No. 15-_____

In the Supreme Court of the United States

WAYNE ANDERSON,

Petitioner,

–v–

ASHTON CARTER, Secretary of Defense, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

JEFFREY L. LIGHT
COUNSEL FOR PETITIONER
LAW OFFICE OF JEFFREY L. LIGHT
1712 EYE STREET, N.W.,
SUITE 915
WASHINGTON, DC 20006
(202) 277-6213
JEFFREY@LAWOFFICEOFJEFFREYLIGHT.COM

MAY 11, 2016

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

This Court has recognized an exception to the mootness doctrine where "collateral consequences" flow from the challenged action. *Carafas v. LaVallee*, 391 U.S. 234, 237-38 (1968).

The Eighth and Federal Circuits have held that injury to reputation alone cannot meet the "collateral consequences" exception. The First, Second, Third, Sixth, Seventh, Ninth, and Eleventh Circuits, along with a number of state courts of last resort, have held that reputation alone can meet the "collateral consequences" exception. The D.C. Circuit and the Fifth Circuit follow a third approach, where reputational harm alone is sufficient if it is a "direct effect" of the otherwise moot action, but not if it is a "lingering effect" of the action.

The questions presented are:

1. May a sufficiently tangible and concrete reputational injury meet the "collateral consequences" exception to the mootness doctrine?

2. If this case is not moot, did Petitioner fail to plead a cause of action for retaliation in violation of the First Amendment simply because he never used the word "retaliation" in his *pro se* Complaint?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States District Court for the District of Columbia included Plaintiff Wayne Anderson and Defendants Chuck Hagel, John M. McHugh, Hans E. Bush, Sean Mulholland, and Gregory Julian. A letter from non-party Reporters Committee for Freedom of the Press was lodged on the docket by order of the trial court.

The parties to the proceedings in the United States Court of Appeals for the D.C. Circuit included Appellant Wayne Anderson, and Appellees Chuck Hagel, John M. McHugh, Hans E. Bush, Sean Mulholland, and Gregory Julian, and *amicus curiae* Reports Committee for Freedom of the Press, which submitted a brief in support of Appellant.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

PETITION FOR A WRIT OF CERTIORARI

Mr. Wayne Anderson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The district court's opinion is reported at 20 F. Supp. 3d 114 (D.D.C. 2013). (App.16a). The D.C. Circuit's opinion is reported at 802 F.3d 4 (D.C. Cir. 2015). (App.1a).

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on September 18, 2015. (App.1a). A timely petition for rehearing *en banc* was filed on November 2, 2015. The petition for rehearing *en banc* was denied on February 11, 2016. (App.42a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- **U.S. Const. amend. I**

The First Amendment to the United States Constitution provides:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

- **U.S. Const. art. III, § 2, cl. 1**

Article III, § 2, cl. 1 of the United States Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution . . .

STATEMENT

1. Petitioner Wayne Anderson is an American freelance journalist. (App.52a). In January 2010, Mr. Anderson applied to be an embed journalist with the U.S. Army in the U.S.-led NATO mission force in Afghanistan. (App.52a).

2. Upon approval of Mr. Anderson's application to be an embed journalist, he signed the International

Security Assistance Force's (ISAF)[1] Media Ground Rules (MGR). (App.52a-53a).

3. As an embed reporter, Mr. Anderson covered Army operations on Camp Mike Spann, a U.S.-led NATO base, for several newspapers in Wisconsin and Minnesota, as well as live-radio broadcasts on Minneapolis radio station KTLK-FM. (App.53a).

4. Starting on July 17, 2010, Mr. Anderson performed his duties as a journalist by starting the first segment of live-radio news broadcasts on the Minnesota National Guard and their mentoring work with the Afghan National Army (ANA). (App.53a). Mr. Anderson sent his first story to the Rochester, Minnesota-based Post-Bulletin, which published the story. (App.53a-54a).

5. Shortly thereafter, a controversial shooting occurred at the Afghan military base Camp Shaheen, which was adjacent to Camp Spann. (App.54a).

6. There, one American soldier and civilian were wounded and one American civilian trainer was killed on Camp Shaheen. (App.54a). Several Afghan personnel were also killed or wounded. (App.54a). The American casualties were immediately put in an ambulance and rushed back to a hospital at Camp Spann. (App.54a).

7. From a safe, non-interfering distance, Mr. Anderson videoed the off-loading of the Americans

---

[1] The International Security Assistance Force (ISAF) was an international stabilization military force in Kabul, Afghanistan authorized by the United Nations Security Council in December 2001.

and immediately started to report this breaking news. (App.54a).

8. Mr. Anderson interviewed U.S. troops who were directly involved, their commanding officers, and ANA commanders at Camp Shaheen. (App.54a). Mr. Anderson produced a news report which presented all sides of this controversial story. (App.54a).

9. Mr. Anderson's reporting, along with his video, was published in *The Washington Times*, an American newspaper. (App.55a).

10. However, during his reporting work, U.S. Command attempted to interfere multiple times and have Mr. Anderson's reporting stopped. (App.54a).

11. In another attempt, a senior base commander called Mr. Anderson into his office and warned him that he was "outside your charter. You're chasing a non-story here. Forget this. This is not 1968! This is not 1968!" (App.54a). He was referring to the My Lai massacre in the Vietnam War. (App.54a).

12. After the story was published, a U.S. soldier confronted Mr. Anderson at a high-level command meeting, pointing to a printout of the story and shouting, "You wrote this, "f—ing s—t!?" (App.55a). Commanders at the meeting expressed no objection to this content and attitude. (App.55a).

13. Mr. Anderson was then escorted out of the office and notified that his embed status was immediately terminated. (App.55a-56a).

14. That night, Mr. Anderson was removed from the camp and transferred by vehicle and plane, under

guard, to a U.S.-led NATO base in Kabul where he met with Respondent, U.S. Army Col. Hans Bush. (App.56a).

15. After a 15-minute review of the charges against Mr. Anderson, outside and alongside a busy airport terminal, Regional Command North requested that Mr. Anderson's embed status be terminated. (App.56a).

16. In a memorandum decision, Col. Bush stated that Mr. Anderson "did violate paragraph 22(a) and 22(c) of the International Security Assistance Forces Ground Rules by posting video of wounded personnel to your You Tube (sic) profile." (App.65a).

17. Col. Bush's allegations were not grounded or in compliance with the language of the MGR, which does not prohibit posting videos of wounded personnel. The MGR only prohibits revealing their specific identities, such as clear and recognizable facial features, exact rank, gender, or race. (App.73a-74a).

18. The video footage did not reveal the identities of the personnel, as laid out by the MGR. Thus no violation of the MGR ever occurred. (App.58a). Prior to publication of the video, both Mr. Anderson and his editor at *The Washington Times* reviewed the video footage to confirm this fact. (App.58a).

19. After he returned to the United States, Mr. Anderson administratively appealed the memorandum decision and termination of his embed status. (App.59a).

20. Respondent U.S. Army Colonel Gregory Julian denied Mr. Anderson's appeal. (App.57a).

21. The Reporters Committee for Freedom of the Press and Mr. Anderson's congressman, Rep. Sean Duffy, wrote letters expressing concern about Mr. Anderson's treatment, as well as freedom of the press issues. (App.58a). However, no revision to the memorandum decision was ever made and Mr. Anderson was never reinstated as an embed reporter.

22. Thus, the harmful memorandum decision remains as an un-retracted, erroneous official governmental statement of wrongdoing by Mr. Anderson.

23. On July 25, 2012, Mr. Anderson, acting *pro se*, filed a Complaint against Secretary of Defense Robert Gates, Secretary of the Army John M. McHugh, Col. Hans E. Bush, Col. Sean Mulholland, Col. Gregory Julian, and "[o]ther Defendants as yet unknown," in the U.S. District Court for the District of Columbia. (App.44a-64a).

24. Except for the "[o]ther Defendants as yet unknown," Mr. Anderson sued each party "for damages in his individual capacity and for declaratory and injunctive relief in his official capacity[.]" (App.50a). He sued the "[o]ther Defendants as yet unknown" "in their individual capacities." (App.51a).

25. The Complaint set forth three counts: violation of 42 U.S.C. § 1983; breach of contract; and "Declaratory Relief." (App.59a-63a).

26. Respondents moved to dismiss pursuant to Fed. R. Civ. Pro. Rule 12(b)(1), (2), (5), and (6). (App. 17a). They argued that none of them had been properly served in their individual capacities; that the Complaint failed to allege sufficient facts linking each of the defendants to the District of Columbia for

purposes of establishing personal jurisdiction; that they are entitled to qualified immunity to the extent that they are sued in their individual capacities; that 42 U.S.C. § 1983 is inapplicable to federal officials; that the district court lacked subject matter jurisdiction over the claim for breach of contract; and that declaratory judgment is improper because the Complaint contained no allegations of future harm. (App.22a-40a).

27. After the parties had fully briefed these issues, the district court granted the motion to dismiss. (App.16a). First, the court held that because Respondents had not been properly served in their individual capacities, the court lacked personal jurisdiction over them. (App.23a-28a). Second, the court held that it lacked subject matter jurisdiction over Mr. Anderson's claim for breach of contract. (App.35a-38a). Finally, the court dismissed Mr. Anderson's claims for injunctive and declaratory relief for lack of subject matter jurisdiction. (App.39a-40a).

28. While dismissal for lack of service of process is generally without prejudice, the court decided that it was nevertheless proper to reach the merits of Mr. Anderson's claims in order to prevent what the court perceived to be a potential, subsequent meritless suit. (App.28a). After observing that Mr. Anderson's claim pursuant to 42 U.S.C. § 1983 was not cognizable against Respondents, the court construed this claim as arising under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). (App.29a). So construed, the court held that Mr. Anderson had not stated a claim against

Secretary Gates and Secretary McHugh because there were no allegations of personal participation by either of these high-ranking officials. (App.30a-31a). As to the remaining named defendants, the district court held that they were entitled to qualified immunity. (App.31a-35a).

29. After Mr. Anderson's Complaint was dismissed, he retained counsel who filed a timely Notice of Appeal to the United States Court of Appeals for the D.C. Circuit. (App.5a). Respondents moved for summary affirmance, but their motion was denied.

30. On appeal, Mr. Anderson argued that he had properly stated a claim for violation of the Administrative Procedures Act (APA) and retaliation in violation of the First Amendment. (App.5a). He limited his appeal to claims against Respondents in their official capacities only, and argued that he was entitled to declaratory and injunctive relief. (App.5a). By appealing only the claims against the Respondents in their official capacities, Mr. Anderson mooted any issue over proper service of process, as it was undisputed that he had properly served the United States.

31. After oral argument, the D.C. Circuit ordered supplemental briefing on the issue of mootness.

32. A split panel of the D.C. Circuit affirmed the judgment of the district court.

33. The panel majority held that the United States had not waived its sovereign immunity with respect to the APA claim; that Mr. Anderson had not adequately raised in his Complaint a claim for retaliation in violation of the First Amendment; and that the case was moot. (App.5a-12a).

34. Judge Srinivasan dissented. Although agreeing with the panel majority on the APA claim, his dissent concluded that Mr. Anderson had clearly and sufficiently raised a First Amendment retaliation claim and that the case is not moot. (App.13a-15a).

35. The dissent agreed with Mr. Anderson that because the termination order "memorializes judgments" about Mr. Anderson (*i.e.*, that he violated the MGR), he suffers a sufficient ongoing personal and professional harm. (App.15a). Because a declaratory judgment could grant "relief" and help restore Mr. Anderson's reputation and status in the journalistic community, thus affecting his employment opportunities, the case was not moot. (App.15a).

36. Mr. Anderson timely petitioned for rehearing and rehearing *en banc*. The petitions were denied. (App.42a).

37. This timely petition for a writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

I. THE D.C. CIRCUIT'S APPLICATION OF THE COLLATERAL CONSEQUENCES DOCTRINE TO REPUTATIONAL HARM IS IN CONFLICT WITH VIRTUALLY EVERY OTHER FEDERAL CIRCUIT COURT TO HAVE CONSIDERED THE ISSUE

Where "collateral consequences" flow from a challenged action which is otherwise moot, a live controversy remains. *See Carafas v. LaVallee*, 391

U.S. 234, 237-38 (1968). This Court has infrequently addressed the collateral consequences doctrine outside of the criminal law arena, and the federal circuit courts of appeal have taken divergent approaches to determining what constitutes collateral consequences in civil cases.

This instant case is a timely opportunity for this Court to clarify the "collateral consequences" doctrine and resolve the growing conflict amongst the federal circuit courts.

Many plaintiffs faced with an otherwise moot case assert reputational harm as a collateral consequence, but the circuits are deeply divided as to whether and when such an alleged injury is sufficient to avoid mootness. Clarity is needed in this area. In the absence of clear guidance from this Court, three basic approaches have developed that need this Court's guidance. These vastly differing approaches have caused confusion and conflict amongst the lower courts.

The Eighth and Federal Circuits follow a rigid rule under which reputational harm or stigma can never constitute sufficiently concrete collateral consequences to avoid mootness. *See North Dakota Rural Dev. Corp. v. United States Dep't of Labor*, 819 F.2d 199, 200 (8th Cir. 1987) (where primary relief sought is moot, "vindication of reputation" and "stigma" are insufficient to prevent mootness); *Tesco Corp. v. Nat'l Oilwell Varco, L.P.*, 804 F.3d 1367, 1379 (Fed. Cir. 2015) (reputational interest "alone is insufficient to justify our jurisdiction where there is no judgment that remains.")

