazewick's Ethics Investigation was incorrectly dated "2009".

from practicing law in any and all proceedings under the Navy JAG's cognizance. See Compl. "Introduction"; AR 64-67.

37. VADM Houck stated that "I find you filed an appellate brief with NMCCA that contained statements you knew to be false and misleading . . . ." AR. 66.

38. A copy of this letter was sent to the CAAF. AR. 67.

39. On June 10, 2010, the CAAF sent plaintiff a letter informing him that the Court had been informed that plaintiff had been "suspended from the practice of law in the U.S. Navy-Marine Corps Court of Criminal Appeals by the Judge Advocate General of the Navy." AR 42.

40. The CAAF suspended plaintiff from appearing before the Court and issued a an order to show cause as to why he should not be disbarred by that Court. AR. 42.

41. Plaintiff was given to July 12, 2010 to respond. AR 42.

42. Plaintiff sought and was granted more than one extension of time to respond. AR 33-41.

43. On September 22, 2010, plaintiff filed his response to the show cause order. AR 15-22.

44. On October 26, 2010, the CAAF suspended plaintiff from practicing before it for one year, effective retroactively from

June 10, 2010. Compl. ¶ 111; AR 13-14.

45. Plaintiff filed a motion for reconsideration, which, on December 17, 2010, the CAAF denied. AR 2-12.

Respectfully Submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN PART AND MOTION TO DISMISS IN PART

PRELIMINARY STATEMENT

This case arises from a decision made by the Judge Advocate General of the United States Navy ("NJAG") to suspend Plaintiff Earle A. Partington from practicing law in any and all proceedings involving Navy and Marine Corps personnel, after conducting an ethics investigation into plaintiff's representation of a client during a court-martial proceeding. Specifically, plaintiff alleges that the ethics investigation was conducted without statutory authority, that defendants violated NJAG internal procedures, and that he was denied his Fifth Amendment due process right to defend himself against the charges brought. Plaintiff also seeks to sue the individually named defendants under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) ("Bivens"), for violating his Fifth Amendment rights.

Defendants, Vice Admiral ("VADM") James W. Houck, JAGC, United States Navy ("USN"), Captain Robert A. Porzeinski, Captain Robert B. Blazewick, Captain C.N. Morin, and the United States Court of Appeals for the Armed Forces ("CAAF"), move for summary judgment on Counts One, Two and Three of the Complaint, which claim that the suspension decision lacked statutory authority, violated plaintiff's Fifth Amendment rights, and violated the Administrative Procedure Act.

With respect to the claims against defendants in their individual capacities in Count Four, these claims should be dismissed for several reasons. First, the comprehensive potential remedies that plaintiff can seek through the APA constitute plaintiff's exclusive remedy for the actions he alleges have occurred. Moreover, special factors counsel against recognizing the existence of a Bivens remedy where a comprehensive statutory scheme provides relief in the same area.

Second, even if Bivens could apply to any of plaintiff's claims, all of the individually-sued defendants are entitled to qualified immunity because their alleged actions did not violate clearly-established constitutional law. Navy supervisors and managers are entitled to make decisions about attorneys appearing before military tribunals when designed to ensure that such attorneys comply with appropriate ethics standards in the course of their representation. The decisions made in this case fall

comfortably within this realm.

Additionally, plaintiff's claims against some of the individually sued defendants are also subject to dismissal because they were not personally served with the Complaint.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. U.S. v. Toles, NMCCA No. 200602374 (2007)

On or about April 29, 2006, Plaintiff Earle Partington, an attorney licensed to practice in Hawaii,[2] entered an appearance as a civilian defense counsel in the General Court-Martial of AM1 Stewart Toles, II, a U.S. Navy sailor stationed in Hawaii. Compl. ¶¶ 1, 9; Administrative Record ("AR") 736. Pursuant to the "Court-Martial Notice of Appearance" that he signed, adopted and submitted to the military trial court, plaintiff voluntarily agreed "**to abide by all Rules for Courts-Martial and Military Rules of Evidence set forth in the current editions of the Manual [for] Courts-Martial, United States, JAG Instruction 5803.1** series (Professional Conduct of Attorneys Practicing Under the Supervision of the Judge Advocate General),..." Compl. ¶ 9; AR 1238-39 (emphasis added). Plaintiff also advised the Military Judge that he was "certified under Article 27(b)" of the Uniform Code of Military Justice ("UCMJ"). AR 736-737.

[2] Plaintiff Partington is also licensed to practice in California, the Northern Mariana Islands, Oregon (inactive), the District of Columbia (inactive), Zimbabwe, and multiple federal courts including the CAAF. Compl. ¶ 1.

On or about July 24-26, 2006, after pleading guilty to various charges and specifications, pursuant to a pre-trial agreement negotiated by plaintiff on behalf of his client, AM1 Toles was found guilty and sentenced to a bad conduct discharge and five years confinement. Compl. ¶¶ 12, 23; AR 872-1120.

AM1 Toles also retained plaintiff to represent him during the automatic appeal of Toles' court-martial conviction. See 10 U.S.C. § 866. Compl. ¶ 24. On or about March 23, 2007, the appellate brief drafted by plaintiff on behalf of his client was filed with the United States Navy-Marine Corps Court of Criminal Appeals ("NMCCA"). Compl. ¶ 24; AR 596-619.

After considering the complete Record of Trial ("ROT"), plaintiff's appellate brief and the government's response, on October 30, 2007, the NMCCA issued its written decision affirming AM1 Toles' conviction. Compl. ¶¶ 31, 32; AR 572-78. However, the NMCCA was particularly "concerned with the unsavory tactics by [Plaintiff]," and found various arguments proffered by plaintiff in his appellate brief to be "disingenuous," "clear misrepresentations of the record", and/or "wholly unsupportable by the record." Compl. ¶ 34; AR 575. The NMCCA stated that it was "forwarding this opinion to the Judge Advocate General of the Navy and the Navy's Rules Counsel for review and appropriate action." AR 575, n.5. On September 22, 2008, the Clerk of the NMCCA forwarded the opinion as a professional responsibility

complaint against plaintiff, citing Navy JAG Instruction 5803.1C. AR 291-92, 318-25, 365-66.

B. The Investigation Phase

1. Captain Robert Porzeinski's Preliminary Inquiry

On October 10, 2008, plaintiff was advised that a written professional responsibility complaint had been filed with the Navy Rules Counsel by the NMCCA.[3] Compl. ¶¶ 41, 42; AR 365-66. The notice specifically advised plaintiff who had signed and submitted the complaint, which JAGINST 5803.1C professional responsibility rules he potentially had violated, and that the Rules Counsel would be conducting an initial probable cause inquiry to determine if any violations occurred.[4] AR 365-66. Plaintiff was provided a copy of the complaint and advised that he could submit written matters to the Rules Counsel for consideration, which he did on October 26, 2008. Compl. ¶ 45; AR 365-371.

