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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Andrew Keith Wright,

Plaintiff,

vs.

U.S. Army, et al.,

Defendants.

No. CIV 02-967-PHX-EHC ✓
(Consolidated)

No. CIV 03-555-PHX-JAT
No. CIV 03-1252-PHX-JAT
No. CIV 03-1321-PHX-JAT
No. CIV 03-1693-PHX-JAT

ORDER

Pending before the Court is Plaintiff's 1) Motion for Preliminary Injunction [Dkt. 75-3]; 2) Motion for Declaratory Relief [Dkt. 75-4]; and 3) Motion to Find Defendants in Contempt [Dkt. 75-5].

Attached as an Appendix to this Order is a chronology of events involving Plaintiff's military career from May 24, 2002, the date Plaintiff filed his initial Complaint, to date.

Relevant Procedural History

On July 12, 2002, the Court entered a Preliminary Injunction enjoining the U.S. Government and any of its agencies having jurisdiction over Plaintiff's military status from 1) dropping Plaintiff from the rolls of the Army; and 2) terminating his active duty status as a Captain prior to December 20, 2002. Defendants did not appeal the Order granting the Preliminary Injunction.

(93)

1 On December 23, 2002, Defendants filed a Motion to Dismiss [Dkt. 54] and submitted an
2 exhibit ("Letter") to their Motion to Dismiss, which stated:

3 Based on the reasoning of the U.S. District Court in issuing the preliminary
4 injunction, this command does not intend to take action to void Andrew Wright's status
5 as a captain, U.S. Army Reserve, on or after 20 December 2002.

6 Captain Wright is currently serving on a tour of extended active duty. Future
7 actions after 20 December 2002 to extend that active duty tour or to allow that tour to
8 terminate on its end date with Captain Wright's release to the Individual Ready Reserve
9 will be in accordance with all laws and regulatory standards applicable to similarly
10 situated officers of the U.S. Army Reserve who are serving on active duty.
11 [Dkt. 57, p. 2; Dkt. 54, Exh. 1].¹

12 On January 17, 2003, despite the attestations in the Letter one month earlier and without
13 filing with the Court, the Department of the Army Central Personnel Security Clearance
14 Facility Plaintiff issued an "Intent to Revoke" Memorandum, which notified Plaintiff that a
15 preliminary decision had been made to revoke his security clearance pursuant to the Smith
16 Amendment. [Dkt. 67, Exh. 6-5].

17 In its Order dated February 28, 2003, the Court granted Defendants' Motion to Dismiss
18 [Dkt. 54] because "Plaintiff ha[d] received the relief he requested." [Dkt. 57, p. 4].² The
19 Court dismissed the case as moot based on Defendants' representations in its December 2002
20 Motion to Dismiss.³ [Dkt. 57, p. 4].

21 On March 23, 2003, Defendants revoked Plaintiff's ten-year security clearance after only
22 seven years, which Plaintiff alleges operated to "negate the ability of the Plaintiff to continue
23 to serve on Active Duty with the Army or obtain an assignment in the Army Reserve." [Dkt.
24 75, p. 2, filed February 2, 2004]. On February 2, 2004, Plaintiff filed a "Motion to Re-Open
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26 ¹ Letter from Lieutenant Colonel Rafe R. Foster to U.S. Attorney Paul K. Charlton,
27 which was attached as Exhibit 1 to Defendants' Motion to Dismiss [Dkt. 54].

28 ² The Court was unaware on the date of its Order that an "Intent to Revoke"
Memorandum had been issued.

³ Defendants contend that the Letter, *supra*, represents that the U.S. Army "would not
seek to void plaintiff's status as a captain but would otherwise treat him as any similarly
situated officer. . . ." [Dkt. 78, p.3]. The Motion and the Court's Order confirmed that any
actions concerning a change in Plaintiff's status as an officer in the U.S. Army Reserve would
not be premised on matters which occurred prior to December 20, 2002.

1 case, Motion for Temporary Restraining Order and Preliminary Injunction, Motion for
2 Declaratory Relief, and Motion to Find Defendants in Contempt." [Dkt. 75].

3 On February 3, 2004, Defendants notified Plaintiff, by Memorandum, of an upcoming
4 hearing to take place at the Armed Forces Reserve Center in North Little Rock, Arkansas,
5 on February 18, 2004. The "subject" of the Memorandum was listed as "Notification of
6 Show Cause Board." The Memorandum, issued by the Department of the Army, stated that
7 "[t]he hearing [is] to consider CPT Andrew K. Wright. . . for administrative separation⁴ for
8 intentional misstatement of facts in official statements or records, for the purpose of
9 misrepresentation and conduct unbecoming an officer. . ."

10 On February 12, 2004, the Court granted Plaintiff's Motion to Re-Open the case to
11 consider actions the U.S. Army took subsequent to the Court's Order of February 28, 2003,
12 which dismissed Plaintiff's claims because he had received the relief requested. Further, the
13 Court granted Plaintiff's Motion for Temporary Restraining Order and enjoined Defendants,
14 or any division thereof, from taking any action to discharge, demote, or otherwise voiding
15 or suspending Plaintiff's status on inactive duty as a Captain in the U.S. Army Reserve for
16 a period of ten (10) days from the date of the Order or as extended by the Court.

17 Plaintiff claims the U.S. Army is now "attempt[ing] to achieve indirectly what the Court
18 has ruled they were estopped from doing" based on an alleged misrepresentation in July
19 2003, discussed *infra*. [Dkt. 75, p.2]. At issue is whether the Court acted based on
20 representations that Plaintiff had received the relief requested in granting Defendants' Motion
21 to Dismiss, and if so, whether events subsequent to the Court's Order of February 28, 2003,
22 have occurred which justify Plaintiff's dismissal, or whether Defendants are retaliating
23 against Plaintiff.