On the other hand, the majority of circuits hold that reputational harm or stigma may alone constitute

a sufficiently serious collateral consequence to prevent a case from becoming moot. *See Obert v. Republic Western Ins. Co.*, 398 F.3d 138, 143 (1st Cir. 2005) (holding it "is sufficient to avoid mootness" that "the reputations of counsel are affected by the findings that individual counsel and their firms violated state ethics rules or Rule 11"); *In re Surrick*, 338 F.3d 224, 230 (3d Cir. 2003) ("the continuing stigma resulting from his suspension places Surrick's appeal squarely within the second" exception to mootness–collateral effects); *In re Hancock*, 192 F.3d 1083, 1084 (7th Cir. 1999) (suspended attorney's appeal was not mooted by his payment of the imposed sanction and subsequent reinstatement); *Lasar v. Ford Motor Co.*, 399 F.3d 1101, 1109 (9th Cir. 2005) ("[W]e agree with the prevailing view that settlement of an underlying case does not preclude appellate review of an order disqualifying an attorney from further representation insofar as that order rests on grounds that could harm his or her professional reputation"); *Kirkland v. National Mortgage Network, Inc.*, 884 F.2d 1367, 1370 (11th Cir. 1989) (holding that attorney's appeal of the revocation of his *pro hac vice* status was not moot following dismissal of the underlying case because "the 'brand of disqualification' on grounds of dishonesty and bad faith could well hang over his name and career for years to come"). *Cf. ACORN v. United States*, 618 F.3d 125, 134 (2nd Cir. 2010) ("Even if the plaintiffs are not and never will be interested in applying for grants or funding from the Department of Defense, the fact that the defense department's appropriations law specifically prohibits ACORN and its affiliates from being eligible for federal funds affects the plaintiffs' reputation with other agencies, states, and

private donors"); *Parsons v. United States DOJ*, 801 F.3d 701, 711-712 (6th Cir. 2015) ("concrete reputational injuries" and "stigmatization" constitute injury in fact). The state courts of last resort to have confronted the issue have generally agreed with the approach taken by these circuits. *See e.g.*, *Tazewell County Sch. Bd. v. Brown*, 591 S.E.2d 671, 674 (Va. 2004) (where teacher had resigned and therefore could not be reinstated, mootness was not found because of harm to professional reputation caused by actions of School Board); *Putman v. Kennedy*, 900 A.2d 1256, 1262 (Conn. 2006) (expiration of domestic violence restraining order did not render challenge moot because adverse effect on reputation was a sufficient "collateral consequence[] of [an] otherwise moot court order[]").

The D.C. Circuit has taken an entirely different approach to determining whether reputational injury alone may constitute collateral consequences sufficient to avoid dismissal for mootness. Under D.C. Circuit case law, a live controversy exists where the alleged reputational injury "derives directly" from an otherwise moot government action, but not where the injury is the "lingering effect" of an otherwise moot government action. *Foretich v. United States*, 351 F.3d 1198, 1213 (D.C. Cir. 2003). Of the federal circuit courts of appeals, only the Fifth Circuit follows the D.C. Circuit's *Foretich* test.[2] *See Danos v. Jones*, 652 F.3d 577, 584 (5th Cir. 2011).

---

[2] An unpublished decision from the Tenth Circuit, *Robertson v. Colvin*, 564 Fed. Appx. 931, 934 (10th Cir. 2014) quoted *Foretich*, but no binding precedent from that circuit has adopted the D.C. Circuit's approach to determining when reputational harm is sufficient to avoid mootness.

Certiorari should be granted to resolve the deep, present, ongoing and entrenched divide among the circuit courts' approaches to applying the collateral consequences doctrine in the civil context. The judicial confusion among the federal courts begs this Court's guidance.

II. THE D.C. CIRCUIT'S DISTINCTION BETWEEN "DIRECT" AND "LINGERING" EFFECTS ON REPUTATION HAS NO BASIS IN THIS COURT'S ARTICLE III JURISPRUDENCE

Article III limits the jurisdiction of federal courts to "Cases" and "Controversies." This "case-or-controversy limitation serves two complementary purposes. It limits the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. It also defines the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government." *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 395-96 (1980) (internal citations and quotation marks omitted). Thus, "mootness has two aspects: when the issues presented are no longer live or when the parties lack a legally cognizable interest in the outcome." *Id.* at 396 (internal quotation marks omitted).

The D.C. Circuit's test for mootness in cases where reputation is alleged as the cognizable harm, distinguishes between harm that is a "direct" result of a moot government action and harm that is only a "lingering" effect of a moot government action.

The distinction drawn by the D.C. Circuit is similar to that advanced by the respondents in *Powell v. McCormack*, 395 U.S. 486, 498-500 (1969) and rejected by this Court.

In *Powell*, the respondents differentiated between "primary and principal relief" and "secondary" relief, arguing that once the primary form of relief becomes moot, the existence of a secondary form of relief is not worthy of judicial consideration. *Id.* at 499. This Court, relying on *Bond v. Floyd*, 385 U.S. 116 (1966), rejected any distinction between primary and secondary claims for relief. *Id.* Such a distinction is not relevant because as long as "one of the several issues presented becomes moot, the remaining live issues supply the constitutional requirement of a case or controversy." *Id.* at 497. Thus, even where an injunction is not possible to redress a plaintiff's injury, the availability of declaratory relief may save a case from mootness. *Id.* at 498.

The D.C. Circuit's test did not originate from any principled interpretation of the text or purposes of Article III or any of this Court's decisions. Rather, it arose out of an attempt to explain the apparent inconsistencies in the D.C. Circuit's own case law on the issue of whether reputational injury sufficient to prevent dismissal for mootness. *Foretich*, 351 F.3d at 1212 ("Our case law makes clear that where reputational injury is the lingering effect of an otherwise moot aspect of a lawsuit, no meaningful relief is possible and the injury cannot satisfy the requirements of Article III") (emphasis added); *McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of the Judicial Conf. of the United States*,

264 F.3d 52, 57 (D.C. Cir. 2001) ("In this circuit, when injury to reputation is alleged as a secondary effect of an otherwise moot action, we have required that some tangible, concrete effect remain, susceptible to judicial correction") (internal quotation marks omitted, emphasis added).

The only case in which the D.C. Circuit purported to attribute its novel test to authority beyond its own case law is *Penthouse Int'l, Ltd. v. Meese*, 939 F.2d 1011, 1019 (D.C. Cir. 1991). In *Penthouse*, the panel majority's opinion observed that "[i]n all the cases in which this court (in line with Supreme Court precedent, *see, e.g., Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 81 L. Ed. 2d 483, 104 S. Ct. 2576 (1984)), has found that the effects of an alleged injury were not eradicated, some tangible, concrete effect, traceable to the injury, and curable by the relief demanded, clearly remained." The majority opinion then cited as an example *Reeve Aleutian Airways v. United States*, 889 F.2d 1139, 1143 (D.C. Cir. 1989) for the proposition that a case is not moot where "the reputational injury was a direct effect of the legal action the government had taken[.]" *Id.* However, neither *Firefighters Local Union No. 1784* nor *Reeve Aleutian Airways* drew a distinction between reputational injuries which were the "direct effect of the legal action the government had taken" and reputational injuries which were only an indirect or lingering result of the government's action.

Not only is the D.C. Circuit's test without any legal basis and in conflict with virtually every other circuit to have considered the issue, but the way in

which the test is intended to be applied is ill-defined and causes confusion even within the circuit, as demonstrated in this case. The D.C. Circuit has never attempted to specifically articulate what it means by "direct" versus "lingering" effect, and these terms do not have well-known legal meanings.

The panel majority's opinion in this case is opaque on this issue, merely offering the conclusory statement that "in the present case, as in *Penthouse International*, the alleged reputational injury is the 'lingering effect of an otherwise moot action,' and this case is moot." (App.12a).

Judge Srinivasan's dissent reaches a contrary conclusion and actually provides an explanation as to why the harm suffered by Mr. Anderson is not a "lingering" effect: "A declaratory judgment pronouncing the defendants' actions unconstitutional could help restore appellant's reputation and status in the journalistic community, potentially affecting his ability to obtain employment. The harm appellant alleges is therefore not a lingering effect of an otherwise moot government action, but rather is the primary and continuing effect of an unretracted termination order" (internal quotation marks and citations omitted). (App.15a).

Judge Srinivasan's reasoned approach was rejected by the panel majority, but the majority offered no alternative explanation. The *en banc* court declined Mr. Anderson's invitation to clarify the test, leaving the law in the D.C. Circuit unclear and confusing as to what constitutes "direct" versus "lingering" reputational harm.

This Court can help resolve the present conflict and confusion in the D.C. Circuit and federal courts.

III. THE D.C. CIRCUIT'S HOLDING THAT PETITIONER'S *PRO SE* COMPLAINT DOES NOT RAISE A FIRST AMENDMENT RETALIATION CLAIM IS IN DIRECT CONFLICT WITH THIS COURT'S PRECEDENT

If the Court grants certiorari on the mootness issue and vacates the judgment of the D.C. Circuit, it will be presented with another threshold issue—whether the complaint states a claim for relief. The D.C. Circuit panel majority held that it does not, but the majority's decision is in such clear conflict with this Court's precedent that, as in *Johnson v. Shelby*, 574 U.S. ___ (2014) (per curiam), the issue can be quickly disposed of by this Court.

In *Johnson*, the plaintiffs brought a suit for damages, alleging that they were fired for investigating the criminal conduct of a city alderman. The district court granted summary judgment against the plaintiffs because they failed to invoke 42 U.S.C. § 1983 in support of their claim. *Id.* A federal appellate court affirmed. *Id.*

This Court summarily reversed, holding that the federal rules "do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted." *Id.*

This Court then stated in no uncertain terms, "Having informed the city of the factual basis for their complaint, they were required to do no more to stave off threshold dismissal for want of an adequate statement of their claim." *Id.* (emphasis added).

Thus, Mr. Anderson was required to do no more than state the factual basis that would support a claim for retaliation under the First Amendment. As Judge Srinivasan, in his dissent, aptly put it: "The complaint was drafted by a *pro se* plaintiff, and count one speaks in the language of a First Amendment retaliation claim, alleging that defendants 'caused the termination of [appellant's] journalist-embed status without just cause of his constitutionally protected speech.'" (App.14a).

The panel majority reasoned that the complaint did not raise a claim for retaliation in violation of the First Amendment because Mr. Anderson's "prayer for relief made it plain that his complaint was for a lack of 'procedural due process,' not for the violation of his First Amendment rights." (App.9a).

A complaint, of course, can be "for" more than one theory of liability. Here, the panel majority found that the complaint was not "for" retaliation under the First Amendment solely by relying on the prayer for relief. This method of analysis is clearly erroneous, as this Court's precedent makes clear that the sufficiency of a complaint is to be determined by reference to its factual allegations. Even if the panel majority was correct in relying on the prayer for relief, however, there is nothing in the prayer for relief that negates or disclaims the legal theory of retaliation in violation of the First Amendment.

For these reasons, the Court should also grant certiorari on the question of whether the complaint pled a cause of action for retaliation in violation of the First Amendment and remand this issue to the district court to permit Mr. Anderson to amend his complaint.

See Johnson, 574 U.S. ___ ("For clarification and to ward off further insistence on a punctiliously stated 'theory of the pleadings,' petitioners, on remand, should be accorded an opportunity to add to their complaint a citation to § 1983.")

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JEFFREY L. LIGHT
COUNSEL FOR PETITIONER
LAW OFFICE OF JEFFREY L. LIGHT
1712 EYE STREET, N.W.,
SUITE 915
WASHINGTON, DC 20006
(202) 277-6213
JEFFREY@LAWOFFICEOFJEFFREY
LIGHT.COM

MAY 11, 2016

APPENDIX TABLE OF CONTENTS

MAJORITY OPINION OF THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT (SEPTEMBER 18, 2015)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WAYNE M. ANDERSON,

Appellant,

v.

ASHTON B. CARTER,
Secretary of Defense, ET AL.,

Appellees.

No. 14-5002

Appeal from the United States District Court
for the District of Columbia
(No. 1:12-cv-01243)

Before: HENDERSON and SRINIVASAN, Circuit Judges, and SENTELLE, Senior Circuit Judge

---

SENTELLE, Senior Circuit Judge:

Appellant Wayne M. Anderson is a freelance journalist. In July of 2010, he was working as an embed journalist at a NATO base in Afghanistan. After he reported on a controversial shooting incident at an adjoining Afghan national army base over the

objections of United States military personnel assigned to the NATO operation, his embed status was withdrawn, and he was returned to the United States. Anderson brought the present action against the Secretary of Defense and subordinate officers in both their personal and official capacities, seeking, as is relevant to the present appeal, reversal of the memorandum terminating his embed status and reinstatement of his credentials and accommodation status. The district court dismissed appellant's claims in their entirety. Because we conclude that Anderson has asserted no claim cognizable by this court, we affirm the judgment of dismissal.

I. BACKGROUND

A. Factual Allegations

Because the basis of our decision that this case must be dismissed for lack of jurisdiction is not dependent upon any detail of the underlying facts, our discussion will be brief. Further detail may be found in the district court's opinion. *See Anderson v. Gates*, 20 F. Supp. 3d 114 (D.D.C. 2013).

In 2010, Anderson, a freelance journalist working under contract for a Washington, DC, newspaper, applied for status of a military-embed journalist in Afghanistan with the North Atlantic Treaty Organization ("NATO") International Security Assistance Force, an international force created by the United Nations Security Council to assist in maintaining security in Afghanistan. In process of becoming an embedded reporter, Anderson signed and submitted an acknowledgment of the "Media Ground

Rules" required by the International Security Assistance Force. That acknowledgment included a statement by the embed journalist that:

> I have read the media ground rules provided to me by International Assistance Force Afghanistan (ISAF) Public Affairs staff and agree, with my signature, to abide by them. I also understand that any violation of these ground rules is cause for the revocation of my accommodated media status with ISAF.

In July of 2010, during his first week as an embedded reporter, Anderson videotaped and photographed casualties from a shooting incident near the base where he was assigned. According to defendants, the video showed the identifiable faces of wounded soldiers. He posted the video on YouTube without receiving consent from the soldiers and before their next of kin could be notified, all in violation of the Ground Rules. Anderson disputes the accusation that his photographs and video product revealed the identity of the soldiers. Neither we nor the district court need resolve that factual dispute in order to dispose of this litigation.

A few days after the photographing and videoing incident, Colonel Hans E. Bush reviewed a request to terminate Anderson's accommodated status based on his alleged violation of the Ground Rules. Colonel Bush found that plaintiff had violated the Ground Rules and approved the termination. As a result of termination of his status, the military returned Anderson to the United States. Upon his return, he appealed the termination through the International Security Assistance Force Public Affairs channels. In January of 2011, Colonel Gregory Julian, Chief of

Public Affairs of the Supreme Headquarters Allied Powers Europe and Allied Command Operations, denied Anderson's appeal. Both Bush and Julian were subsequently named as defendants in this litigation.

B. The Litigation

Anderson, at that time acting without counsel, filed a three-count complaint in the United States District Court for the District of Columbia against Robert Gates, then-Secretary of Defense; John M. McHugh, then-Secretary of the Army; Colonels Bush and Julian; and Colonel Sean Mulholland. The complaint purported to seek relief against defendants in both their individual and official capacities. *See Anderson*, 20 F. Supp. 3d at 119. Count I of the complaint alleged that defendants in their individual capacities violated Anderson's First Amendment rights by terminating his status in retaliation for his constitutionally protected speech, and by refusing or neglecting to prevent such deprivations or denials of his First Amendment rights. Count II alleged a breach-of-contract claim based on the theory that the defendants had breached an agreement arising from the acknowledgment of the "Ground Rules." Count III sought "a judicial declaration that defendants conduct deprived Anderson of his rights under the U.S. Constitution and the laws of the United States." *Id.* (quoting Andersons complaint at ¶ 63).