[3] LCDR Kathleen Elkins, JAGC, USN, was assigned as the Professional Responsibility Coordinator at the Office of the Judge Advocate General's (OJAG) Administrative Law Division. The OJAG Administrative Division falls under the cognizance of the Assistant Judge Advocate General for Civil Law, who also serves as the Navy Rules Counsel; at the time, this official was defendant CAPT Chris Morin, JAGC, USN.

[4] See 32 C.F.R. § 776.80.

In accordance with JAGINST 5803.1C,[5] on June 18, 2009, the Rules Counsel appointed CAPT Robert Porzeinski, JAGC, USNR, to conduct a Preliminary Inquiry into the allegations of professional misconduct by plaintiff. Compl. ¶ 46; AR 308-09. Subsequently, on June 29, 2009, CAPT Porzeinski advised plaintiff of the Preliminary Inquiry to determine whether plaintiff had violated Rule 3.3 of JAGINST 5803.1C.[6] AR 310. CAPT Porzeinski also advised plaintiff of the evidence that would be considered, as well as plaintiff's right to submit a written statement and any written materials for consideration. Id. CAPT Porzeinski requested plaintiff's response no later than July 10, 2009. Id.

On July 16, 2009, having received no response from plaintiff, CAPT Porzeinski completed the Preliminary Inquiry and submitted it to the Rules Counsel for action. AR 276-371. CAPT Porzeinski's Preliminary Inquiry included several "Findings of Fact," "Opinions" based on those facts, and "Recommendations." AR 292-307. By a preponderance of the evidence, CAPT Porzeinski found that plaintiff violated Rules 3.1 and 3.3 of JAGINST 5803.1C[7], and recommended that a formal ethics investigation be convened. AR 305-07.

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[5] See JAGINST 5803.1C, ¶ 6(a)(4), AR 484; 32 C.F.R. § 776.83.

[6] See 32 C.F.R. § 776.42.

[7] See 32 C.F.R. §§ 776.40 & 776.42.

On July 22, 2009, CAPT Prozeinski received plaintiff's response to CAPT Prozeinski's June 29, 2009 letter. Compl. ¶ 49; AR 288. CAPT Porzeinski responded, again requesting any written submissions from plaintiff by August 14, 2010. Compl. ¶ 50; AR 289-90.

On August 22, 2009, having received no response from plaintiff, CAPT Porzeinski submitted his "Supplemental Report" to the Rules Counsel. AR 286-90. After CAPT Porzeinski submitted his report, he received plaintiff's response. Compl. ¶ 51; AR 282-84. On September 8, 2009, CAPT Porzeinski then submitted his "Second Supplemental Report." AR 278-84. After considering plaintiff's August 10, 2009 letter, CAPT Porzeinski made additional "Findings of Fact" and "Opinions" in the "Second Supplemental Report." AR 278-81.

2. Captain Robert Blazewick's Ethics Investigation

In accordance with JAGINST 5803.1C, on October 6, 2009, the Rules Counsel appointed CAPT Robert Blazewick, JAGC, USN, to conduct a formal ethics investigation into the allegations of professional misconduct by plaintiff.[8] Compl. ¶¶ 52, 53; AR 116. On October 6, 2009, plaintiff received notification of the commencement of the investigation, a detailed list of the professional conduct violations he had allegedly committed, a copy of CAPT Porzeinski's "Preliminary Inquiry," and was advised

[8] See 32 C.F.R. § 776.84.

of his procedural due process rights. Compl. ¶ 58; AR 111-15. Those procedural rights included the right to request a hearing before the Investigative Officer, the right to inspect all evidence, the right to present written or oral statements or materials, and the right to call witnesses and be assisted by counsel. AR 111-12. Plaintiff was advised to respond by October 14, 2009, with his decision as to whether he desired a hearing. Id.

On October 22, 2009, CAPT Blazewick contacted plaintiff requesting a decision as to whether he wanted a hearing. AR 212-14. From October 29, 2009, to January 11, 2010, plaintiff and CAPT Blazewick exchanged numerous letters and emails regarding the Ethics Investigation and plaintiff's right to a hearing. Compl. ¶ 92; AR 216-70. Pursuant to his January 6, 2010, letter, plaintiff clearly expressed that he had "no intention in participating" in any hearing. Compl. ¶¶ 94, 99; AR 250. On January 11, 2010, CAPT Blazewick advised plaintiff that a hearing would still be held on January 19, 2010, where plaintiff could present evidence, witness testimony and/or a statement for consideration. AR 237, 271. Plaintiff failed to attend the hearing. AR 271.

After considering all the materials plaintiff submitted, on February 19, 2010[9], CAPT Blazewick submitted his Ethics Investigation to the Rules Counsel.[10] Compl. ¶ 95; AR 79-274. CAPT Blazewick's Ethics Investigation included several "Findings of Fact," "Opinions" based on those facts, and "Recommendations." Compl. ¶¶ 96-98; AR 82-110. CAPT Blazewick found by clear and convincing evidence that plaintiff had violated Rules 3.1 and 3.3 of JAGINST 5803.1C[11], and recommended that the Ethics Investigation be forwarded to the Navy JAG for further action. See Compl. ¶ 110; AR 109-10.

On March 31, 2010, plaintiff, having reviewed the Ethics Investigation, submitted a response to the Rules Counsel. AR 74. On April 5, 2010, the Rules Counsel forwarded the Ethics Investigation to the Navy JAG for action. AR 68-73.

C. The Navy JAG & CAAF's Suspensions

On May 17, 2010, after reviewing the Ethics Investigation, in accordance with Rules for Courts-Martial ("R.C.M.") Rule 109

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[9] CAPT Blazewick's Ethics Investigation was incorrectly dated "2009".

[10] On February 19, 2010, CAPT Morin, having commenced "terminal leave" prior to his retirement from the U.S. Navy on June 1, 2010, was no longer serving as the Navy Rules Counsel.

[11] See 32 C.F.R. §§ 776.40 & 776.42.

and JAGINST 5803.1C[12], VADM James Houck, JAGC, USN, the Navy Judge Advocate General ("JAG"), indefinitely suspended plaintiff from practicing law in any and all proceedings under the Navy JAG's cognizance. See Compl. "Introduction"; AR 64-67. In particular, VADM Houck stated that "I find you filed an appellate brief with NMCCA that contained statements you knew to be false and misleading . . . ." AR. 66. A copy of this letter was sent to the CAAF. AR. 67.

On June 10, 2010, the CAAF sent plaintiff a letter informing him that the Court had been informed that plaintiff had been "suspended from the practice of law in the U.S. Navy-Marine Corps Court of Criminal Appeals by the Judge Advocate General of the Navy." AR 42. Pursuant to Rule 15(b) of the Rules of Practice and Procedure for the CAAF, plaintiff was suspended and issued a an order to show cause as to why he should not be disbarred by that Court. Id. He was given to July 12, 2010 to respond. Id.

By letter dated July 9, 2010, plaintiff responded and asked for an extension of time to respond to September 7, 2010, due to the need to obtain counsel to represent him. AR 40-41. That same day plaintiff's request was granted. Id. at 41. On or about August 30, 2010, plaintiff was granted another extension to respond, to and including September 21, 2010. Id. at 39. Yet

[12] See 32 C.F.R. § 776.86.

another extension to September 23, 2010, was subsequently granted upon request. Id. at 38.

