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INFORMATION PAPER

25 Feb 02

SUBJECT: Privacy Act - Court of Appeals (DC) Decision in Cummings v. Department of the Navy

PURPOSE: To provide information and a brief analysis of the above-cited case.

FACTS:

1. In a 2-1 decision, the U.S. Court of Appeals for the District of Columbia Circuit recently held that the Feres doctrine does not bar a lawsuit for damages under the Privacy Act filed by a member of the Armed Forces, reversing the district court's dismissal of the cause of action and remanding the case to the district court for further proceedings addressing the service member's specific Privacy Act allegations. The district court had held that the Feres doctrine barred the lawsuit because the injury occurred in the course of activity incident to military service.

2. Mary Louise Cummings, a naval aviator, was assigned to a flight squadron in November 1994 at the Naval Air Station, Cecil Field, in Jacksonville, FL, to train on F-18 Hornet aircraft. Six months into her training period, the U.S. Navy convened a Field Naval Aviator Evaluation Board (the Board) to assess her flying skills and to evaluate her potential. The Board recommended terminating her flying status. The Commander of the Navy's Atlantic Fleet, however, disagreed with the Board's recommendation and directed that Cummings retain her flight status and continue training on F-18 Hornet aircraft.

3. During this time, the U.S. Navy permitted Robert Gandt, the future author of the book, Bogeys and Bandits: Making of a Fighter Pilot, to observe naval aviators training on Hornet aircraft, without their knowledge, when researching material for the upcoming book. The book was based upon his observations of the Hornet training program and other information supplied by the U.S. Navy. Cummings alleges that the other information included the unauthorized release of her training record to Gandt. Cummings also alleges that a character in Gandt's book, named "Sally Hopkins," portrays her in his book and that Gandt's book includes details from her training record and direct quotations from her negative evaluation report by the Board. As a result, her military and civilian prospects were severely damaged, and she suffered severe mental distress, embarrassment, and personal and professional humiliation.

DISCUSSION:

1. The Privacy Act of 1974, 5 U.S.C. section 552a, as amended, prohibits a federal agency from disclosing any record contained within a system of records, except by the written request of or with the prior written consent of the individual to whom the record pertains, unless certain

exceptions apply. The Privacy Act provides for both criminal penalties against the individual and civil remedies against the agency for violations of its provisions.

2. The doctrine first enunciated in Feres v. United States, 340 U.S. 135 (1950), provides that the U.S. Government shall not be held liable under the Federal Tort Claims Act for injuries to service members that arose out of or were incurred in the course of activity incident to service. The Feres doctrine has subsequently been extended to bar lawsuits for deprivation of civil rights under 42 U.S. C. section 1985 (3), as well as to common-law and constitutional tort actions.

3. The U.S. Court of Appeals for the D.C. Circuit was unwilling to extend the reach of the Feres doctrine any further because the Privacy Act does not implicate any of the rationales presented for extending the reach of the Feres doctrine to the Privacy Act.

a. Nowhere does the Privacy Act establish a parallel private (civil) liability against individuals as it does against the United States in the same manner and to the same extent under like circumstances.

b. Unlike the need to resort to local tort law under the Federal Tort Claims Act, the distinctly federal relationship between the United States and its military forces, covered by the Privacy Act, is governed by Federal law.

c. Unlike veterans' benefits for injured service members, Congress has provided no other compensation or benefit system for those injured by violations of the Privacy Act.

d. The peculiar and special relationship between the service member and his commanders would not be disrupted and military discipline would not be undermined if lawsuits were allowed to proceed forward for violations of the Privacy Act incurred during the course of military service.

CONCLUSION:

Since this was a split decision, the U.S. Navy may request reconsideration of the decision en banc, which if granted, could lead to a different result. If not granted, however, then the U.S. Navy will have to decide whether to file for certiorari to the U.S. Supreme Court, which could ultimately lead to the loss of the entire Feres doctrine, even within the context of the Federal Tort Claims Act from which it first arose. In the meantime, we in the Federal Government must be extra vigilant in guarding against the unauthorized disclosure of agency records protected by the Privacy Act.

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