All defendants moved to dismiss "for lack of personal jurisdiction over defendants in their individual capacities under Federal Rules of Civil Procedure 12(b)(5) and 12(b)(2), for failure to state a claim upon which relief can be granted under Rule 12(b)(6), and for lack of subject-matter jurisdiction under Rule

12(b)(1)." *Id.* The district court granted the motion and dismissed the action. Anderson filed the present appeal.

II. THE APPEAL

On appeal, Anderson, now acting through counsel, alleges no error in the dismissal of the claims against the defendants in their individual capacities. Indeed, he acknowledges that "[t]his appeal is limited to a suit against [d]efendants-[a]ppellees in their official capacities . . . " Reply Br. at 16. Of course, even without the acknowledgment, any error not asserted and argued on appeal is deemed forfeited. We therefore confine our discussion to the claims against defendants in their official capacities.

Briefly put, appellant is now arguing that he has sufficiently alleged "a claim for retaliation under the First Amendment and a claim for violation of the Administrative Procedure Act." Appellants Br. at 9. As in all cases, our first duty is to ascertain whether the district court, and derivatively this court, have jurisdiction to determine those claims. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–101 (1998). For two reasons, we conclude that appellant's claims are not within the jurisdiction of the courts.

III. ANALYSIS

The Supreme Court has taught in *Steel Co.* and numerous other cases that when a federal court has no jurisdiction over a case, it cannot determine any other question concerning the merits of that action. However, since the two grounds affecting our decision in this action are equally threshold questions, we will

observe that appellant's claims founder on either or both of them.

First, appellant's allegations do not bring his claims within the jurisdictional statute he asserts. Briefly put, this action is barred by the sovereign immunity of the United States. Appellant forthrightly admits that, as he has asserted no error in the district court's dismissal of the claims against the individual defendants, "[t]his appeal is limited to a suit against the [d]efendants-[a]ppellees in their official capacities and therefore the suit is subject to governmental defenses including sovereign immunity." Reply Br. at 16 (citing *Kentucky v. Graham*, 473 U.S. 159, 166–67 (1985)). What appellant does not concede, but what is correct, is that an action against the United States cannot surpass the barrier of sovereign immunity without a statutory waiver. "It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell*, 463 U.S. 206, 212 (1983). The governments consent to be sued may not be inferred, but must be "unequivocally expressed" in statutory text. *Fed. Aviation Admin. v. Cooper*, 132 S. Ct. 1441, 1448 (2012). "Moreover, a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane v. Pena*, 518 U.S. 187, 192 (1996).

Appellant asserts that his claim is cognizable under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702. Unfortunately for appellant, that statute does not waive sovereign immunity for the present claims. We note in considering Anderson's argument that it is not at all clear that he actually asserted this position below, but affording as we do lenience in our

review of the pleading of *pro se* litigants, as appellant then was, we will at least consider the argument for the APA as an applicable exception to sovereign immunity. Having so considered, we determine that the APA excludes the present action by its terms.

The APA, in 5 U.S.C. § 701, provides review of actions of an agency of the United States. *See* 5 U.S.C. § 701(b)(1). The statutory definition of "agency" expressly "does not include—military authority exercised in the field in time of war." *Id.* § 701(b)(1)(G). From the very face of the complaint, all of the events surrounding the controversy between the embed journalist and the military occurred within that excluded circumstance. While certainly the conflict in Afghanistan was not a declared war, it cannot be gainsaid that it was a "war" nonetheless. As the Supreme Court noted in *Bas v. Tingy*, 4 U.S. 37, 40 (1800), "hostilities may subsist between two nations" on a limited basis, which would be properly termed "*imperfect war*," in our era to be called "undeclared war." Justice Washington in the *Bas* decision went on to note that the true definition of war is "an external contention by force, between some of the members of the two nations, authorised by the legitimate powers," even if it is not a "perfect" declared war. *Id.* at 40–41. In the present case, the facts relied upon by appellant, including the wounding of the soldiers whose photographs were at issue between Anderson and the military make it clear that, like the French in *Bas v. Tingy*, the Afghans in the present case are enemies of the United States, and the military authority against which Anderson seeks to litigate was being exercised in the field and time of war. In short, the APA does not provide a waiver of the

sovereign immunity defense creating jurisdiction over Anderson's cause.

Despite the clear terms of the statute, appellant asserts that the military authority exception does not preclude judicial review of the decision to terminate his embed status. While appellant's brief does not provide a succinct expression of why the exception does not apply, the gist of his argument seems to be that the statutory exception should only apply when attempted litigation "involves military decision-making." Reply Br. at 12. Appellant argues that his case does not come within that category, as he "does not ask for judicial review of the rules contained in the MGR," nor "encroach[ ] on issues such as how a military leader 'handles a casualty of one of the men or women he is charged to lead,'" nor "how a military leader should handle a casualty." *Id.* at 13.

Perhaps if the statutory exception to the APA waiver of sovereign immunity were so limited, appellant might have a colorable argument, albeit one he did not raise in the district court. But the statute is not so limited. It says what it says. Courts "assume that Congress means what it says in a statute . . . " *Williams v. Paromo*, 775 F.3d 1182, 1188 (9th Cir. 2015). The current litigation does not come within the terms of reviewing an agency under the APA. Sovereign immunity is not waived.

As we noted above, "a waiver of the government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane*, 518 U.S. at 192. We cannot afford the statute the liberal and countertextual interpretation forwarded by appellant. We do not have jurisdiction.

We do not rule out the possibility that under other circumstances and based on other pleadings a plaintiff similarly situated to appellant might bring a retaliatory claim for violation of First Amendment rights within the jurisdiction of the court, but this is not that case. While appellant's lengthy complaint in the district court cited the First Amendment and alleged its violation in general terms, ultimately his prayer for relief made it plain that his complaint was for a lack of "procedural due process," not for the violation of his First Amendment rights. For the procedural due process claim to have any legs at all, appellant would have had to establish that he was deprived of something to which he was constitutionally entitled. As he has shown no constitutional entitlement to the status of embed journalist, his claim did not survive the motion to dismiss in the district court, nor will it survive the lack of jurisdiction in face of sovereign immunity in this court. *Cf. Flynt v. Rumsfeld*, 355 F.3d 697 (D.C. Cir. 2004) (holding that a journalist has no constitutional right to be actively embedded in military units).

C. Mootness

While the Supreme Court in *Steel Co.* makes clear that once we have established that we have no subject-matter jurisdiction, we can proceed no further, we do not violate this admonition when we observe that more than one threshold basis bars adjudication. As we have noted before:

> While *Steel Co.* reasoned that subject-matter jurisdiction necessarily precedes a ruling on the merits, the same principle does not dictate a sequencing of jurisdictional issues.

> "[A] court that dismisses on . . . non-merits grounds such as . . . personal jurisdiction, before finding subject-matter jurisdiction, makes no assumption of law-declaring power that violates the separation of powers principles underlying . . . *Steel Company*."

Public Citizen v. United States District Court, 486 F.3d 1342, 1346 (D.C. Cir. 2007) (quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999)). We will therefore note that even if we err in our determination that Anderson brought no justiciable claim in the first instance, any claim which he may have asserted is now moot.

As Anderson himself acknowledges, "'[a] case is moot if events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future.'" Appellant's Supp. Br. at 2 (quoting *Transwestern Pipeline Co. v. FERC*, 897 F.2d 570, 575 (D.C. Cir. 1990)). Otherwise put, "'if an event occurs while a case is pending on appeal that makes it impossible for the court to grant any effectual relief whatever to a prevailing party, the appeal must be dismissed.'" *Id.* (quoting *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992)).

The prayer for relief in Andersons complaint asks the court, in pertinent part, "to reverse the memorandum terminating plaintiffs embed accommodation status without procedural due process. . . " Appellees assert, and appellant has not disputed, that as the war in Afghanistan has drawn down, the remaining embed program is operated by NATO, which is not a party to this action. Further, Anderson is at liberty to apply for the limited embed program still available. There

appears to be nothing this court can do that will put him back in the same position he occupied before the events alleged in the complaint and nothing the court can do to make whole any loss caused by the removal. He has not sought damages, nor is it clear that we would have jurisdiction to grant them if he did. This is quintessential mootness, and we have no jurisdiction over moot controversies.

Anderson attempts to escape from the trap of mootness by asserting that his additional prayer for declaratory relief underlies a live controversy. That is, he asserts that he has a reputational injury which will be relieved by a judicial declaration that his First Amendment rights were violated. In support of this proposition, he principally relies on *Foretich v. United States*, 351 F.3d 1198 (D.C. Cir. 2003). It is true, as Anderson asserts, that we did hold in *Foretich* that declaratory relief that would "remove the imprimatur of government authority from an [a]ct that effectively denounces Dr. Foretich as a danger to his own daughter" left open a live controversy and escaped mootness. 351 F.3d at 1215. But the *Foretich* decision does not carry the day for Anderson.

In that unique case, Congress had passed a bill of attainder, and we did hold that under the extreme circumstances there present, "where reputational injury derives directly from an unexpired and unretracted government action, that injury satisfies the requirements of Article III standing to challenge the action." *Id.* at 1213.[1]

---

[1] Though the particular quote from *Foretich* speaks in terms of standing rather than mootness, the decision taken as a whole is on point to a mootness discussion.

However, a more full examination of the reasoning of *Foretich* discloses that "[o]ur case law makes clear that where reputational injury is the lingering effect of an otherwise moot aspect of a lawsuit, no meaningful relief is possible and the injury cannot satisfy the requirements of Article III." *Id.* at 1212.

Similarly in *Foretich*, we discussed *Penthouse International, Ltd. v. Meese*, 939 F.2d 1011 (D.C. Cir. 1991). *In Penthouse International*, "because the reputational injury . . . was the lingering effect of an otherwise moot action, we distinguished cases in which the reputational injury was the 'direct effect of the legal action the government had taken.'" *Id.*

Unlike *Foretich*, in which there remained among congressionally enacted statutes essentially a declaration of guilt against an untried citizen, in the present case, as in *Penthouse International*, the alleged reputational injury is the "lingering effect of an otherwise moot action," and this case is moot.

CONCLUSION

For the reasons set forth above, we affirm the judgment of dismissal entered by the district court.

OPINION OF JUDGE SRINIVASAN CONCURRING IN PART AND DISSENTING IN PART (SEPTEMBER 18, 2015)

For the reasons well explained by my colleagues, appellant's claim under the Administrative Procedure Act fails because the statute precludes judicial review of "military authority exercised in the field in time of war." 5 U.S.C. § 701(b)(1)(G). That provision applies to appellant's APA claim, and I fully concur in the court's decision with regard to that claim. I believe, however, that appellant also raises a First Amendment retaliation claim, and that claim, in my view, is not moot. I therefore respectfully dissent from the court's affirmance of the dismissal of appellant's constitutional claim.

Count one of appellant's complaint, as the court observes, *ante* at 4, alleges that defendants unconstitutionally terminated his embed status in retaliation for his protected First Amendment activity. That claim might ultimately fail on the merits for a variety of reasons. But the sole question at this stage is whether the claim should be dismissed at the outset of the case. I believe it should survive dismissal and would remand it to the district court for further proceedings.

Sovereign immunity poses no obstacle to appellant's First Amendment claim. *Ante* at 5-6, 8-9. Appellant's briefing on appeal specifies that he seeks only equitable relief (not damages). And as we have explained, "[i]t is well-established that sovereign immunity does not bar suits for specific relief against government officials where the challenged actions of

the officials are alleged to be unconstitutional." *Clark v. Library of Congress*, 750 F.2d 89, 102 (D.C. Cir. 1984).

To the extent my colleagues believe that appellant, based on his complaint's prayer for relief, raises only a Fifth Amendment due process claim rather than a First Amendment claim, *ante* at 8, I read the complaint differently. The complaint was drafted by a pro se plaintiff, and count one speaks in the language of a First Amendment retaliation claim, alleging that defendants "caused the termination of [appellant's] journalist-embed status without just cause of his constitutionally protected speech." J.A. 19. Even assuming the precise language of a complaint's prayer for relief could in theory annul a claim raised in the body of the complaint, I do not understand the complaint's prayer to do so. Rather, in addition to a general plea for the grant of any relief the court deems appropriate, J.A. 23, the prayer seeks, among other things, "a declaratory judgment" that the defendants "violated the First and Fifth Amendments." J.A. 22. That language, by specifically referring to the First Amendment, reinforces the First Amendment retaliation claim raised in count one.

In my view, moreover, appellant's First Amendment retaliation claim has not been mooted by the drawdown of military operations in Afghanistan. It may have become more difficult for reporters to embed in Afghanistan, but there is no showing that it has become "impossible." *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992). It is true that NATO, a non-party to this case, administers the embed program; but the prior mission was also led by NATO, leaving it unclear—at least at this stage of the proceedings—

whether the current embed requirements mark a significant change from prior procedures. Even if there is no guarantee that appellant would be reinstated if he were to prevail, "the availability of a partial remedy is sufficient to prevent [a] case from being moot." *Calderon v. Moore*, 518 U.S. 149, 150 (1996) (internal quotation marks omitted). The government, which bears the burden of demonstrating mootness, has not shown that the transition to a NATO-led mission has made it impossible for the court to provide any relief bearing on a United States journalist's ability to embed.

Appellant also seeks declaratory relief. He may be able to reapply to the embed program, but the order terminating his embed status remains in effect. That order "memorializes judgments" about him—namely, that he violated the ISAF Ground Rules—that inflict ongoing personal and professional harm. *Foretich v. United States*, 351 F.3d 1198, 1215 (D.C. Cir. 2003). A declaratory judgment pronouncing the defendants' actions unconstitutional could help restore appellant's reputation and status in the journalistic community, potentially affecting his ability to obtain employment. The harm appellant alleges is therefore not a "lingering effect of an otherwise moot government action," *id.* at 1213, but rather is the primary and continuing effect of an unretracted termination order. *See McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders*, 264 F.3d 52, 57 (D.C. Cir. 2001).

For those reasons, I would conclude that appellants First Amendment retaliation claim survives dismissal and should be remanded to the district court for further proceedings.

MEMORANDUM OPINION OF THE DISTRICT COURT FOR THE DISTRICT OF COLUMBIA (DECEMBER 6, 2013)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WAYNE M. ANDERSON,

Plaintiff,

v.

ROBERT GATES,
Secretary of Defense, ET AL.,

Defendants.