On September 22, 2010, plaintiff filed his response to the show cause order. AR 15-22. On October 26, 2010, the CAAF suspended plaintiff from practicing before it for one year, effective retroactively from June 10, 2010. Compl. ¶ 111; AR 13-14. Plaintiff filed a motion for reconsideration, which, on December 17, 2010, the CAAF denied. AR 2-12.

Having been previously advised by the Navy JAG in his May 17, 2010, indefinite suspension imposition letter, the various jurisdictions where plaintiff was licensed to practice law were advised of the actions taken by the Navy Rules Counsel.[13] AR 45-62.

III. ARGUMENT

A. Plaintiff's First Cause of Action Should be Dismissed

1. Discipline of Civilian Counsel Practicing Under the Navy JAG's Cognizance is Authorized by Law.

Plaintiff alleges both that the Navy JAG had "no statutory authority pursuant to the UCMJ or any other statute, to discipline Partington," and that the JAG lacked statutory authority to "issue rules and/or regulations that provide for the imposition of discipline on civilian defense counsel." Compl.

[13] See 32 C.F.R. § 776.88.

¶¶ 117-18. This claim, however, ignores the fact that the President of the United States has specifically authorized each of the respective service JAGs to both discipline civilian counsel and to issue regulations providing for such.

The United States Constitution provides: "The President shall be Commander in Chief of the Army and Navy of the United States..." U.S. CONST. Art II, § 2. In 1951, "[b]y the authority vested in me as President by the Constitution and the laws of the United States of America, including chapter 47 of title 10 United States Code (Uniform Code of Military Justice, 10 U.S.C. 801-946)," the President prescribed the Manual For Courts-Martial ("M.C.M."). See Executive Order 10214; 16 Fed. Reg. 1303 (Feb. 10, 1951). Over time, various Presidents have issued Executive Orders amending the M.C.M.

On December 12, 1993, pursuant to Executive Order 12888, see 58 Fed. Reg. 69153 (Dec, 29, 1993), President William Clinton amended the 1984 edition of the M.C.M.[14] In particular, R.C.M. 109 - "Professional Supervision of Military Judges and Counsel" - was amended to the version applicable to the case at bar. In R.C.M. 109(a), the President "ordered" each respective service JAG with the responsibility for the "professional supervision and discipline of military trial and appellate military judges, judge

[14] See Ronald Reagan per Executive Order 12473 promulgated the 1984 edition of the M.C.M. 49 Fed. Reg. 17152 (Apr. 23, 1984)

advocates and other lawyers who practice in proceedings governed by the code and this Manual. To discharge this responsibility each Judge Advocate General may prescribe rules of professional conduct not inconsistent with this rule or this Manual." 58 Fed. Reg. 69153 (Dec, 29, 1993)(emphasis added). It should be noted that the term "other lawyers" is used in addition to "judge advocates" in this context.

R.C.M. 109(a) further provides that the "rules of professional conduct promulgated pursuant to this rule may include sanctions for violations of such rules. Sanctions may include but are not limited to indefinite suspension from practice in courts-martial..." Id. (emphasis added). Throughout R.C.M. 109, the word "person" is used, as opposed to the word "judge advocate," indicating that the JAG's authority applies to all lawyers, both military and civilian, who practice in military proceedings.

This is further confirmed by reviewing the Analysis section for R.C.M. 109, located in Appendix 21 of the M.C.M. It states:

> This Rule applies to all military and appellate judges and to all judge advocates and lawyers who practice in military justice, including the administration of nonjudicial punishment and pretrial and posttrial matters relating to courts-martial. The rule also applies to civilian lawyers so engaged as did its predecessor. The Rule does not apply to lay persons.

Id.(emphasis added).

In order to properly "discharge [his] responsibility," as directed by the President, the Navy JAG, through JAGINST 5803.1C[15], "prescribe[d] rules of professional conduct not inconsistent with [R.C.M. 109] or [the M.C.M.]" The provisions of JAGINST 5803.1C apply to all "covered attorneys" as defined by the instruction.[16] "Covered attorneys" include:

> all civilian attorneys representing individuals in any matter for which the JAG is charged with supervising the provision of legal services. These matters include, but are not limited to, courts-martial...

See JAGINST 5803.1C ¶ 4(b)(2); AR 375; 32 C.F.R. § 776.2(b)(2).

JAGINST 5803.1C lists the M.C.M. as one of its controlling authorities. See JAGINST 5832.1C Ref(b); AR 373. Additionally, the Navy clearly referenced the instruction in all its correspondence with plaintiff. AR 79, 111, 117, 136, 192-193, 216, 225-226, 231-234 and 278. Finally, the JAG cited the instruction, R.C.M. 109 and 32 C.F.R. § 776, as the authorities for his action in the suspension decision letter to plaintiff. AR 65-66.

Thus, considering the President of the United States, pursuant to the clear undisputable authority vested in him by the Constitution and the laws of the United States, including 10 U.S.C. §§ 801-946, explicitly authorized the discipline of

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[15] See 32 C.F.R. §§ 776 et seq.

[16] See JAGINST 5803.1C ¶ 4(a); AR 374; 32 C.F.R. § 776.2.

civilian attorneys serving as defense counsel in courts-martial, and authorized the adoption of regulations to support such actions, plaintiff's First Cause of Action with respect to VADM James Houck, sued in his official capacity as the decision maker for the Navy with respect to plaintiff's suspension, must fail and be dismissed or summary judgment on the claim entered for defendant VADM Houck.

2. Plaintiff Waived his Right to Challenge Defendants' Authority to Discipline Him.

Although plaintiff alleges the Navy JAG did not possess the proper authority to discipline him via JAGINST 5803.1C, plaintiff conveniently ignores the fact that he voluntarily "agreed to abide by...JAG INSTRUCTION 5803.1 series (Professional Conduct of Attorneys Practicing Under the Supervision of the Judge Advocate General).." AR 1238-39. Having agreed to abide by this instruction, plaintiff is not free to escape its provisions for discipline for violations of the conduct requirements. Accord Ghawanmeh v. Islamic Saudi Academy, 672 F. Supp.2d 3, 10 (D.D.C. 2009) (defense of sovereign immunity is waived when the defendant agreed to subject itself to the Court's jurisdiction).

3. The Claim Against the CAAF should be Dismissed.

Plaintiff's First Cause of Action alleging lack of statutory authority purports to be against the CAAF as well as VADM Houck. However, plaintiff makes no allegations that the CAAF acted outside of its authority in suspending him from practice for one

year. Indeed, plaintiff mentions no alleged wrongdoing by the CAAF with respect to this count whatsoever. Compl., ¶¶ 113-18.