Civil Action No. 12-1243 (JDB)

Before: John D. BATES, United States District Judge

Plaintiff Wayne Anderson, proceeding pro se, brings this action against former Secretary of Defense Robert Gates,[1] Secretary of the Army John M. McHugh, U.S. Army Colonel Hans E. Bush, U.S. Army Brigadier General Sean Mulholland, and U.S. Army Colonel Gregory Julian in their individual and official capacities, as well as "[o]ther [d]efendants as yet unknown" in their individual capacities. Defendants are sued in

[1] Pursuant to Federal Rule Civil Procedure 25(d), the Court substitutes the current Secretary of Defense, Charles Hagel, for former Secretary Gates in his official capacity.

their individual capacities for damages and in their official capacities for declaratory and injunctive relief. Andersons claims originate from the termination of his status as a military embed-journalist in Afghanistan. Before the Court is [13] defendants'[2] motion to dismiss under Federal Rules of Civil Procedure 12(b)(1), (2), (5), and (6). For the reasons set forth below, the Court will grant defendants' motion.

BACKGROUND

On or about January 2010, Anderson, a freelance American journalist, applied for "military embed-journalist accommodation status" in Afghanistan. Compl. [ECF No. 1] ¶ 24. As part of the application process, Anderson signed a copy of the International Security Assistance Force ("ISAF") Media Accommodation and Ground Rules Agreement ("MAGRA"), confirming that he would abide by the ISAF Media Ground Rules ("Media Ground Rules"). *Id.* ¶¶ 25, 55, 57. ISAF is an international stabilization force in Kabul, Afghanistan that was created by the United Nations Security Council in December 2001. *Id.* ¶ 25 n.1. The Media Ground Rules were promulgated "to encourage the democratic ideals of open reporting and transparency, while balancing the needs of operational security and service member privacy," and "[v]iolations of any of the . . . rules may

---

2 All defendants are represented in their official capacities by defense counsel from the U.S. Attorney's Office, and Brigadier General Mulholland, Colonel Julian, and Colonel Bush are also represented in their individual capacities by that counsel. Former Secretary Gates and Secretary McHugh are not represented in their individual capacities. *See* Defs'. Mot. to Dismiss ("MTD") [ECF No. 13] at 12-13.

result in termination of accommodated status." *Id.* ¶ 25; Media Ground Rules, Ex. A to MTD [ECF No. 13-2] at 1.[3] After Brigadier General Mulholland authorized Andersons embed accommodation status, Anderson flew to Kabul and was embedded with the Minnesota Army National Guard. Compl. ¶¶ 26-27. Andersons role in Afghanistan was to provide news coverage of Army personnel and operations for several newspapers and live broadcasts. *Id.* ¶ 26.

On or about July 20, 2010, while Anderson was embedded in Afghanistan, he filmed an ambulance offloading American personnel who had been attacked in "a controversial shooting." *Id.* ¶ 29. On July 29, 2010, Andersons story about the shooting and video of the ambulance offloading were published on *The Washington Times* website. *Id.* ¶ 34. The next day, a U.S. Army captain[4] told Anderson that his embed status would be terminated. *Id.* Defendants contend that Anderson's embed status was terminated because his video showed the identifiable faces of wounded soldiers, and the dissemination of such a video violated Media Ground Rules ¶¶ 22(a) and (c), which require accommodated media to receive written permission from wounded soldiers or, in the case of a fatality, to notify the appropriate next of kin before dissemination. MTD at 4. Anderson denies that his video contained

---

[3] The Court only cites the Media Ground Rules, an exhibit submitted by defendants that Anderson has not contested, because it provides helpful context. The Court will not rely on the content of the exhibit for the purposes of resolving any part of the motion to dismiss under Rule 12(b)(6).

[4] Anderson did not name this individual as a defendant in this action.

images of identifiable wounded military personnel. Pl.'s Opp'n to MTD ("Opp'n") [ECF No. 16] at 8.

On or about July 31, 2010, Anderson had a "15-minute meeting" with Colonel Bush that "took place outdoors and alongside a busy military-airport terminal." Compl. ¶ 36. Colonel Bush[5] "accused [Anderson] of violating" the Media Ground Rules by "posting [a] video of wounded personnel."[6] *Id.* ¶ 37. Colonel Bush then signed a memorandum terminating Anderson's embed status "without seeing or requesting to see the exculpatory video footage or asking for any substantial evidence from [Anderson]." *Id.* ¶ 39. Anderson subsequently returned home to the United States, where he appealed the termination. *Id.* ¶¶ 40, 41. On or about January 20, 2011, Colonel Julian, sitting in Brussels, Belgium, decided the appeal and upheld Anderson's embed-status termination. *Id.* ¶¶ 41, 42; Opp'n at 11.

Anderson then filed this three-count lawsuit. Count I alleges that defendants in their individual capacities violated 42 U.S.C. § 1983 because "they caused the termination of [Anderson]'s journalist-embed status without just cause of his constitutionally

---

5 Anderson states that, at this meeting, "[d]efendants accused" him of violating the Media Ground Rules. Because Colonel Bush is the only defendant alleged to be present at this meeting, the Court will assume Anderson intended to refer to Colonel Bush in this situation.

6 Anderson argues that posting videos of wounded personnel is not a violation of the Media Ground Rules; rather, posting a video of identifiable wounded military personnel is a violation. Compl. ¶ 37. He states that "[d]efendants later declined to amend the erroneous charge and properly state an accurate, valid charge." *Id.*

protected speech; and . . . refus[ed] or neglect[ed] to prevent such deprivations and denials to [Anderson] in violation of the First Amendment free speech and freedom of the press rights." *Id.* ¶ 52. Count I also alleges that defendants in their individual capacities violated 42 U.S.C. § 1983 because "[Anderson] possesses a constitutionally protected interest and he was subsequently deprived of that interest without a meaningful hearing . . . in violation of his procedural due process rights as afforded by the Fifth Amendment." Compl. ¶ 50. Count II alleges a breach of contract claim, stating that, by signing the MAGRA, Anderson entered into a contract with the U.S. Army, and that defendants breached that contract. *Id.* ¶¶ 55-60. Count III "seeks a judicial declaration that defendants conduct deprived Anderson of his rights under the U.S. Constitution and the laws of the United States." *Id.* ¶ 63. Anderson also asks that the Court "enjoin [d]efendants to reverse the Memorandum terminating [Anderson]'s embed accommodation status" and award Anderson costs. *Id.* at 16.[7]

Defendants have filed a motion to dismiss for lack of personal jurisdiction over defendants in their individual capacities under Federal Rules of Civil Procedure 12(b)(5) and 12(b)(2), for failure to state a claim upon which relief can be granted under Rule 12(b)(6), and for lack of subject-matter jurisdiction under Rule 12(b)(1).

---

7 The final paragraph of the complaint is not numbered, so the Court cites the relevant page number.

STANDARDS OF REVIEW

Federal Rule of Civil Procedure 12(b)(5) provides for dismissal of an action for ineffective service of process. "[T]he party on whose behalf service is made has the burden of establishing its validity when challenged; to do so, he must demonstrate that the procedure employed satisfied the requirements of the relevant portions of [Federal] Rule [of Civil Procedure] 4 and any other applicable provision of law." *Light v. Wolf*, 816 F.2d 746, 751 (D.C. Cir. 1987) (internal quotation marks and citation omitted). "If dismissing [a plaintiff's] claim without prejudice due to insufficient service would lead to the refiling of a meritless claim, however, this Circuit has held that it is proper to consider other means of dismissing the [claim]." *Dominguez v. Dist. of Columbia*, 536 F. Supp. 2d 18, 22 (D.D.C. 2008) (citing *Simpkins v. Dist. of Columbia Govt*, 108 F.3d 366, 369-70 (D.C. Cir. 1997)).

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of an action where a complaint fails "to state a claim upon which relief can be granted." To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain "'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)); *accord Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (per curiam). Although "detailed factual allegations" are not necessary, plaintiffs must furnish "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action" to provide the "grounds" of "entitle[ment] to relief." *Twombly*, 550

U.S. at 555 (internal quotation marks and citation omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570); *accord Atherton v. D.C. Office of the Mayor*, 567 F.3d 672, 681 (D.C. Cir. 2009).

Federal Rule of Civil Procedure 12(b)(1) provides for the dismissal of an action for lack of subject-matter jurisdiction. Although the Court must construe the complaint liberally, a plaintiff bears the burden of establishing the elements of federal jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The Court may look beyond the allegations in the complaint to resolve a motion to dismiss for lack of subject-matter jurisdiction. *Haase v. Sessions*, 835 F.2d 902, 906 (D.C. Cir. 1987).

ANALYSIS

The Court will first discuss its lack of personal jurisdiction over defendants in their individual capacities under Rule 12(b)(5) because they have not been properly served.[8] And although the Court lacks personal jurisdiction over defendants in their individual capacities, it will nonetheless analyze Anderson's constitutional claims against them and dismiss those claims under Rule 12(b)(6). *See Simpkins*, 108 F.3d at 370 (holding that district court's dismissal of

[8] Because the Court lacks personal jurisdiction over defendants in their individual capacities under Rule 12(b)(5), it is unnecessary to resolve defendants Rule 12(b)(2) argument, which also contends that the Court lacks personal jurisdiction over defendants in their individual capacities.

constitutional claims on the merits rather than for insufficiency of process was proper where claims were meritless). Next, the Court will dismiss Anderson's breach of contract claim for lack of subject-matter jurisdiction under Rule 12(b)(1). Finally, the Court will also dismiss Anderson's claims for injunctive and declaratory relief for lack of subject-matter jurisdiction.

I. Personal Jurisdiction over Defendants in Their Individual Capacities

"Service of process, under longstanding tradition in our system of justice, is fundamental to any procedural imposition on a named defendant." *Mann v. Castiel*, 681 F.3d 368, 372 (D.C. Cir. 2012) (quoting *Murphy Bros.*, *Inc. v. Michetti Pipe Stringing*, *Inc.*, 526 U.S. 344, 350 (1999)). "Under the federal rules enacted by Congress, federal courts lack the power to assert personal jurisdiction over a defendant 'unless the procedural requirements of effective service of process are satisfied.'" *Id.* (quoting *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 514 (D.C. Cir. 2002)). Although "[p]ro se litigants are allowed more latitude than litigants represented by counsel to correct defects in service of process and pleadings," *Moore v. Agency for Int'l Dev.*, 994 F.2d 874, 876 (D.C. Cir. 1993), they still bear the burden of demonstrating that service was properly effected, and courts regularly dismiss actions when that burden is not met, *Cornish v. United States*, 885 F. Supp. 2d 198, 204-05 (D.D.C. 2010) (dismissing pro se plaintiff's claims for ineffective service of process); *Cruz-Packer v. Dist. of Columbia*, 539 F. Supp. 2d 181, 186-87 (D.D.C. 2008) (same).

When a federal employee is "sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf (whether or not the officer or employee is also sued in an official capacity), a party must serve the United States and also serve the officer or employee under Rule 4(e), (f) or (g)." Fed. R. Civ. P. 4(i)(3). Rule 4(e) governs the service relevant here. It provides that service may be effected on the officer or employee by

> delivering a copy of the summons and of the complaint to the individual personally; leaving a copy of each at the individuals dwelling or usual place of abode with some person of suitable age and discretion who resides there; or delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

Fed. R. Civ. P. 4(e)(2). The Rule also permits service to be effected according to the law of "the state where the district court is located or where service is made." *Id.* at 4(e)(1). Applicable here, the Civil Rules of the District of Columbia Superior Court provide that service can be effected upon an individual "by mailing a copy of the summons, complaint and initial order to the person to be served by registered or certified mail, return receipt requested," or "by mailing a copy of the summons, complaint and initial order by first-class mail, postage prepaid, to the person to be served, together with two copies of a Notice and Acknowledgment . . . and a return envelope, postage prepaid, addressed to the sender." D.C. Super. Ct. Civ. R. 4(c)(3), 4(c)(4).

Service must be effected "within 120 days after the complaint is filed" unless "the plaintiff shows good

cause for the failure" to meet this deadline. Fed. R. Civ. P. 4(m); *see also Strong-Fischer v. Peters*, 554 F. Supp. 2d 19, 23 (D.D.C. 2008) (holding that a plaintiff carries the burden of showing good cause for failure to meet the deadline). "Good cause exists when some outside factor . . . rather than inadvertence or negligence, prevented service." *Mann*, 681 F.3d at 374 (internal quotation marks and citation omitted) (citing as examples of good cause "a defendant's intentional evasion of service" and a pro se plaintiff's reliance on a U.S. Marshal to effect service). "[A] plaintiff must employ a reasonable amount of diligence in determining . . . how to effect service" before good cause for failure to meet the deadline may be found. *Prunte v. Universal Music Group*, 248 F.R.D. 335, 338-39 (D.D.C. 2008). "In sum, [g]ood cause means a valid reason for delay." *Mann*, 681 at 375 (internal quotation marks and citation omitted).

Defendants argue that Anderson failed to effect proper service on them in their individual capacities because he attempted to serve them only at what he believed to be their work addresses. MTD at 10 (citing 9/14/2012 Affirmations of Service [ECF No. 4] at 3 (copy of summons and complaint mailed to former Secretary Gates at the Pentagon), 7 (copy of summons and complaint mailed to Secretary McHugh at the Pentagon), 8 (copy of summons and complaint mailed to Colonel Bush at the Pentagon), 12-13 (copy of summons and complaint mailed to Brigadier General Mulholland at the Pentagon and sent via email), 18 (copy of summons and complaint mailed to Colonel Julian at the Pentagon); 10/15/2012 Affirmations of Service [ECF No. 6] at 1 (copy of summons and complaint mailed to Colonel Julian at U.S. Southern

Command), 3 (copy of summons and complaint mailed to Brigadier General Mulholland at the Army Litigation Division)).

Anderson does not dispute that he attempted to serve defendants only at what he believed to be their work addresses, but nonetheless argues that he perfected service on all defendants except Brigadier General Mulholland, whose "whereabouts w[ere] impossible" to ascertain "for a normal civilian." Opp'n at 13-14. Anderson states that he mailed the summons and complaint to Brigadier General Mulholland at the Pentagon, but it was returned to him. *Id.* He further contends that his method of service for all defendants was proper because his attempts were in good faith and defendants' employers would not provide him with defendants' "personal or regular contact addresses." *Id.* As of April 9, 2013, however, Anderson was aware of the contact information for an agent designated to accept personal service for Colonel Julian, Colonel Bush, and Brigadier General Mulholland.[9] *Id.* at 14-15. Anderson was also on notice that his attempts at service on all defendants in their individual capacities had been insufficient. *See* Amended Notice of Appearance [ECF No. 3] at 1 n.1; Consent Mot. for Enlargement of Time [ECF No. 5] at 1 n.2; 2d Consent Mot. for Enlargement of Time [ECF No. 8] at 1 n.2; 3d Consent Mot. for Enlargement of Time [ECF No. 10] at 1 n.2; 4th Consent Mot. for Enlargement of Time [ECF No. 11] at 1 n.2. Nonetheless, Anderson did not attempt to serve the designated agent. He also did not

---

[9] Defense counsel told Anderson that he did not have a representation agreement with former Secretary Gates or Secretary McHugh and thus was unable to arrange an agent to accept individual service on their behalf. Opp'n at 14-15.

attempt to perfect service on defendants by other means. Despite these failings, he now asks the Court to grant him an extension of time to "cure any failure" if it finds that he did not properly serve defendants. Opp'n at 15.

Upon review of the record, the Court finds that Anderson failed to adequately serve the individual defendants. He did not satisfy the requirements of Rule 4(e) by serving any of the defendants personally, leaving a copy of the summons and complaint at the dwelling or usual place of abode of any defendant, or serving an authorized agent of any of the defendants. *See* Fed. R. Civ. P. 4(e). Nor did Anderson demonstrate that he properly effected service on any of the defendants under D.C. law because he has not submitted any proof that defendants signed for or otherwise received the mailings or that any recipients of the mailings were authorized to accept service on behalf of defendants in their individual capacities. *See Wilson-Greene v. Dept of Youth Rehab. Servs.*, 2007 WL 2007557, at *2 (D.D.C. July 9, 2007) (stating that "[a]lthough the Civil Rules of the D.C. Superior Court allow[] service by mail, such service must be made on the individual to be served[,]" which requires evidence "that a copy of the complaint and the summons was delivered to the individual [defendants]"); s*ee also Toms v. Hantman*, 530 F. Supp. 2d 188, 191 (D.D.C. 2008) (holding that the plaintiff did not properly effect service under D.C. law by sending the summons and complaint by certified mail to the defendants business address). Moreover, Anderson admits that he did not serve the agent designated by defendants to accept service on behalf of Colonel Julian, Colonel Bush, and Brigadier General Mulholland. It is unclear why

Anderson did not make use of this agent, particularly with respect to Brigadier General Mulholland, whom Anderson admits he was not able to properly serve. Anderson does not provide good cause for why he did not act to perfect service, other than to assert, erroneously, that he has already perfected service.

Because defendants in their individual capacities have not been properly served, this Court lacks personal jurisdiction over them. However, the Court will nonetheless examine Andersons constitutional claims against defendants in their individual capacities because, although Rule 4(m) and Rule 12(b)(5) permit courts to dismiss without prejudice claims against defendants who were not properly served, this Circuit has held that allowing a plaintiff to file another suit containing the same meritless claims would be inconsistent with the district court's duties. *See Simpkins*, 108 F.3d at 370.

II. Constitutional Claims Against Defendants in Their Individual Capacities

Anderson styles the first count of his complaint as a claim for damages against defendants in their individual capacities under 42 U.S.C. § 1983. He alleges that defendants are liable under Section 1983 for violating his First and Fifth Amendment rights by terminating his embed status. As defendants correctly argue, however, this claim suffers from a fatal flaw: Section 1983 claims can arise only from actions taken under color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988) ("To state a claim under Section 1983, a plaintiff must allege the violation of a right secured by the Constitution and the laws of the United States, and must show that the alleged deprivation was

committed by a person acting under color of state law."). "Section 1983 does not apply to federal officials acting under color of federal law." *Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1104 (D.C. Cir. 2005) (internal citations omitted). Defendants are all federal employees, and although Anderson claims that they "acted under color of state law," Compl. ¶¶ 22, 52, all of his allegations entail actions by defendants acting under color of federal law. Accordingly, Anderson fails to state a claim upon which relief may be granted under Section 1983.

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), on the other hand, recognizes "an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001). Because the Court is required to construe plaintiff's claims in the light most favorable to him, *see Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994), the Court will construe Count I of Andersons complaint as arising under *Bivens*, rather than Section 1983. *See Jones v. United States*, 934 F. Supp. 2d 284, 293 (D.D.C. 2013) (construing plaintiff's claim under *Bivens* rather than Section 1983). And although the Court lacks personal jurisdiction over the individual defendants, it will analyze the merits of Anderson's constitutional claims because "delaying the inevitable would not . . . [be] in keeping with the Supreme Court's instruction to the lower federal courts 'to weed out' insubstantial *Bivens* suits 'expeditiously.'" *Simpkins*, 108 F.3d at 370 (citing *Siegert v. Gilley*, 500 U.S. 226, 232 (1991)).

A. Defendants Former Secretary Gates and Secretary McHugh

To be held liable under *Bivens*, the defendant must have participated personally in the alleged wrongdoing; liability cannot be premised upon a theory of vicarious liability or respondeat superior. *See Iqbal*, 556 U.S. at 676 ("Because vicarious liability is inapplicable to *Bivens* . . . suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution."); *accord Cameron v. Thornburgh*, 983 F.2d 253, 258 (D.C. Cir. 1993).

Anderson's complaint does not allege that former Secretary Gates or Secretary McHugh participated personally in any of the alleged constitutional violations. Rather, Anderson's claims against these two defendants are based solely on their supervisory statuses. Compl. ¶¶ 16 ("Gates is a U.S. Secretary of Defense . . . vested with the supervision of military-media public affairs rules, both foreign and domestic"); 17 ("McHugh is a U.S. Secretary of the Army . . . vested with the supervision of military-media public affairs rules, both foreign and domestic"). Former Secretary Gates and Secretary McHugh are not mentioned anywhere else in the complaint. Moreover, Anderson did not respond to defendants' argument that his claims against former Secretary Gates and Secretary McHugh must be dismissed because he did not allege that they personally participated in the alleged violations, thereby conceding the argument. *Day v. D.C. Dept of Consumer & Regulatory Affairs*, 191 F. Supp. 2d 154, 159 (D.D.C. 2002) ("If a party fails to counter an argument that the opposing party makes in a motion, the court may treat that argument as conceded.").

Hence, even liberally construing Andersons claims under *Bivens* against former Secretary Gates and Secretary McHugh, they must be dismissed under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

B. Defendants Colonel Bush, Brigadier General Mulholland, and Colonel Julian

Anderson claims that Colonel Bush was responsible for terminating his embed status, Brigadier General Mulholland was responsible for "approv[ing] the language and charge of the [termination] [m]emorandum[,]" and Colonel Julian was responsible for upholding that termination on appeal. Compl. ¶¶ 36-42; Opp'n at 9. Anderson has thereby alleged that these three defendants personally participated in the alleged constitutional violations. Defendants respond that Brigadier General Mulholland and Colonels Bush and Julian are not liable for the alleged violations because they are entitled to qualified immunity, which "shields [them] from civil damages liability." *Reichle v. Howards*, ___U.S.___,132 S. Ct. 2088, 2093 (2012) (citing *Ashcroft v. al-Kidd*, ___U.S.___,131 S. Ct. 2074, 2080 (2011)). The doctrine of qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments," and "protects 'all but the plainly incompetent or those who knowingly violate the law.'" *al-Kidd*, 131 S. Ct. at 2085 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). To overcome a claim of qualified immunity, a plaintiff must show (1) that the facts alleged or shown make out a violation of a constitutional right, and (2) that the right was clearly established at the time of the violation. *See Saucier v. Katz*, 533 U.S. 194, 201

(2001). The Supreme Court in *Pearson v. Callahan*, 555 U.S. 223, 236 (2009), modified the *Saucier* approach such that lower courts may use their discretion to decide which of the two prongs to address first. *Accord Reichle*, 132 S. Ct. at 2093. Here, Anderson fails to demonstrate a clearly established right, hence the Court need only reach the second prong.

For a right to be clearly established, it must be sufficiently developed under existing law so as to provide an official with sufficient guidance. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The unlawfulness of the officers' actions must, in light of pre-existing law, "be apparent," *id.*, and "existing precedent must have placed the statute or constitutional question beyond debate," *al-Kidd*, 131 S. Ct. at 2083. Anderson claims that when defendants terminated his status as an embed reporter, they violated his First Amendment free speech and freedom of the press rights. Compl. ¶ 52. He also claims the defendants violated his Fifth Amendment due process rights when they "depriv[ed] him of a meaningful hearing" in the course of terminating his embed status. *Id.* ¶¶ 50-52. Both of Anderson's claims rely on the validity of his assertion that he has a constitutionally protected right to be an embed journalist. This Circuit's clear statement that such a right does not exist is therefore fatal to his claims.

In *Flynt v. Rumsfield*, 355 F.3d 697 (D.C. Cir. 2004), *cert. denied*, 543 U.S. 925 (2004), the D.C. Circuit held that the First Amendment does not guarantee to the press a right to be embedded with military units. There, the Circuit found that "[t]here is nothing we have found in the Constitution, American history, or our case law to support [appellants'] claim" that

"there is a First Amendment right for legitimate press representatives to travel with the military, and to be accommodated and otherwise facilitated by the military in their reporting efforts during combat, subject only to reasonable security and safety restrictions." *Id.* at 703. The Circuit reiterated an earlier holding that "'freedom of speech [and] of the press do not create any per se right of access to government . . . activities simply because such access might lead to more thorough or better reporting.'" *Id.* (quoting *JB Pictures, Inc. v. Dept of Defense*, 86 F.3d 236, 238 (D.C. Cir. 1996)).

Accordingly, although Anderson certainly has a general First Amendment free speech right, he does not have a clearly established right to be embedded with the military in the exercise of that right. Hence, his claim that defendants' termination of his status as an embed reporter violated his First Amendment rights must fail.[10]

---

[10] In the facts section of his complaint, Anderson also claims that "U.S. command made five attempts to stop the reporting of . . . adverse-war news, in violation of the Constitution (First Amendment rights) . . . " Compl. ¶ 30. The only facts that Anderson alleges in support of this claim is that "one example is a senior-base commander yelled and warned [Anderson] in a meeting . . . [that he was] 'outside [his] charter' [and] chasing a non-story.'" *Id.* Anderson does not name this unidentified commander as a defendant, nor does he provide any additional information about the other four alleged First Amendment violations. He also states that he "is informed, believes and alleges that [d]efendants' conduct constituted a form of news embargo," *id.* ¶ 32, but he does not claim that any of the named defendants were in any way involved in the alleged "attempts to stop reporting of . . . adverse-war news," *id.* ¶ 30. Anderson also does not allege that any of the actions actually prevented him from exercising his First Amendment rights and does not allege

Andersons Fifth Amendment claim fares no better. "The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in liberty or property. Only after finding the deprivation of a protected interest do we look to see if the [governments] procedures comport with due process." *Gen. Elec. Co. v. Jackson*, 610 F.3d 110, 117 (D.C. Cir. 2010) (quoting *Amer. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999)). Here, Anderson has not alleged a basis for the Court to find any deprivation of liberty or property. He invokes only his alleged First Amendment right to be an embed journalist as the predicate liberty interest violated for his due process claim. Under this theory, his claim must fail because, given the preceding analysis, Anderson does not have a constitutionally protected right to be an embed journalist. *See Yohn v. Coleman*, 639 F. Supp. 2d 776, 787 (E.D. Mich. 2007) (court concluded that due process claim failed when based on a non-cognizable First Amendment claim). Accordingly, Anderson has not demonstrated that he had a clearly established due process right at the time of the alleged violations. Colonel Bush, Brigadier General Mulholland, and Colonel Julian are protected by qualified immunity, and Anderson's claims against them must be dismissed.

---

facts sufficient to establish a chilling effect. "A pro se complaint must be held to less stringent standards than formal pleadings drafted by lawyers, but even it must plead factual matter that permits the court to infer more than the mere possibility of misconduct." *Jones v. Horne*, 634 F.3d 588, 596 (D.C. Cir. 2011) (internal quotation marks and citations omitted). To the extent that Anderson intended these additional allegations to represent an independent legal claim, they fail to state a claim upon which relief can be granted.

Count I therefore will be dismissed in its entirety for failure to state a claim upon which relief may be granted.

III. Breach of Contract Claims

Anderson asserts that, "[o]n or about March 22, 2010, [he] entered into a contract agreement with the U.S. Army by signing the [ISAF MAGRA] which acts as contract between [Anderson] and the U.S. Army," and that defendants breached that "contract" in several ways, causing Anderson "injuries and damages." Compl. ¶ 55. A breach of contract claim against defendants in their official capacities is "in all respects other than name, to be treated as a suit against the entity [of which the named defendants are employees]"—here, the U.S. Army and the Department of Defense.[11] *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (internal quotation marks and citation omitted). As a general matter, "[i]t is axiomatic that the United States [and its agencies] may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell*, 463 U.S. 206, 212 (1983); *see also FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (explaining that, without a specific waiver, the federal government and its agencies are protected from suit by the doctrine of sovereign immunity). Because

---

[11] To the extent that Anderson intended to bring his breach of contract claim against defendants in their individual capacities—and it is not clear from the record that he did—those claims would be dismissed for ineffective service of process, as discussed above, and for failure to state a claim because defendants were not parties to any alleged contract in their personal capacities.

Anderson seeks to invoke this federal courts jurisdiction, he bears the burden of establishing its subject-matter jurisdiction, *see Lujan*, 504 U.S. at 561, and by extension, the burden to demonstrate defendants' waiver of sovereign immunity.

Defendants argue that this Court lacks subject-matter jurisdiction over Anderson's breach of contract claim under the Tucker Act and the Little Tucker Act. Through the Tucker Act, the United Stated waived sovereign immunity and granted the United States Court of Federal Claims exclusive jurisdiction over contract actions against the government for money damages exceeding $10,000. 28 U.S.C. § 1491(a)(1). The related Little Tucker Act grants district courts concurrent jurisdiction over claims founded on a contract with the United States that seek less than $10,000. *Id.* § 1346(a)(2). Courts have consistently construed these provisions as "authorizing only actions for money judgments and not suits for equitable relief against the United States." *Richardson v. Morris*, 409 U.S. 464, 465 (1973); *see also Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 608 (D.C. Cir. 1992) (noting that the Tucker Act "has long been construed as waiving sovereign immunity only for claims seeking damages, and not for those seeking equitable relief (except in very limited circumstances [not presented here])") (internal quotation marks and citations omitted);[12] *Lee v.*

---

[12] The Tucker Act permits the Court of Federal Claims to grant certain equitable relief where an otherwise valid Tucker Act claim seeking money damages from the United States already exists. *See* 28 U.S.C. § 1491(a)(2); *see also Greenhill v. Spellings*, 482 F.3d 569, 576 (2007); *Taylor v. United States,* 73 Fed. Cl. 532, 545-46 (2006).