The CAAF was established pursuant to 10 U.S.C. § 941 as an Article I Court under the U.S. Constitution. For administrative purposes, the Court is located in the Department of Defense. 10 U.S.C. § 941. Under 10 U.S.C. § 944, the CAAF is authorized to "prescribe its rules of procedure . . . ." Id. Pursuant to this authority, the CAAF has adopted the Model Rules of Professional Conduct of the American Bar Association. CAAF Rule 15(a).

Under CAAF Rule 15(b):

> Whenever a member of the Bar of this Court has been disbarred or suspended from practice in any court of record, the Court will enter an order suspending that member from practice before this Court and affording the member an opportunity to show cause, within thirty days, why a disbarment should not be entered. Upon response, or if no response is timely filed, the Court will enter an appropriate order.

See http://www.armfor.uscourts.gov/Rules.htm. Accordingly, the CAAF plainly had the statutory authority to enact a rule dealing with disciplinary action for attorneys appearing before that Court.

Moreover, "courts have inherent authority to impose sanctions for abusive litigation practices undertaken in bad faith." Young v. Off. of the United States Senate Sergeant at Arms, 217 F.R.D. 61, 65 (D.D.C. 2003). The Supreme Court has made clear that this power includes the power "to discipline attorneys who appear before it." Chambers v. NASCO, Inc., 501

U.S. 32, 43 (1991), *citing* Ex parte Barr, 9 Wheat. 529, 531; 6 L.Ed. 152 (1824). Consequently, due to its inherent power to protect the integrity of the judicial system, the CAAF plainly had the authority to suspend plaintiff after having been informed of the Navy's findings that plaintiff had filed an appellate brief with the NMCCA that contained statements he knew to be false and misleading. AR 66-67.

Thus, to the extent that plaintiff's First Cause of Action suggests that the CAAF lacked the authority to suspend him, that claim is plainly without merit and should be dismissed.

Moreover, plaintiff's claims against CAAF are barred by absolute judicial immunity. A court can only act through its judges, and as a class, judges have long enjoyed absolute immunity from any lawsuit arising out of their judicial functions. Forrester v. White, 484 U.S. 219, 225 (1988). A judge performing a "judicial act" is protected by absolute immunity from suit unless there is a "clear absence of all jurisdiction." Stump v. Sparkman, 435 U.S. 349, 356-59 (1978). Protected judicial acts are identified by considering "the nature of the act itself, i.e., whether it is normally performed by a judge, and . . . the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity." Stump, 435 U.S. at 362.

It is abundantly clear from plaintiff's allegations that he is suing CAAF for actions taken by the court in its judicial capacity. In particular, plaintiff is challenging the CAAF's imposition of a suspension from practice before it pursuant to Rule 15(b) of the Court's official "Rules of Practice and Procedure." Compl. ¶¶ 111, 112. Clearly CAAF's imposition of disciplinary action upon an attorney admitted to practice before it who has been suspended from practice in an other court, in accordance with its published "Rules of Practice and Procedure," with the Clerk of Court signing the official Order for the Court effectuating the suspension, constitute acts normally performed by a judge or a court in its judicial capacity. Therefore, since CAAF as an institution is not subject to suit, and its judges and employees have absolute judicial immunity, all causes of action against CAAF should properly be dismissed. See Murray v. United States Court of Appeals for Veterans Claims, 2009 WL 3805241 (D.D.C. Oct 29, 2009); see also Mireles v. Waco, 502 U.S. 9, 11 (1991).

B. Plaintiff's Second Cause of Action Should be Dismissed

In his Second Cause of Action plaintiff alleges that he was denied procedural due process and he suffered a loss of a liberty

interest in violation of his Fifth Amendment rights. Compl. ¶¶ 119-26.[17]

The Court of Appeals for this Circuit has recognized that there are three basic elements to a procedural due process claim: there must be (1) a deprivation; (2) of life, liberty, or property; (3) without due process of law. Propert v. District of Columbia, 948 F.2d 1327, 1331 (D.C. Cir.1991). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (*quoting* Armstrong v. Manzo,3380 U.S. 545 (1965)). However, it is equally fundamental that due process is "not a technical conception with a fixed conception unrelated to time, place and circumstances;" rather, it is "flexible and calls for such procedural protections as the particular situation demands." Id. at 334.

Consequently, "[t]he precise form of notice and the precise kind of hearing required [in a given circumstance] depend[ ] upon a balancing of the competing public and private interests involved." Propert, 948 F.2d at 1332. In determining what process is due, three distinct factors are considered and

[17] Plaintiff also lists CAAF in bold in the caption to his "Second Cause of Action," but any claims in this cause of action against CAAF are subject to dismissal on the grounds of absolute judicial immunity, as discussed above.

commonly referred to as the "Mathews factors," a reference to the Supreme Court decision in which they were first articulated:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335. "Depending on the tilt of the Mathews balance in a particular case, the usual requirement of written notice may be relaxed, and the timing and content of the hearing may vary." Propert, 948 F.2d at 1332 (internal citation omitted); see also Logan v. Zimmerman Brush Co., 455 U.S. 422, 434 (1982) ("[T]he timing and nature of the required hearing will depend on appropriate accommodation of the competing interests involved") (internal quotation marks omitted). Given the intensely fact-based nature of the inquiry, the Supreme Court has cautioned against adopting a "sweeping and categorical" approach to the Due Process Clause. Gilbert v. Homar, 520 U.S. 924, 931, (1997).

The Fifth Amendment of the United States Constitution precludes the government from depriving citizens of their liberty and property interests without due process of law. U.S. Const Art. V. However, a liberty interest to pursue or property interest in employment does not arise from the Fifth or

Fourteenth Amendments of the U.S. Constitution itself, but, if at all, from "independent source[s] such as state law. . .." Board of Regents v. Roth, 408 U.S. 564, 577 (1972); see Wilkinson v. Austin, 545 U.S. 209, 221 (2005) (liberty interests may be located in the Constitution itself or arise from state law or policies). Plaintiff's Complaint completely fails to allege any state or federal law, constitutional right, or regulation whatsoever that creates an independent source for his underlying claim of entitlement to represent clients in courts-martial proceedings. Additionally, there are no facts alleged that indicate, and there is no basis in law to find, that plaintiff had a protected liberty or property interest in continued employment as a defense counsel in proceedings under the Navy JAG's cognizance.

It is well established that persons possess no constitutional, statutory or regulatory right to engage in the practice of law in any particular jurisdiction. See Yeiser v. Dysart, 267 U.S. 540, 541 (1925). In an unpublished decision in a case brought by an attorney claiming due process violations in connection with her termination, the Third Circuit held that "state actions that exclude a person from one particular job are not actionable in suits . . . brought directly under the due process clause. It is the liberty to pursue a calling or occupation, and not the right to a specific job, that is secured

by the Fourteenth Amendment." O'Donnell v. Simon, 362 Fed. Appx. 300, 304 (3d Cir. 2010), *citing* Piecknick v. Pennsylvania, 36 F.3d 1250, 1259 (3d Cir. 1994). The Third Circuit in Simon held that the action complained of affected only the plaintiff's specific job with her employer, not her broader right to practice law, and, accordingly, she had not asserted a constitutionally protected liberty interest. Simon, 362 Fed. Appx. at 304.