Thornton, 420 U.S. 139, 140 (1975) (holding that the Little Tucker Act "empowers district courts to award damages but not to grant injunctive or declaratory relief"). Hence, for a plaintiff to satisfy his burden of establishing a district court's subject-matter jurisdiction under the Little Tucker Act, he must plead a dollar amount in damages, and that amount must not exceed $10,000. *See Hafen v. Pendry*, 646 F. Supp. 2d 159, 160 (D.D.C. 2009).

Although Anderson asserts that he suffered "damages" from the alleged breaches of contract, Compl. ¶ 55, he does not request money damages anywhere in his complaint. Instead, he requests that the Court "enjoin the [d]efendants to reverse the Memorandum terminating [his] embed accommodation status without procedural due process . . . [and] enter such other relief to which [Anderson] may be entitled as a matter of law or equity, or which the Court determines to be just and proper." Compl. at 16-17. Moreover, neither the MAGRA nor the related Media Ground Rules appear to contemplate money damages. MAGRA, Ex. B. to MTD [ECF No. 13-2]; Media Ground Rules, Ex. A to MTD;, 835 F.2d at 906 (holding that the Court may look beyond the allegations in the complaint to resolve a motion to dismiss for lack of subject-matter jurisdiction).

Defendants correctly assert that, pursuant to the Little Tucker Act, Andersons claim based on an alleged contract with the U.S. Army may only be brought in this Court if Anderson seeks monetary damages, and that the amount sought is less than $10,000. *See* 28 U.S.C. § 1346(a). Here, Anderson has only made out a request for equitable relief. He has not pled a dollar amount of monetary damages or

sufficient facts by which to calculate such an amount, and thus he has failed to satisfy his burden to establish subject-matter jurisdiction. Hence, Anderson's claim lies outside the jurisdiction afforded to this Court.[13]

Because the Court of Federal Claims also cannot entertain contract actions against the United States solely for equitable relief, this Court declines to exercise its authority under 28 U.S.C. § 1631 to transfer the present action to the Court of Federal Claims, as "[i]t would not be in the interest of justice to transfer this case when the Court of Claims would refuse to exercise jurisdiction." *Motorola, Inc. v. Perry*, 917 F. Supp. 43, 48 (D.D.C. 1996) (citing *A & S Council Oil Co., Inc. v. Lader*, 56 F.3d 234, 242 (D.C. Cir. 1995)).

For the foregoing reasons, Count II will be dismissed for lack of subject-matter jurisdiction.[14]

---

[13] To the extent that Anderson intended that the Court construe his breach of contract claim under state law, *see* Compl. ¶ 60 ("[d]efendants breached the Contract by failing to uphold Wisconsin's law of right to cure a contract . . . "), this Court lacks diversity jurisdiction over it because Anderson has not alleged that the matter in controversy exceeds $75,000—as stated above, he has not alleged any amount of monetary damages. *See* 28 U.S.C. § 1332 (requiring the matter in controversy to exceed $75,000 and to be between citizens of different states). Additionally, the Court exercises its discretion and declines supplemental jurisdiction to hear the claim under 28 U.S.C. § 1367(c)(3) because the Court will dismiss all claims over which original jurisdiction is asserted.

[14] Even if this Court did have subject-matter jurisdiction over Anderson's breach of contract claims, they would likely merit dismissal for failure to state a claim upon which relief can be granted. To succeed on a contract claim, a plaintiff must demonstrate the existence of a contract. *See Henke v. Dept of Commerce*, 83 F.3d 1445, 1450 (D.C. Cir 1996); *Carter v. Bank of*

IV. Claims for Declaratory Judgment and Injunctive Relief

Turning last to Andersons request for a declaratory judgment that "[d]efendants' conduct deprived [him] of his rights under the U.S. Constitution and the laws of the United States[,]" Compl. ¶ 63, the Court points to the "well-established rule that the Declaratory Judgment Act is not an independent source of federal jurisdiction.'" *C&E Services, Inc. of Washington v. D.C. Water and Sewer Auth.*, 310 F.3d 197, 201 (D.C. Cir. 2002) (quoting *Schilling v. Rogers*, 363 U.S. 666, 677 (1960)). "Rather, the availability of [declaratory] relief presupposes the existence of a judicially remediable right." *Id.* (internal quotation marks and citation omitted). But as explained above, Anderson has no viable constitutional claim. Having dismissed all of Anderson's other claims, no actual case or controversy remains and thus this Court cannot render a declaratory judgment. *See, e.g.*, *Buchwald v. Citibank, N.A.*, 2013 WL 5218579, at *7 (D.D.C. Sept. 17, 2013); *Seized Property Recovery, Corp. v. U.S. Customs and Border Protection*, 502 F. Supp. 2d 50, 64 (D.D.C. 2007). For the same reason, the Court cannot entertain Andersons request to "enjoin the [d]efendants to reverse the Memorandum terminating Plaintiff's embed accommodation status without procedural due process." *See,*

Am., 845 F. Supp. 2d 140, 144 (D.D.C. 2012). "A contract has certain essential elements, to wit, competent parties, lawful subject matter, legal consideration, mutuality of assert and mutuality of obligation." *Henke*, 83 F.3d at 1450 (internal citations omitted). Without deciding the issue, the Court notes that Anderson does not appear to have sufficiently alleged the existence of an enforceable contract with the U.S. Army.

e.g., Coe v. Holder, 2013 WL 3070893, at *2 n.4 (D.D.C. June 18, 2013) (holding that a request for injunctive relief does not assert any separate cause of action); *Goryoka v. Quicken Loan, Inc.*, 2013 WL 1104991, at *3 (6th Cir. Mar. 18, 2013) (holding that a request for injunctive relief is a remedy and not a separate cause of action).

Defendants' motion to dismiss Anderson's complaint in its entirety will therefore be granted.[15]

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss will be granted. A separate Order accompanies this Memorandum Opinion.

/s/ John D. Bates

---

[15] In his opposition to defendants' motion to dismiss, Anderson requests leave to amend his complaint to "cure any defects." Opp'n at 31. This request fails to comply with the law of this Circuit, which requires that a motion for leave to amend a complaint be accompanied by a proposed amended complaint. *See* Local Civil Rule 15.1 (requiring a motion for leave to amend to include the proposed amended pleading); *see also United States ex rel. Williams v. Martin-Baker Aircraft Co.*, 389 F.3d 1251, 1259 (D.C. Cir. 2004) ("[A] bare request in an opposition to a motion to dismiss—without any indication of the particular grounds on which amendment is sought—does not constitute a motion within the contemplation of [the applicable Federal Rule of Civil Procedure,] Rule 15(a)"). Anderson's request neither included a proposed amended complaint nor indicated that he would be able to plead sufficient facts to state a plausible claim for relief. *See Rollins v. Wackenhut Services, Inc.*, 703 F.3d 122, 131-32 (D.C. Cir. 2012) (affirming district court decision to deny request for leave to amend complaint in identical circumstances). Hence, the Court denies his request for leave to amend.

United States District Judge

Dated: December 6, 2013

ORDER OF THE DISTRICT OF COLUMBIA CIRCUIT DENYING PETITION FOR REHEARING (FEBRUARY 11, 2016)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WAYNE M. ANDERSON,

Appellant,

v.

ASHTON B. CARTER,
Secretary of Defense, ET AL.,

Appellees.

No. 14-5002

Before: GARLAND, Chief Judge; HENDERSON, ROGERS, TATEL, BROWN, GRIFFITH, KAVANAUGH, SRINIVASAN, MILLETT, PILLARD, and WILKINS, Circuit Judges; SENTELLE, Senior Circuit Judge

---

Upon consideration of appellant's petition for rehearing en banc, the response thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

PER CURIAM

For The Court:
Mark J. Langer, Clerk

BY: /s/ Ken R. Meadows
Deputy Clerk

CIVIL RIGHTS COMPLAINT
(TITLE 42 U.S.C. § 1983)
COMPLAINT FOR DAMAGES, DECLARATORY RELIEF AND INJUNCTIVE RELIEF,
DEMAND FOR JURY TRIAL
(JULY 25, 2012)

UNITED STATES DISTRICT AND BANKRUPTCY COURTS FOR THE DISTRICT OF COLUMBIA

WAYNE M. ANDERSON
1631 State Road 48
Frederic, WI 54837
Tel: (715) 327-5525
Email: wayneanderson@centurytel.net,

Plaintiff, Pro Se

v.

ROBERT GATES
Secretary of Defense
Department of Defense
1000 Defense Pentagon
Washington, DC 20301-1000

JOHN M. MCHUGH
Secretary of Army
101 Army Pentagon
Washington, DC 20310-0101

HANS E. BUSH
U.S. Army Colonel

1400 Defense Pentagon
Washington DC 20301-1400

SEAN MULHOLLAND
U.S. Army Colonel
1400 Defense Pentagon
Washington DC 20301-1400

GREGORY JULIAN
U.S. Army Colonel
1400 Defense Pentagon
Washington DC 20301-1400

Other Defendants as yet unknown,

Defendants.

Case: 1:12-cv-01243

Wayne M. Anderson ("Plaintiff"), *pro se*, for his Complaint in this action, alleges and avers as follows:

INTRODUCTION

1. This is a civil action under 42 U.S.C § 1983 seeking damages and Injunctive relief against Defendants for committing acts, under color of law, with the intent and for the purpose of depriving Plaintiff of rights secured under the Constitution (First Amendment and Fifth Amendment) and laws of the United States by ruling adversely against Plaintiff for his exercise of constitutionally protected speech and for refusing or neglecting to prevent such deprivations and denials to Plaintiff

2. Plaintiff seeks relief from the Court by ruling unconstitutional the Defendants' part in the establishing and execution of an illegal dispute resolution system that allowed the termination of Plaintiff's embed accommodation status without minimal due-process protection. (*Goldberg v. Kelly*, 397 U.S. 254 (1970))

3. Plaintiff seeks relief from the Court by ruling unconstitutional the Defendants' part in failing to uphold the contract agreement that existed between Plaintiff and the Defendants. By signing the International Security Assistance Force Afghanistan, ISAF Media Ground Rules (MGR), the MGR served as a contract between Plaintiff and the U.S. military.

4. The Court may not have the authority to reverse the whole of the "Termination of Accommodated Status" ruled in the "MEMORANDUM FOR MR. WAYNE ANDERSON" dated July 31, 2010, but it does have the authority to separate the defendants from NATO (and the Department of Defense/NATO policy on embeds) and rule against their specific unconstitutional conduct in said Memorandum. The Defendants are all U.S. citizens, military directors and military officers, who are subject to the laws and orders of the Constitution, who swear an oath to uphold those laws. (5 U.S.C. § 3331; DA Form 71, August 1, 1959; Article 92 Uniform Code of Military Justice.) Defendants first serve under the American flag; and at no time are they permitted to disregard that or become quasi non-U.S. citizens to shield them from their obligations to constitutional duties to U.S. civil or U.S. military laws.

5. Plaintiff sustained an injury in fact and seeks relief from the court by reversing the Memorandum

and thus restoring Plaintiff's good name and reputation in the journalistic community, which is sullied by this termination and prevented him from employment opportunities.

6. Plaintiff, an American news reporter and citizen who was on foreign soil in the authority, custody, care and control of the U.S. military and at the time he was exercising his First Amendment rights; he seeks a judicial declaration that the Defendants violated his basic due-process rights and that he should be afforded due-process rights including an evidentiary hearing with procedural due process before government officials deny him, or other U.S. civilian citizens, due-process rights. See *Goldberg*; *Hamdi v Rumsfeld*, 542 U.S. 507 (2004), *Boumediene v. Bush*, 553 U.S. 723 (2008), *Vance v. Rumsfeld*, U.S. CA 7th Cir 10-1687 (2011), *Doe v. Rumsfeld*, U.S. DC Court, Case No. 1:08-CV-1902 (2011).)

7. As a freelance embed-journalist at Camp Mike Spann, a U.S.-controlled NATO base in Afghanistan, Plaintiff reported on an incident regarding a suspected-Taliban shooting at adjoining Afghan Camp Shaheen on July 20, 2012. Plaintiff was told this incident ended in the killing and/or wounding of several American military and U.S. civilian contractors, as well as Afghan National Army (ANA) personnel. The American casualties were taken to Camp Spann by an ANA ambulance. Plaintiff witnessed the offloading by U.S. Army hospital staff and videoed the incident.

8. This shooting incident was later investigated by the U.S. Army and ISAF. A report of these findings substantiated Plaintiff's reporting and a copy was obtained by Plaintiff on May 31, 2011 under a

Freedom of Information Act request. (USCENTCOM Case #11-0058)

9. The story and video produced by Plaintiff were published in The Washington Times newspaper on July 29, 2010. Immediately after publication Plaintiff was flown to Kabul and his embed accommodation status was terminated without any opportunity to contact U.S. Army command, The Washington Times or legal counsel. After returning home to Wisconsin, he appealed the termination, citing his constitutional rights. On Jan. 20, 2011 U.S. Army officials ruled in an in-house administrative appeal that the Constitution, U.S. law or Supreme Court rulings were "not relevant" in Afghanistan in his circumstance.

JURISDICTION

10. Jurisdiction is proper in this Court because this litigation arises under federal law, namely 42 U.S.C. Sections 1983 and 1988, as amended. The Court has jurisdiction over this action under 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1346(a)(2), 28 U.S.C. § 1343, and 28 U.S.C. §§ 2201, 2202 (Declaratory Judgment Act).

11. Plaintiff is domiciled in Wisconsin and Department of Defense is addressed in Washington, DC and this Court has jurisdiction over this under 28 U.S.C.§§ 1331 and 1332.

12. An actual controversy exists between the parties, in that the challenged actions of the Defendants have caused, and will continue to cause, Plaintiff harm unless the requested relief is granted.

VENUE

13. The Defendants are of the United States agency, its officer or its employee. One or more of the Defendants resides within this District and/or performs official duties within this District, and a substantial part of the events or omissions giving rise to Plaintiff's claim have occurred or will occur in this District. This Court, accordingly, has personal jurisdiction over each of the Defendants under 28 U.S.C. §§ 1391(b) and 1391(c).

14. Plaintiff's Federal and State law claims against the Defendants derive from a common focus of operative fact and are of such character that Plaintiff would ordinarily be expected to try them in one judicial proceeding. Consequently, this court has pendent jurisdiction over Plaintiff's State law claims against the Defendants.

PARTIES

15. Wayne Anderson is an American citizen and freelance journalist, who was embed in Afghanistan with the U.S. Army. He currently resides in Frederic, Wisconsin.

16. Robert Gates is a U.S. Secretary of Defense and a "person" subject to suit within the meaning of 42 U.S.C. § 1983. He is vested by the President of the United States "in all matters relating to the Department of Defense. (10 U.S.C.A. § 113, 50 U.S.C. 401) He is vested with the supervision of military-media public affairs rules, both foreign and domestic, within DoD Directive 5122.5. He is sued for damages in his individual capacity and for declaratory and injunctive relief in his official capacity.

17. John M. McHugh is a U.S Secretary of Army and a "person" subject to suit within the meaning of 42 U.S.C. § 1983. He is vested with the supervision of military-media public affairs rules, both foreign and domestic, within DoD Directive 5122.5. He is sued for damages in his individual capacity and for declaratory and injunctive relief in his official capacity.

18. Hans E. Bush is a U.S. Army colonel, and at the time of Plaintiff's termination, chief of public affairs, International Security Assistance Force Joint Command, Afghanistan. He is sued for damages in his individual capacity and for declaratory and injunctive relief in his official capacity. He is vested with the supervision of military-media public affairs rules as chief of public affairs, International Security Assistance Force Joint Command. He is sued for damages in his individual capacity and for declaratory and injunctive relief in his official capacity.

19. Sean Mulholland is a U.S. Army colonel, and at the time of Plaintiff's termination, deputy commander Regional Command North in Afghanistan. He is sued for damages in his individual capacity and for declaratory and injunctive relief in his official capacity. He is vested with the supervision of military-media public affairs rules and command authority to grant, effect and terminate media embeds accommodation status. He is sued for damages in his individual capacity and for declaratory and injunctive relief in his official capacity

20. Gregory Julian is a U.S. Army colonel, and at the time of Plaintiff's appeal, chief public affairs Supreme Headquarters Allied Powers Europe and Allied Command Operations (NATO), Brussels. He is sued for damages in his individual capacity and for

declaratory and injunctive relief in his official capacity. He is vested with the supervision of military-media public affairs rules and MGR and authority to affirm or reverse the findings of the Public Affairs Office community as chief of public affairs Supreme Headquarters Allied Powers Europe and Allied Command Operations (NATO). He is sued for damages in his individual capacity and for declaratory and injunctive relief in his official capacity.

21. Defendants as yet unknown worked as duly appointed government officials and/or agents of the U.S. governments responsible to formulating and implementing military media public affairs policies and practices. At the time of the filing of this complaint, the Plaintiff does not know the identity of these defendants. They are sued in their individual capacities.

22. At all time relevant, all the Defendants acted under color of state law.

LIABILITY WAIVER EXPIRED

23. On March 22, 2010 Plaintiff signed the MGR, with the accompanying provision of "ISAF Indemnification Agreement and Liability Waiver, Media Organization." In this matter, the relevant part of the Waiver states: "Waive all claims of any nature or kind, including, but not limited to claims for personal injury . . . against NATO . . . ISAF. . .military departments of Troop Contributing Nations. . . governments," etc. (Paragraph #5) The Liability Waiver does not list, contemplate or indemnify against constitutional torts and only applies to embed journalists "while being an accommodated media." Plaintiff's status of an accommodated media personnel ended

when the U.S. Army unilaterally terminated Plaintiff's accommodation status. Thus the Waiver provision no longer exists and Plaintiff is free to pursue his claim before this Court. In addition, Col. Julian told Plaintiff in an email that the MGR were no longer in effect after his embed ended.

GENERAL ALLEGATIONS
FACTS

24. On or about January 2010, Plaintiff, a freelance journalist, applied for a U.S. military embed-journalist accommodation status in Afghanistan. Although the Defendants posted "FAQ" on their military website and Plaintiff was able to ask questions via email regarding his accommodation status in Afghanistan to the public relations division, the Defendants did not provide the Plaintiff with any review, formal training, or even a basic informational session regarding the MGR or his accommodation. (This was similar when Plaintiff was embedded in Iraq in 2007. (Press ID # 15807))

25. On or about March 22, 2010, Plaintiff signed the International Security Assistance Force (ISAF)[1] Media Accommodation and Ground Rules Agreement (MGR) after he reviewed the downloaded MGR posted on Defendant U.S. Army-run website and emailed the

---

[1] The International Security Assistance Force (ISAF) is an international stabilization force in Kabul, Afghanistan consisting of about 9,000 personnel. Authorized by the United Nations Security Council in December 2001, the ISAF was charged with securing Kabul and its nearby Bagram air base from Taliban and al Qaida elements and factional warlords, so as to allow for the establishment and security of the Afghan Transitional Administration headed by Hamid Karzai.

scanned MGR to ISAF, per its request. At that time he was not asked to sign, or was made aware of, any other media agreement or military directives on media accommodation or rights.

26. As a journalist, he would provide news coverage of Army personnel and operations for several newspapers in Wisconsin and Minnesota, and live broadcasts to Minneapolis news/talk station KTLK-FM (100.3) for The Chris Baker Show. On or about July 12, 2010, Plaintiff was made aware that Defendant Col. Sean Mulholland authorized Plaintiff's embed accommodation status via email.

27. On or about July 15, 2010, Plaintiff arrived in Kabul and there entered a U.S.-controlled NATO military base and was issued media credentials. (Press ID # RC-C 789) From Kabul he was transported north by the Army to their Camp Mike Spann (Camp Spann) and embedded with the Minnesota Army National Guard, Operation Mentoring Liaison Team (OMLT) 47, under the command of Maj. David Baer.

28. Starting on or about July 17, 2010 Plaintiff performed his duties as a journalist by commencing the first segment in series of news radio broadcasts on OMLT 47 personnel and their mentoring-security work with ANA. Plaintiff sent the first print news story to the newspaper Post-Bulletin, Rochester, Minnesota, which was subsequently published in August 14, 2010.

29. Approximately five days after he arrived in Camp Spann, on or about July 20, 2010, a controversial shooting occurred on ANA Camp Shaheen, which adjoins Camp Spann. Several American soldiers and civilian weapon's trainers were

wounded and/or killed, likewise Afghan personnel. From a safe, non-interfering distance, Plaintiff video filmed the heroic, emotional and professional ambulance offloading of American personnel attacked at Camp Spann and immediately started reporting on the breaking news.

30. Plaintiff gathered news on this adverse incident from U.S./Afghan sources, enlisted soldiers directly involved and supervising commanders from July 20, 2010 through July 28, 2010. During this week U.S. command made five attempts to stop the reporting of this adverse-war news, in violation of the Constitution (First Amendment rights) and in violation of the MGR. One example is a senior-base commander yelled and warned Plaintiff in a meeting, where staff members could see and hear: "Wayne, you're outside your charter. You're chasing a non-story here," said Col. Paul Calbos. "Forget this. This is not 1968. This is not 1968!"

31. Plaintiff understands the historical 1968 reference to the My Lai Massacre, during the Vietnam War where hundreds of Vietnam civilians were sexually abused, tortured and killed by American soldiers. The massacre prompted outrage around the world and increased U.S. calls to get out of Vietnam. U.S. command in Afghanistan is not permitted to intimidate, interfere or request journalists to "forget" reporting legitimate news stories. (MGR 22 (a))

32. Plaintiff is informed, believes and alleges that Defendants' conduct constituted a form of news "embargo," in violation of Plaintiff's First Amendment rights and MGR directives. (MGR 13)

33. While speech and press freedoms are not wholly unqualified, in this instant case there were no circumstances that would justify an embargo towards Plaintiff's reporting or permit censorship. Any stopping (or attempts to stop) the kind of reporting Plaintiff engaged in would have a "chilling" effect on legitimate speech, a constitutional right. (*Lamont v. Postmaster General*, 381 U.S. 301; MGR 13).

34. On July 29, 2010, Plaintiff's story and video ran in The Washington Times. http://www.washingtontimes.com/news/2010/jul/29/contractors-afghan-recruits-in-deadly-training-dis/

35. Immediately thereafter on July 30, 2010, U.S. Army Capt. Jodi Whitt, public affairs 10th Mountain Division, requested Plaintiff to attend a meeting, regarding the news story and video. There he was verbally accosted and confronted in a threatening manner by an Army staff member over the story: "You wrote this f—ing s—t!" demanded the soldier with other colorful commentary. The soldier refused to identify himself. All this while U.S. commanders observed the incident and did not voice or indicate objection. Plaintiff was then taken outside the headquarters' building and notified of his immediate embed termination. He rightfully requested to talk to base and regional commanders; all requests were denied. Later he was escorted off the base and flown back to Kabul.

36. On or about July 31 2010, Plaintiff was taken off the military plane in Kabul and given an approximate 15-minute meeting conducted by Defendant Col. Bush, chief of public affairs International Joint Command, which took place outside and alongside a busy military-airport terminal. U.S. Navy Lt. Cmdr.

Thomas Porter, public affairs International Joint Command; and Chief Petty Officer [Kevin] Taylor, public affairs International Joint Command were in attendance.

37. At this time, Defendants accused Plaintiff of violating the provision of the MGR by, "posting video of wounded personnel . . . " But "posting" is not an MGR violation. Posting the "identity" of wounded military personnel can be a MGR violation. (Defendants later declined to amend the erroneous charge and properly state an accurate, valid charge.)

38. Defendant Col. Bush also presented Plaintiff, at the outdoor's Kabul meeting, with three unidentified photos of military personnel being carried on stretchers, alleging one photo was of a U.S. soldier. Col. Bush did not say which photo was of the alleged soldier, for which Plaintiff was being charged or the identities of the other two, putting Plaintiff in confusion.

39. Defendant Col. Bush without seeing or requesting to see the exculpatory video footage or asking for any substantial evidence from Plaintiff, nor reviewing the MGR to ascertain if a valid violation was cited, was able to immediately reach a guilty verdict. He then signed the embed termination Memorandum of July 31, 2010.

40. Plaintiff was escorted off the base and returned home to the United States.

41. When Plaintiff soon after returned home, Plaintiff contacted U.S. Marine Col. David A. Lapan, Acting Deputy Assistant Secretary of Defense for Media Operations (Pentagon), to inquire about appealing his conviction. After a month of the Army,

Pentagon and U.S. Central Command determining the process and venue, Plaintiff's in-house appeal was granted. And it was determined to be adjudicated by Defendant Col. Julian, Chief, Public Affairs Supreme Headquarters Allied Powers Europe and Allied Command Operations (Brussels).

42. On or about January 20, 2011, Defendant Col. Julian rendered his verdict in the in-house appeal matter. Defendant Col. Julian, in consultation with U.S. Army lawyers, ruled that the U.S. Constitution, federal law and Supreme Court rulings are "not relevant" for American reporters, U.S. civilians, who are joined with the U.S. military in Afghanistan. Furthermore "there is no (US) law governing" American media in Afghanistan, even while in the authority, care, custody and control of the U.S. military.

43. This judicial pronouncement after eight years of repeated court opinion to the contrary; this after the deaths of over 2,000 American military and nearly 17,000 wounded who honorably swore to uphold the Constitution; this after American taxpayer have funded more than $240 billion across 11 years in their hope and under direction of the Commander-in-Chief to establish and further conduct a constitutional democracy there.

44. On several occasions in 2010 and 2011, Plaintiff called, emailed and petitioned several congressional leaders, who are on record of being concerned about military matters and respecting the Constitution. These leaders are: Sens. Ron Johnson, John McCain, Rand Paul; and Rep. Howard "Buck" McKeon. Plaintiff was not permitted to speak directly to these public representatives, but their staff did

expressed disappointment on their behalf in the lack of Constitutional observance by the U.S. military.

45. On December 21, 2010, The Washington Times sent a letter to Defendant Col. Julian to "disagree strongly" with the journalist termination, said Bill Gertz, Geopolitical Editor and Plaintiff's editor on the Afghan shooting story. "The story he reported was solid and the identity of the wounded were not shown on the video . . . Furthermore, I believe the military broke its own Media Ground Rules for reporters in acting the way it did by not giving him a fair hearing."

46. On March 18, 2011 Plaintiff's U.S. representative, Congressman Sean Duffy took responsible action and sent an official letter to Defendant Col. Julian "raising concerns" over Plaintiff's "hastily" termination and "giving no meaningful hearing or opportunity for a proper defense."

47. On several occasions in 2011, Plaintiff contacted several House Committee officials. After much persistence, the Committee eventually responded by email: "HASC (House Armed Service Committee) reviewed your case and determined Media Ground Rules to be outside our jurisdiction. We defer to DoD/NATO policy on embeds, and as such have no plans to increase our oversight of the issue," emailed John Noonan, HASC staff member on June 28, 2011.

48. Plaintiff has also pleaded with the Army and exhausted administrative remedies by informing and requesting in writings for over 11/2 years of Pentagon officials and the Defendants the basic required

elements of notice to the agency and parties, which suffice as sufficient notice. These many emails and Plaintiff's 15-page, in-house administrative appeal over the past 18 months, which provided the agency and Defendants more than sufficient notice so they could, "conduct a proper investigation to determine liability, conduct settlement negotiations and assign value to the claim." (*State Farm v. United States*, 2004 WL 1638175 (E.D.N.Y.); *McNeil v. United States*, 508 U.S. 106, 112 (1993) This sufficient notice informed Defendants of the negligent act, intentional act and absence of a standard policy, practice and custom for dealing with constitutional issues for embed journalists on foreign soil in the care, custody and authority of the U.S. military, which caused Plaintiff's injury and his seeking a change in that policy and the reversal of Defendants' decision to terminate Plaintiff's embed accommodation.

COUNT I
VIOLATION OF 42 U.S.C. § 1983

49. The allegations of paragraphs 1 through 48 of this Complaint are re-alleged and incorporated by reference.

50. At the time of his journalist-embed termination, Plaintiff possessed a constitutionally protected interest and he was subsequently deprived of that interest without a meaningful hearing expressed in *Goldberg* in violation of his procedural due process rights as afforded by the Fifth Amendment.

51. Defendants who have caused the termination of Plaintiff's embed accommodation status without procedural due process rights under

Goldberg, deprived Plaintiff of his rights by failing and refusing to provide a meaningful post-deprivation tort remedy to justify denying Plaintiff's constitutionally protected interest.

52. Defendants have acted under the color of state law when they caused the termination of Plaintiff's journalist-embed status without just cause of his constitutionally protected speech; and for refusing or neglecting to prevent such deprivations and denials to Plaintiff in violation of First Amendment free speech and freedom of the press rights, and his Fifth Amendment due process rights of the United States Constitution.

53. As a direct and proximate result of Defendants' violation of 42 U.S.C § 1983, Plaintiff has sustained injuries and damages.