Similarly, in the instant case, the actions taken have resulted in the suspension of plaintiff's ability to practice law before Navy/Marine Corps tribunals, but have not affected his broader ability to practice law in civilian courts or before any forum of another military department, such as the Army or Air Force. Thus, plaintiff has failed to allege any facts that, through a statutory or constitutional guarantee, establish that he possesses a liberty interest or property interest in continued employment as a civilian defense counsel in courts-martial proceedings.

Even assuming that plaintiff had alleged sufficient facts to show that he had a constitutionally cognizable interest in his employment as a lawyer representing clients in Navy/Marine Corps tribunals, plaintiff was provided abundant due process prior to the indefinite suspension of his ability to practice law before Navy/Marine Corps tribunals.

In October 2008, plaintiff was provided notice of the charges and he responded by generally denying them. Compl. ¶ 45; AR 367-71. A preliminary inquiry was initiated in June 2009 and, during this inquiry, plaintiff was afforded the opportunity to, and did, submit numerous matters for consideration by the investigating officer, CAPT Porzeinski. Compl. ¶¶ 46, 49, 51; AR 276-371.

In October 2009, after reviewing the complete Preliminary Inquiry, the Navy Rules Counsel initiated a formal ethics investigation, appointing CAPT Blazewick as the Investigating Officer. Compl. ¶¶ 52, 53; AR 76-274. Plaintiff was notified of the formal ethics investigation and the specific 14 violations of JAGINST 5803.1C[18] he allegedly committed. Compl. ¶ 58; AR 111-12. Plaintiff submitted several pieces of correspondence in response to these allegations, but voluntarily refused on multiple occasions to avail himself of the right to be heard in a non-adversarial hearing where he was advised he could present witnesses, present additional evidence, present an argument on his behalf or though counsel. Compl. ¶ 94; AR 250. Even after being advised by plaintiff that he had no intention of taking part in any hearing, CAPT Blazewick informed plaintiff that he still would (and did) hold the hearing as scheduled, in the event plaintiff changed his mind. AR 237, 271.

[18] 32 C.F.R. § 776.

Clearly, at each and every step of this process, plaintiff was afforded significant due process rights, many of which he consciously chose not to exercise.

R.C.M. 109(a) answers the question of "what process is due," stating that an "[Indefinite suspension from practice in courts-martial] may only be imposed by the Judge Advocate General of the armed service of such courts. Prior to imposing any discipline under [R.C.M. 109], the subject of the proposed action must be provided notice and an opportunity to be heard." Only after plaintiff was provided notice and an opportunity to be heard by both CAPT Porzeinski and CAPT Blazewick, did the Navy JAG impose an indefinite suspension. AR 64-67. Thus, although plaintiff has failed to cite to any statute, regulation or constitutional provision that provides him with a valid liberty or property interest in his ability to serve as a defense counsel in military proceedings, it is abundantly clear that, from the date the NMCCA filed the professional responsibility complaint until the date the Navy JAG imposed an indefinite suspension, plaintiff was provided significant due process rights throughout the whole process. Therefore, defendants are entitled to summary judgment on his claims of a violation of his Fifth Amendment rights.

C. Plaintiff's Third Cause of Action Should be Dismissed

Plaintiff's third cause of action seeks review of agency action under the Administrative Procedure Act ("APA"). Under the

APA, "[t]he entire case on review is a question of law, and only a question of law," and can be resolved on the administrative record in the context of a motion for summary judgment. Marshall County Health Care Authority v. Shalala, 988 F.2d 1221, 1226 (D.C. Cir. 1993); see American Bioscience, Inc. v. Thompson, 269 F.3d 1077, 1083-84 (D.C. Cir. 2001); University Medical Center v. Shalala, 173 F.3d 438, 440 n.3 (D.C. Cir. 1999). In such record review cases, the district court generally does not resolve factual issues or duplicate agency fact-finding efforts, but instead functions as an appellate court addressing a legal issue. James Madison Ltd. by Hecht v. Ludwig, 82 F.3d 1085, 1096 (D.C. Cir. 1996). For this reason, the normal standard of review for a summary judgment motion, which requires a district court to decide whether there is any "genuine issue of material fact," *see* Fed. R. Civ. P. 56(c), does not apply. Sierra Club v. Mainella, 459 F. Supp. 2d 76, 89-90 (D.D.C. 2006); see LCvR 7(h)(2) (statement of undisputed material facts not required for cases "in which judicial review is based solely on the administrative record"). To the contrary, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." Camp v. Pitts, 411 U.S. 138, 142 (1973). Summary judgment, therefore, is the mechanism through which the Court decides whether as a matter of law the agency action under review is supported by the

administrative record and is otherwise consistent with the APA standard of review. See Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985) ("The task of the reviewing court is to apply the appropriate APA standard of review . . . to the agency decision based on the record the agency presents to the reviewing court.").

Under the APA standard of review, a court must "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), in excess of statutory authority, id. § 706(2)(C), or "without observance of procedures required by law," id. § 706(2)(D). The scope of review, however, is "narrow," and "the court is not to substitute its judgment for that of the agency." Motor Vehicle Mfgr's Ass'n v. State Farm Mutual Auto Insurance Co., 463 U.S. 29, 43 (1983); see Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). The arbitrary and capricious standard is "[highly deferential," and "presumes the validity of agency decisions." AT&T Corp. v. FCC, 220 F.3d 607, 616 (D.C. Cir. 2000).

In order to satisfy the APA standard of review, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" State Farm, 463

U.S. at 43 (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)); accord Alpharma, Inc. v. Leavitt, 460 F.3d 1, 6 (D.C. Cir. 2006). The administrative record, however, need not include explicit discussion of every factor that is relevant to the agency's decision so long as the bases for the agency's policy choices are otherwise clear from the nature and context of the challenged action. See Domtar Maine Corp. v. FERC, 347 F.3d 304, 311-12 (D.C. Cir. 2003), *cert. denied*, 541 U.S. 1029 (2004). "While [the court] may not supply a reasoned basis for the agency's action that the agency itself has not given, [the court should] uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." Bowman Transportation, Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285-86 (1974) (internal citation omitted).

Here, the decision by VADM Houck to suspend plaintiff was soundly based on the record before the agency, which consisted of both a preliminary inquiry and a subsequent ethics investigation. As VADM Houck found:

> I have determined that there is clear and convincing evidence you violated the following Rules of Professional Conduct set forth in JAGINST 5803.1C: Rule 3.1 (Meritorious Claims and Contentions) and Rule 3.3 (Candor and Obligation Toward the Tribunal).
>
> To summarize your professional misconduct, I find that you took two misstatements made by the military judge when he said he was entering a "finding of not guilty" with respect to certain specifications and, in turn, grossly exaggerated those misstatements in your appellate brief to the point that you intentionally

> misrepresented the posture of the case by claiming the military judge dismissed and/or acquitted your client of the offenses at issue. An objective reading of the record of trial conclusively demonstrates the military judge intended to convey that he was rejecting your client's attempt to plead guilty to certain offenses and was instead entering 'pleas' of not guilty on his behalf. The military judge made this clear on numerous occasions, carefully and specifically explaining this very point to you and your client as reflected on pages 278-282 of the record of trial. [footnote 3: Indeed, you specifically acknowledged at trial the meaning and affect of the military judge's action, 'CDC: I know the Court has entered a not guilty plea.' See ROT page 280.] . . .
>
> Accordingly, I find that you filed an appellate brief with NMCCA that contained statements you knew to be both false and misleading . . . .