COUNT II
BREACH OF CONTRACT

54. The allegations of paragraphs 1 through 53 of this Complaint are re-alleged and incorporated by reference.

55. On or about March 22, 2010, Plaintiff entered into a contract agreement with the U.S. Army by signing the International Security Assistance Force Afghanistan, ISAF Media Ground Rules, which acts as contract between Plaintiff and the U.S. Army.

56. There is mutual assent between the parties when the Defendant Col. Sean Mulholland, deputy commander Regional Command North in Afghanistan, authorized and affirmed the terms of the MGR contract with his official granting Plaintiff's embed

accommodation status via email on or about July 12, 2010.

57. The MGR act as a "contract" between the media and the military, as expressed by the Defendant Col. Lapan. They are agreed upon rules of permissible and non-permissible conduct for both parties to observe. (MGR 1-22) If "disputes" arise out of these agreed upon rules, then an "honest broker" will work with the parties to resolve them. (MGR 16) The signatures of both parties are present on the document. (MRG Page 6) The joint purpose of the MGR, created by the U.S. military and advanced by U.S. citizen journalists, is expressed in its opening statement: "The following media accommodations grounds rules are intended to encourage the democratic ideals of open reporting and transparency . . . "

58. In 2003, the United States Department of Defense (DoD) adopted the "embedded media" policies and procedures, now the MGR, which is the creation of, the continued mandate of, and the authorization of the DoD. There is no actual separation between the MGR and DoD—between the document and its author. The embedded media policy was designed for journalists by the U.S. military to enter into a joint agreement to facilitate the reporting of military stories, operations and related information for the American public, and others. The DoD promulgated the embedded media policy by contracting with authorized journalists who would be allowed minimally restrictive access to U.S. military war operations.

59. Defendants breached the Contract by unsuccessfully preventing, but violating, the intent of

the news embargo rule. "Service members will not prohibit news media representatives from viewing or filming casualties," of which the end purpose is publication. (MGR 22(a)) Five attempts to embargo Plaintiff story constitutes interference with publication. The MGR affirms the ideal of "open reporting and transparency" to the public by stating: "They (rules) are in no way intended to prevent the release of negative coverage or embarrassing information . . . " (Opening paragraph)

60. Defendants breached the Contract by interfering on five separate occasions to stop the release of legitimate news they viewed as "negative coverage or embarrassing information . . . " (MGR opening paragraph) Defendants breached the Contract by failing to provide an "honest broker" in its dispute with Plaintiff (MGR 16) Defendants breached the Contract by failing to uphold Plaintiff's right to defense in consulting Public Affairs Office command before termination. (MGR 16) Defendants breached the Contract by failing to uphold Wisconsin's law of right to cure a contract breach by "stop[ping] the offending conduct and . . . substantially perform[ing] the contract." (2010 WI 15, Par. 47, 323 Wis. 2d 294, 779 N.W.2d 423)

61. As a direct and proximate result of Defendants' breach, Plaintiff has sustained injuries and damages.

COUNT III
Declaratory Relief

62. The allegations of paragraphs 1 through 61 of this Complaint are re-alleged and incorporated by reference.

63. There is a real and actual controversy between Plaintiff and Defendants regarding whether Defendants may undertake to act as described herein. Plaintiff contends that Defendants violated the U.S. Constitution and the laws of the United States. On information and belief, Defendants deny that their conduct violated the U.S. Constitution and the laws of the United States. Plaintiff seeks a judicial declaration that Defendants' conduct deprived Plaintiff of his rights under the U.S. Constitution and the laws of the United States.

64. In conclusion, Plaintiff is a pro se litigant acting in good faith, doing the best he can with limited resources on hand in seeking justice in this court. Although Plaintiff has tried, he is neither proficient in legalese nor trained in the technicalities and formalities for a lawyerly pleading. Therefore, as a regular citizen, he asks the court to show leniency. " . . . [A] document filed *pro se* is "to be liberally construed." (*Estelle v Gamble*, 429 U.S. [97], at 106, 97 S. Ct. 285 [1976]) And "a *pro se* complaint, however in artfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." (Ibid)

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court:

Enter a declaratory judgment that the Defendants' conduct, policies, practices, and customs violated the First and Fifth Amendments; enjoin the Defendants to reverse the Memorandum terminating Plaintiff's embed accommodation status without procedural due process; enter judgment according to

the declaratory relief sought; award Plaintiff's costs in this action; enter such other further relief to which Plaintiff may be entitled as a matter of law or equity, or which the Court determines to be just and proper.

DEMAND FOR JURY TRIAL

Pursuant to Federal Rule of Civil Procedure 38 and Civil Local Rule 3-6, Plaintiff hereby demands a jury trial on all issues so triable.

WAYNE M. ANDERSON
1631 State Road 48
Frederic, WI 54837
Tel: 715-327-5525
Email:wayneanderson@centurytel.net

By:

/s/ Wayne M. Anderson
Plaintiff *Pro Se*

Dated: July 20, 2012

MEMORANDUM FROM ISAF TO WAYNE ANDERSON: TERMINATION OF ACCOMMODATED STATUS (JULY 31, 2010)

Headquarters
International Security Assistance
Force Joint Command
Kabul, Afghanistan
APO AE 09354

IJC PAO 31 July 2010

MEMORANDUM FOR MR. WAYNE ANDERSON

SUBJECT: Termination of Accommodated Status

1. I have reviewed Regional Command North's request to terminate your accommodated status.

2. I believe you did violate paragraph 22(a) and 22(c) of the International Security Assistance Forces Ground Rules by posting video of wounded personnel to your You Tube profile.

3. The point of contact for this action is Lieutenant Commander Tom Porter at (93) 079-325-4960.

/s/ Hans E. Bush
Colonel, U.S. Army
Chief of Public Affairs

ISAF MEDIA GROUND RULES

The following media accommodations grounds rules are intended to encourage the democratic ideals of open reporting and transparency, while balancing the needs of operational security and service member privacy. They are in no way intended to prevent the release of negative coverage or embarrassing information but do restrict the release of certain categories of information which could provide mission details useful to the enemy putting military and civilian lives at stake.

Violations of any of the following rules may result in termination of accommodated status:

(1) Unless supported through national programs, accommodated media are responsible for obtaining their own passports and visas and entrance into the Area of Operations (AOR). Media are strongly encouraged to be properly immunized before embedding with units as per the World Health Organization recommendations for the region or country;

(2) Accommodated media must wear their media credentials in a clearly visible location at all times;

(3) Accommodated media will not enter any restricted areas without a military escort;

(4) Accommodated media are responsible for procuring/using personal protective gear, to include as a minimum military-grade helmet and body armour. Clothing and equipment will be subdued in colour and appearance, but non-military in appearance.

(5) Accommodated media are responsible for their own personal and professional gear, including protective cases for professional equipment, batteries, cables, converters, personal protective equipment, etc. Each media representative is responsible for carrying his own gear.

(6) When accepting accommodation from units under NATO command, media will comply with the respective national military codes of conduct (e.g. bans on alcohol, taking of war trophies, etc.);

(7) All interviews with service members will be on the record. Security of information will be the responsibility of the service member being interviewed; however the military member must be informed by the accommodated media when he/she is in an interview situation. The service member will always have the right to decline an interview;

(8) Media will be expected to follow instructions regarding activities and movements;

(9) Media representatives, support staff, producers or personal protection teams will not carry weapons while accommodated;

(10) Interviews with service personnel are authorized upon completion of missions; however, release of information must conform to these media ground rules;

(11) Products will be datelined according to local ground rules that will be provided to accommodated media;

(12) Visible light sources and infra-red devices, including flash or television lights, will not be used

when operating with troops at night unless specifically approved in advance by the on-scene Commander. Likewise, media will follow tactical movement and noise discipline while covering operations;

(13) Embargoes may be imposed to protect operational security. Embargoes will be lifted as soon as the operational security issue has passed;

(14) Communications equipment (such as cell phones) will not be specifically prohibited. However, unit commanders may impose temporary restrictions on electronic transmissions for operational security reasons and as the threat assessment or security situation dictates;

(15) Media are expected to be self sufficient with respect to filing product. On occasion, media may be allowed to file stories via military communications systems subject to national regulations and the limitations of available systems. Media may not be allowed to connect privately-owned computers or USB thumb drives to military networks and should have the capability to burn to CD/DVD. It should be noted that bandwidth limitations can restrict the ability to file video and large files;

(16) If, in the opinion of the unit commander, a media representative is unable to physically, psychologically, mentally, or emotionally withstand the conditions required to operate with the forward deployed forces, the commander or his/her representative may limit the representative's participation to ensure both the reporter's and the unit's safety. Disputes should be raised through PAO channels. The PAO community will work as the honest broker but

the ultimate decision to accommodate media is held by the commander;

(17) NATO forces will provide emergency medical treatment to any media who have been injured while accommodated with a NATO formation or unit in accordance with NATO or national regulations within available capabilities.

(18) If a media representative is injured or killed in the course of military operations, NATO will notify the media representative's agency in accordance with instructions provided on the embed application. It is important that media representatives clearly communicate your desires for these contingencies. The agency will be responsible for further notification of next of kin. Repatriation of media who have been killed or injured is the responsibility of the media outlet employing the journalist. Media outlets employing freelance journalists must pay particular attention to this responsibility.

(19) The following will not be visually recorded without the expressed approval of the local Chief Public Affairs Officer and the local commander:

(a) Restricted military areas, facilities or installations, such as Operations Centres;

(b) Images of maps, navigation devices, communications equipment or Counter Improvised Explosive Devise/Electronic Warfare equipment. Care should be taken in tactical vehicles to ensure these categories of sensitive equipment are not documented;

(c) Classified systems, equipment or demonstrations of capabilities

(d) Any flight line in the theatre of operations and military aircraft operating on or near it. Media will adhere to the ground rules for ramp ceremonies as briefed prior to each ceremony.

(20) The following information is not releasable:

(a) Specific information on troop strength and capabilities, equipment or critical supplies (e.g. artillery, radars, trucks, water, etc.);

(b) Specific number of aircraft in units below wing level, or identification of specific mission aircraft points of origin; stating "land or carrier based" as a point of origin is acceptable. Number and type of aircraft may be described in very general terms such as "large flight", "small flight", "many", "few", 'fighters", "fixed wing", etc.;

(c) Units in the Area of Operation, unless specifically authorised by the unit PAO at the Task Force, Regional Command, or IJC level in which the embed is taking place;

(d) Information regarding future, current postponed or cancelled operations—unless otherwise indicated by the local CPAO;

(e) Imagery that would show level of security at military installations or encampments, especially aerial and satellite imagery which would reveal the name or specific location of military units or installations;

(f) Details of the rules of engagement or escalation of force measures or information regarding force protection measures to include, but

not limited to, those at military installations or encampments, except those that are visible or readily apparent;

(g) Information on intelligence collection activities including targets, methods of attack and results;

(h) Extra precaution in reporting will be required at the start of an operation to maximize operational surprise. Therefore, broadcasts from airfields by accommodated media members are prohibited until authorised by the unit commander;

(i) During an operation, specific information on friendly force troop movements, tactical deployments, and dispositions that would jeopardise operational security or lives. Information on on-going engagements will not be released unless authorised by the on-scene commander;

(j) Information on missing personnel or sensitive equipment or downed aircraft while search and rescue and recovery operations are being planned and executed unless expressly authorised by PA staff;

(k) Information on Special Operations units in the AOR unless authorized by the commander of that unit;

(l) Information on the effectiveness of enemy electronic warfare;

(m) Information on friendly forces electronic warfare equipment or procedures or friendly

forces counter-IED activities which would result in a tactical advantage to the enemy;

(n) Information on effectiveness of enemy camouflage, deception, targeting, direct and indirect fire, intelligence collection or security measures;

(o) All imagery of detainees or any transport of detainees will respect the detainee's rights, and protect the detainee from public curiosity in accordance with Article 13 of the Third Geneva Convention. No photographs or other visual media showing a detained person's recognisable face, nametag or other identifying feature or item may be taken;

(p) Accommodated media will not interview, photograph, film or report on Special Operations Forces or personnel and operations they conduct or participate in, without prior approval of a NATO Special Operations Forces Command representative and COMISAF;

(q) Accommodated media will not report the identity of personnel who kill or injure opposing forces without the prior approval of COMISAF; and

(r) Any other information that may be restricted from time to time by COMISAF due to operational requirements.

(21) The following categories of information are releasable:

(a) Arrival of military units in the area of operation when officially announced.

(b) Approximate friendly force strength figures;

(c) Non-sensitive, unclassified information regarding air and ground operations, past and present;

(d) Size of friendly force participating in an action or operation may be disclosed using general terms such as "multi-unit". Specific force or unit identification may be released when authorised by COMISAF or his designate;

(e) Generic description of origin of air operations, such as "land-based":

(f) Date, time or location of completed military missions and actions as well as mission results;

(g) Types of ordnance expended in general terms;

(h) Number of aerial combat or reconnaissance missions or sorties flown in the AOR; and

(i) Type of forces involved (e.g. air defence, infantry, armour) except for Special Operations forces and those of participating nations.

(22) Unless otherwise advised by the host unit PAO or commander, the following procedures and policies apply to coverage of wounded, injured, and ill personnel.

(a) Accommodated media will honour the national policies for release of names and identity of soldiers killed and wounded; national policies differ and are beyond the scope of this document. Media who witness the deaths

and injuries of coalition service members will not disclose—through video, photos, written or verbal description—the identities of the individuals until the nation has made appropriate notification to the next of kin. Service members will not prohibit news media representatives from viewing or filming casualties. Casualty photographs showing a recognizable face, nametag, or other identifying feature or item will not be used, except as indicated in (b)—(g) below. Media should contact the PAO for release advice.

(b) Media will not be prohibited from covering casualties provided the following conditions are met:

(c) Names, video, identifiable written/oral descriptions or identifiable photographs of wounded service members will not be released without the service member's prior written consent. If the service member dies of his wounds, next-of-kin reporting rules then apply.

(d) National policy dictates the release of names of soldiers killed in action. In respect for family members, names or images clearly identifying individuals "killed in action" will not be released prior to notification of next of kin. The names of those killed in action may be released after the national announcement has been made—journalists may verify through PAO channels.

(e) Media visits to medical facilities are authorized and will be conducted in accordance with applicable national regulations, standard operating procedures, operations orders and instructions by attending physicians. If approved, service or medical facility personnel must escort media at all times.

(f) Patient welfare, privacy, and next of kin/family considerations are the governing concerns about news media coverage of wounded, injured, and ill personnel in medical treatment facilities or other casualty collection and treatment locations.

(g) Permission to interview or photograph a patient will be granted only with the consent of the attending physician or facility commander and with the patient's expressed, informed consent, witnessed by the escort. "Informed consent" means the patient understands his or her picture and comments are being collected for news media purposes and they may appear in news media reports.