AR 65-66.

Plaintiff's Complaint makes clear that he does not dispute the statements in his appellate brief attributed to him. See Compl. ¶¶ 59-88. Rather, plaintiff claims that the statements he made were legal argument and not statements of fact, and therefore could not be considered true or false. Id. The fallacy of this claim is readily apparent from a review of the statements at issue.

For example, plaintiff claims that one statement he made in his brief, saying "the military judge dismissed those specifications for failure to allege an offense . . . [,]" is not a statement of fact but is legal argument. Compl. ¶¶ 65-66. On the contrary, whether a judge has dismissed certain specifications (charges) at trial is a factual matter with legal

implications, but it is certainly not legal argument. Either the specifications remain in force or they are dismissed – their continued existence before the Court is a factual matter that then will generate further legal proceedings.

VADM Houck's conclusions regarding statements made by plaintiff in his appellate brief are corroborated by the brief itself. AR 330-48. For example, plaintiff claimed the military judge "'acquitted]'" his client of certain offenses. AR 331, 333, 337. He also claimed that the judge "dismissed" certain specifications. AR 335. But the trial record supports VADM Houck's conclusion that these statements were false and misleading. See, e.g., AR 972, 976, 986, 992, 993, 1003, 1011-15.

Accordingly, the administrative record in this case fully supports VADM Houck's conclusions that plaintiff's appellate brief contained false and misleading statements which in turn formed a reasonable basis for the decision to suspend plaintiff indefinitely from practicing law in Navy-Marine Corps tribunals. This decision represents no arbitrary or capricious action nor any abuse of discretion. Therefore, defendant Houck is entitled to summary judgment on plaintiff's claim under the APA.[19]

[19] Plaintiff also lists CAAF in bold in the caption to his "Third Cause of Action," but the any claims in this cause of action against CAAF are subject to dismissal on the grounds of absolute judicial immunity, as discussed above.

D. Plaintiff's Fourth Cause of Action Should be Dismissed

In plaintiff's fourth cause of action, he raises Bivens claims against defendants Houck, Porzeinski, Blazewick and Morin, claiming that they violated unspecified "constitutionally protected rights." Compl. ¶¶ 132-36. Given that the only constitutional rights raised in the Complaint concern plaintiff's Fifth Amendment rights, id. at ¶¶ 119-26, the Bivens claims presumably concern these same constitutional rights.

In cases such as this, the courts must decide whether to recognize an implied right of action for the particular constitutional provision, in the context of the particular actions challenged. Wilkie v. Robbins, 551 U.S. 537, 550 (2007). The Supreme Court has identified two circumstances that preclude the creation of an implied right of action directly under the Constitution. First, no Bivens remedy will lie where "Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective." Carlson v. Green, 446 U.S. 14, 18 (1980). Second, "even in absence of affirmative action by Congress," "special factors counseling hesitation," may preclude recognition of any judicially-created remedy for the alleged constitutional violation. Bivens, 403 U.S. at 396; Schweiker v. Chilicky, 487 U.S. 412 (1988). The Court has since clarified that a Bivens remedy should be inferred only if (1) there is no

alternative, existing process for protecting a constitutional interest, and (2) if there are no special factors counseling hesitation against a judicially created remedy. Wilkie, 537 U.S. at 550.

1. Special Factors Counsel Hesitation in The Creation of a Bivens Remedy.

The courts have recognized that special factors counseling against the creation of an alternative Bivens-type remedy must be recognized where a comprehensive statutory scheme has been established to provide relief in a given area. See, e.g., Wilson v. Libby, 535 F.3d 697, 704-10 (D.C. Cir. 2008) (concluding that the Privacy Act constitutes a special factor precluding a Bivens remedy, even though the statute does not afford complete relief to the plaintiffs); Spagnola v. Mathis, 859 F.2d 223, 229-30 (D.C. Cir. 1988) (en banc) (recognizing the exclusivity of the Civil Service Reform Act's remedies); Bush v. Lucas, 462 U.S. 367 (1983) (comprehensive procedural and substantive provisions of the Civil Service Reform Act constitute "special factors" counseling hesitation against a Bivens remedy); Gleason v. Malcomb, 718 F.2d 1044, 1048 (11th Cir. 1983)(special factors counsel against a Bivens remedy where plaintiff could have sought equitable relief pursuant to the APA); GasPlus, L.L.C. v. U.S. Dept. of Interior, 466 F. Supp.2d 43, 50 (D.D.C. 2006)(APA constitutes special factor warranting dismissal of

Bivens claims).[20]

The Court of Appeals has recently explained the special factors analysis as follows:

> We have discretion in some circumstances to create a remedy against federal officials for constitutional violations, but we must decline to exercise that discretion where "special factors counsel[] hesitation" in doing so. See Bivens, 403 U.S. at 396; Spagnola v. Mathis, 859 F.2d 223, 226 (D.C. Cir. 1988) (en banc). In Bivens, the Court implied a remedy where there were no "special factors counseling hesitation in the absence of affirmative action by Congress" that required "the judiciary [to] decline to exercise its discretion in favor of creating damages remedies against federal officials." Spagnola, 859 F.2d at 226 (quoting Bivens, 403 U.S. at 396). Since Bivens, the Supreme Court has "recognized two more nonstatutory damages remedies, the first for employment discrimination in violation of the Due Process Clause, Davis v. Passman, 442 U.S. 228 (1979), and the second for an Eighth Amendment violation by prison officials, Carlson v. Green, 446 U.S. 14 (1980)," but "in most instances[, the Court has] found a Bivens remedy unjustified." Wilke v. Robbins, 127 S. Ct. 2588, 2597 (2007). Indeed, in its "more recent decisions[, the Supreme Court has] responded cautiously to suggestions that Bivens remedies be extended into new contexts." Chilicky, 487 U.S. at 421.
>
> One "special factor" that precludes creation of a Bivens remedy is the existence of a comprehensive remedial scheme. In Bush v. Lucas, 462 U.S. 367 (1983), the Court held that the federal civil service laws were a "special factor" that precluded additional Bivens remedies because they constituted "an elaborate remedial system that ha[d] been constructed step by step, with careful attention to conflicting policy considerations" and thereby reflected Congressional judgment about the type and magnitude of relief

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[20] See also Sloan v. HUD, 231 F. 3d 10, 12 (D.C. Cir. 2002) (recognizing the district court's dismissal of Bivens claims based on APA special factors analysis, but affirming on other grounds).

> available. Id. at 388–90. The scheme did not provide "complete relief" to the plaintiff, but the Court held that the special factors inquiry does "not concern the merits of the particular remedy that was sought" or its completeness. Id. at 380, 388.
>
> * * *
>
> Most recently, in Wilkie v. Robbins, 127 S. Ct. 2588 (2007), the Court again held that the creation of a Bivens remedy is not required solely because there is no alternative statutory remedy. In Wilkie, there was no comprehensive scheme demonstrating "that Congress expected the Judiciary to stay its Bivens hand," but the Court declined to imply a Bivens remedy nonetheless. Id. at 2600. The Court held that a remedy for allegedly harassing conduct of government officials would "come better, if at all, through legislation [because] 'Congress is in a far better position than a court to evaluate the impact of a new species of litigation' against those who act on the public's behalf." Id. at 2604–05 (quoting Bush, 462 U.S. at 389).

Wilson v. Libby, 535 F.3d 697, 704-705 (D.C. Cir. 2008).

Here, without a doubt, the APA provides a remedy for "agency action" when that action is "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2). The statute defines "agency action" as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." See 5 U.S.C. § 706 (incorporating definition contained in 5 U.S.C. § 551(13)). The APA "provides specifically not only for review of '[a]gency action made reviewable by statute' but also for review of 'final agency action for which there is no other adequate remedy in a court.'" Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967)

(quoting 5 U.S.C. § 704). Through the APA, Congress has contemplated that agency actions may violate constitutional rights and has provided a certain set of procedures and remedies to address such situations. See 5 U.S.C. § 706(2) (providing certain remedies of agency action is found to be "arbitrary, capricious, an abuse of discretion, [and] otherwise not in accordance with law," or "contrary to a constitutional right").

In the instant case, the actions taken by defendants clearly meet the statutory definition of "agency action." Upon receipt of an official ethics complaint from the NMCCA, in accordance with JAGINST 5800.7E (Chapter 2) and JAGINST 5803.1C, the Navy Rules Counsel initiated a "Preliminary Inquiry" and follow-up "Ethics Investigation" to ascertain all the facts and circumstances surrounding the NMCCA's professional misconduct allegations.[21] Compl ¶¶ 41, 53; AR 116, 308. CAPT Porzeinski and CAPT Blazewick were officially directed to conduct the investigations, and plaintiff was allowed to, and did, submit materials for consideration. Compl ¶¶ 46, 49, 51, 53, 55, 92, 94; AR 216-270. Based upon these thorough investigations, VADM Houck, in his position as Judge Advocate General of the Navy, pursuant to R.C.M. 109, JAGINST 5803.1C and 32 C.F.R. 776.86, indefinitely suspended plaintiff for his unethical conduct. See Compl "Introduction;" AR 64-67. Because defendants' allegedly

[21] See 32 C.F.R. §§ 776.83, 776.84.

unconstitutional conduct amounted to "agency action," it is subject to judicial review under the APA and the creation of a new Bivens remedy would be inappropriate.

Even plaintiff, by alleging that this Court's jurisdiction is pursuant to the APA (Compl. ¶ 7), and seeking APA review of the JAG's actions as outlined above in his Third Cause of Action (Compl. ¶¶ 127-131), admits this case can be reviewed under the APA. Therefore, his Fourth Cause of Action should properly be dismissed. See, e.g., Sloan v. HUD, 231 F.3d 10, 19 (D.C. Cir. 2000) (stating in dictum that "that a Bivens action may be foreclosed where the possibility of judicial review under the APA, along with other 'statutes, executive orders and regulations,' provides a meaningful remedy.") (*quoting* Krodel v. Young,, 748 F.2d 701, 712-13 & 712 n.6 (D.C. Cir. 1984)); see also Maxey v. Kadrovach, 890 F.2d 73, 75-76 (8th Cir. 1989) (holding that plaintiff could not assert a Bivens claim based on the termination of his employment at a VA medical center because the APA provided an adequate means of relief).

2. The Constitutional Claims Against the Individual Defendants Must Also be Dismissed On The Grounds of Qualified Immunity.

Even if this Court were to entertain a Bivens claim against the individually-sued defendants, plaintiff's Complaint fails to state a claim that can withstand the defense of qualified immunity.

Federal defendants sued in their individual capacity enjoy a qualified immunity from liability for constitutional torts. Cleavinger v. Saxner, 474 U.S. 193, 206 (1985); Procunier v. Navarette, 434 U.S. 555, 561 (1978). Qualified immunity is appropriate unless plaintiff can establish that defendants violated a "clearly established" constitutional right. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); see also Anderson v. Creighton, 483 U.S. 635, 638-39 (1987). Government officials performing "discretionary functions" are shielded from liability for civil damages insofar as their conduct did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Safford Unified School District v. Redding, 129 S. Ct. 2633, 2643 (2009); Harlow, 457 U.S. at 818; Wilson v. Layne, 523 U.S. 603, 609 (1999); Behrens v. Pelletier, 516 U.S. 299, 304 (1996). As the D.C. Circuit has explained:

> Qualified immunity shields officials from liability for damages so long as their actions were objectively reasonable, as measured in light of the legal rules that were 'clearly established' at the time of their actions.

Kalka v. Hawk, 215 F.3d 90, 94 (D.C. Cir. 2000), *quoting* Harlow, 457 U.S. at 818-19; Lederman v. United States, 291 F.3d 36, 47 (D.C. Cir. 2002).

The law in this circuit is clear that "[f]or purposes of qualified immunity, it is not enough for a plaintiff to allege

that a defendant's conduct violated a right that is clearly established in general terms." Harbury v. Deutch, 233 F.3d 596, 610 (D.C. Cir. 2000), *rev'd in part on other grounds sub nom*. Christopher v. Harbury, 536 U.S. 403 (2002). Rather:

> 'the right the official is alleged to have violated must have been "clearly established" in a more particularized . . . sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that *in the light of pre-existing law the unlawfulness must be apparent*.'

Id., quoting Anderson v. Creighton, 483 U.S. at 640 (citations omitted) (emphasis supplied)). See also Saucier v. Katz, 533 U.S. 194, 208 (2001) ("The question is what the officer reasonably understood his powers and responsibilities to be, when he acted, under clearly established standards"); Kalka v. Hawk, 215 F.3d at 94 (same).

Moreover, as discussed above, under Harlow this determination requires an objective, not subjective, analysis. Wilson, 523 U.S. at 609; Crawford-El v. Brittin, 523 U.S. 574, 590 (1998). Plaintiff bears the burden of showing a "prima facie case of defendant's knowledge of impropriety, actual or constructive." Krohn v. United States, 742 F.2d 24, 31 (1st Cir. 1984); see also Davis v. Scherer, 468 U.S. 183, 191 (1984). The protection of qualified immunity applies regardless of whether the government official's error is "a mistake of law, a

mistake of fact, or a mistake based on mixed questions of law and fact." Pearson v. Callahan, 129 S. Ct. 808, 815 (2009) *(quoting* Groh v. Ramirez, 540 U.S. 551, 567 (2004) (Kennedy, J., dissenting)).

As to the "clearly established" inquiry, the defendants need not demonstrate that "the law was established in [their] favor at the time [they] acted." Instead, "[i]t is only necessary for [defendants] to show that the law was unsettled . . . not . . . that a Supreme Court opinion had specifically approved their actions." Zweibon v. Mitchell, 720 F.2d 162, 173-74 n.19 (D.C. Cir. 1983), *cert. denied*, 469 U.S. 880 (1984), *reh. denied*, 469 U.S. 1068 (1984). "[O]nce the trial judge determines the law was not clearly established at the time the contested conduct occurred, the inquiry ceases." Id. at 168 (citing Harlow, supra). Given Harlow's focus, it is irrelevant whether the Court concludes that a complaint states a claim upon which relief may be granted, or even that the plaintiff's rights were in fact violated. "The decisive fact is not that a defendant's position turned out to be incorrect, but that the question was open at the time he acted." Mitchell v. Forsyth, 472 U.S. 511, 535 (1985).

Here, plaintiff argues that he "has constitutionally protected rights which have been knowingly violated by the defendants." Compl. ¶ 133. That is the extent of plaintiff's Bivens claims. Id. Clearly plaintiff's vague allegation falls

woefully short of a sufficient claim that the individual defendants have violated a clearly established specific constitutional right. E.G. Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

Nonetheless, assuming that plaintiff's Bivens allegations concern his Fifth Amendment claims, as demonstrated above plaintiff received all the process that he was due with respect to his suspension and there was no violation of any liberty or property interest that plaintiff possesses. Plaintiff can point to no clear due process rights that he was denied by defendants.

As was previously demonstrated, not only has plaintiff failed to adequately demonstrate that he has a clearly established right to practice law in proceedings falling under the Navy JAG's cognizance, but he has also failed to prove he has a right to due process more comprehensive than that which was provided and that a reasonable person would have known was due. Therefore, since plaintiff has failed to allege any facts supporting an allegation that any of the individually named defendants acted outside their official capacities or outside their official authority, his Fourth Cause of Action should properly be dismissed.

Even if this Court were to find that plaintiff properly alleged sufficient facts and law to "clearly establish[]" a constitutional right as required by Harlow, the Bivens action

should still be dismissed since government officials performing "discretionary functions" are shielded from liability for civil damages insofar as their conduct did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, 457 U.S. 800, 818 (1982). Each defendant exercised considerable discretion as they collected and reviewed facts, including multiple submissions from plaintiff, and based upon such each reached various opinions and made recommendations regarding this case. AR 76-371. And only after two complete investigations were conducted, and advice from the Rules Counsel offered, did the Navy JAG ultimately make a discretionary decision regarding the proper resolution to the professional misconduct complaint filed by the NMCCA. AR 64-73, 76-371. Therefore, qualified immunity insulates defendants from suit. See Wilson v. Layne, 526 U.S. at 609.

3. Plaintiff's Fourth Cause Of Action is also Subject to Dismissal for Failure to Properly Serve The Individually-Named Defendants.

This Court is without personal jurisdiction over defendants sued in their individual capacities in the absence of proper service. It is well-established that, in an action against a federal employee in an individual capacity, the individually-sued defendant must be served with process in accordance with Rule 4(e) of the Federal Rules of Civil Procedure. See Simpkins v. District of Columbia Govt., 108 F.3d 366, 369 (D.C. Cir. 1997);

Lawrence v. Acree, 79 F.R.D. 669, 670 (D.D.C. 1978); Delgado v. Bureau of Prisons, 727 F. Supp. 24 (D.D.C. 1989). Rule 4(e) provides that service is effectuated by complying with the laws of the state for such in which the district court is located by delivering a copy of the summons and complaint to the defendant (or his appointed agent) personally, or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion who resides there. Fed. R. Civ. P. 4(e). Actual notice will not, of course, substitute for technically proper service under Rule 4 and will not permit the Court to render a personal judgment against an individually-sued defendant. See Stafford v. Briggs, 444 U.S. 527 (1980). Service on the Attorney General of the United States or the United States Attorney for the district in which the action is brought, pursuant to the rules applicable to official capacity suits, "does not obviate the requirement of personal service. . .where the action is in substance against a federal official in his individual capacity." Lawrence, 79 F.R.D. at 670; Delgado, 727 F. Supp. at 27. To the extent that plaintiff seeks relief against federal employees in an individual capacity, the Court must acquire personal jurisdiction in order to enter a binding judgment, and personal jurisdiction is only acquired by personal service. E.g., Reuber v. United States, 750 F.2d 1039, 1049 (D.C. Cir.1984).

In this case, plaintiff filed his Complaint with this Court on November 16, 2010. On December 8, 2010, the United States Attorney's Office was served as well as the Department of the Navy's Office of General Counsel ("OGC"). However, the OGC accepted service in official capacity only for VADM Houck, CAPT Morin, and, on December 3, 2010, for CAPT Porzeinski.[22] Plaintiff has filed no evidence that OGC was authorized to accept personal service of a Complaint suing the individual defendants in their personal capacities. Yet, pursuant to plaintiff's Complaint, only VADM Houck is being sued in his official capacity.[23] Compl. ¶ 2; see also Compl. Causes of Action One, Two and Three. Service upon the OGC does not qualify as proper service in regard to any defendant being sued in his individual capacity. Therefore, since the record in this action is devoid of any credible evidence of proper personal service upon the federal defendants being sued in their individual capacities, this action cannot proceed against them individually and plaintiff's Fourth Cause of Action should properly be dismissed.

Nonetheless, the Court need not reach this issue based on

[22] There is no evidence the OGC accepted service in his "official capacity" for CAPT Blazewick.

[23] CAAF is also sued in its official capacity, and was served on December 27, 2010.

the arguments above.[24]

IV. CONCLUSION

For the foregoing reasons, defendants respectfully request that this Court enter judgment in favor of defendant Houck and the CAAF with respect to the First, Second and Third Causes of Action and dismiss the Fourth Cause of Action against the remaining defendants.

Respectfully Submitted,

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[24] Defendants acknowledge that the time in which service can be made on these defendants has not yet expired. See Fed. R. Civ. P. 4(m).

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United States Navy
General Litigation

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EARLE A. PARTINGTON, Plaintiff, v. VICE ADMIRAL JAMES W. HOUCK, JAGC, USN, et al., Defendants.	)	Civil No. 10-1962(HHK)

ORDER

Upon consideration of defendants' motion to dismiss in part and motion for summary judgment in part, plaintiff's responding opposition, and the entire record in this case, it is hereby

ORDERED that defendants' motion is granted; and it is further

ORDERED that judgment is granted to defendant Houck and the United States Court of Appeals for the Armed Forces on plaintiff's First, Second and Third Causes of Action; and it is further

ORDERED that plaintiff's Fourth Cause of Action is dismissed; and it is further

ORDERED that this case is dismissed with prejudice.

_____
UNITED STATES DISTRICT JUDGE