24 The pending, although now-postponed, military proceedings to terminate Plaintiff,
25 considering that the U.S. Army "[did] not intend to take action to void Andrew Wright's
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27 ⁴ The Court notes that the upcoming hearing in Arkansas is for consideration of
28 "administrative separation" as opposed to "release to the Individual Ready Reserve" as stated
in Defendants' letter of December 12, 2002.

1 status as a captain, U.S. Army Reserve, on or after 20 December 2002" [Dkt. 54, Exh. 1], are
2 arguably impacted by prior proceedings in this case.

3 On February 20, 2004, the Court held an evidentiary hearing to determine whether the
4 U.S. Army had acted in contravention to its representations, *supra*, in its Motion to Dismiss,
5 and whether to issue a preliminary injunction.

6 **Legal Standard - Preliminary Injunction**

7 In order to obtain a preliminary injunction, a movant must show either the likelihood of
8 success on the merits and the possibility of irreparable injury *or*, alternatively, the existence
9 of serious questions going to the merits and the balance of hardships tipping in the movant's
10 favor. Mai Systems Corp. v. Peak Computer, Inc., 991 F.2d 511, 516 (9th Cir.1993).

11 In other words, a preliminary injunction may issue when "either a likelihood of success
12 on the merits and the possibility of irreparable injury, or that serious questions going to the
13 merits were raised and the balance of hardships tips sharply in its favor." Immigrant
14 Assistance Project of Los Angeles Cty. Federation of Labor (AFL-CIO) v. I.N.S., 306 F.3d
15 842, 873 (9th Cir. 2002)(quoting Sega Enterprises Ltd. v. Accolade, Inc., 977 F.2d 1510, 1517
16 (9th Cir.1992)).

17 **Discussion**

18 **Plaintiff's Allegations**

19 Plaintiff is proceeding pro se. Plaintiff argues that Defendants, in their December 2002
20 Motion to Dismiss [Dkt. 54], misrepresented their position to the Court. Plaintiff contends
21 that the Order dismissing his claims, based on Defendant's representations, requires the U.S.
22 Army to reinstate his security clearance. Further, Plaintiff alleges that the revocation of his
23 security clearance on March 23, 2003, was in retaliation for his legal actions against the U.S.
24 Army.⁵ Specifically, Plaintiff "contends that several actions committed by the Defendants
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26 ⁵ Plaintiff also alleges due process claims that will not be addressed, as those claims
27 were dismissed pursuant to the Court's Order dated February 28, 2003. The claim before the
28 Court is that of alleged retaliation, after the same Court Order, in violation of the First
Amendment.

1 are indirect [sic] contempt of this Court and in violation of an agreement submitted in writing
2 in this Court to 'treat the Plaintiff as any other Officer' and to take no action to 'divest him of
3 his status as an Officer in the U.S. Army Reserve.'" [Dkt. 67, p.2]. Plaintiff's referral to
4 "several actions" stems from the revocation of his security clearance⁶ and his scheduled
5 hearing in Arkansas before the involuntary separation Board to consider involuntary
6 discharge. Plaintiff argues that any misrepresentation as to the status of his security
7 clearance on an application for voluntary deployment to Honduras by Plaintiff was due to
8 Plaintiff's reliance on the Court's Order, which he believes required reinstatement of his
9 security clearance.

10 Additionally, Plaintiff alleges he has been a reliable and dutiful soldier. Plaintiff
11 submitted a letter from Lieutenant Colonel Scott A. Westley, dated February 25, 2003, which
12 states "I highly recommend approval of this waiver request and that CPT Wright's security
13 clearance be restored. CPT Wright has served with this unit for over two years and I have
14 personally worked with him for eight months of that period. I do not doubt his loyalty to our
15 country or his willingness to serve our Army." [Dkt. 67, Exh. 4-12].⁷

16 Defendants' Allegations

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20 ⁶ Plaintiff avers in his Motion to Find Defendants in Contempt of Court and Motion
21 for Declaratory Judgment that Defendants revoked Plaintiff's security clearance on March
22 23, 2003, twenty-three (23) days after the Court's issuance of its Order. [Dkt. 67,
23 p.4](Plaintiff mistakenly lists the year as 2002, but it is evident Plaintiff intended the year to
24 be reflected as 2003.). Plaintiff also has contended, at the evidentiary hearing of February
25 20, 2004, that the same Order required Defendants to reinstate his security clearance, the
26 revocation of which was pending at the time of the Court's Order.

27 ⁷ There exist numerous other positive reviews in Plaintiff's personnel file. One
28 performance evaluation states that "CPT Wright is an outstanding officer" who has always
been willing "to go the extra mile to complete the mission" and who "should be promoted and
considered for positions of increasing responsibility." [Hearing Exh. 66, p.73]. Another
performance evaluation avers that Plaintiff has "strong convictions and stands behind them"
and is "[u]nfazed by rapidly changing situations." [Hearing Exh. 66, p.80].

1 Defendants argue that the Court, if it accepts Plaintiff's argument, may be erecting "an
2 impenetrable shield against any subsequent adverse personnel actions" against Plaintiff. [Dkt.
3 78, p.5].

4 During the evidentiary hearing on February 20, 2004, Defendant argued that Plaintiff
5 intentionally misrepresented his security clearance status on his application, dated July 10,
6 2003, which was submitted for voluntary deployment with Joint Task Force Bravo to
7 Honduras. Plaintiff represented his security clearance as "Secret." [Hearing Exh. 29, p.8].

8 A Memorandum issued on December 7, 2003, and signed by Major General James A.
9 Sholar, referenced the July 2003 application, and advised Plaintiff that:

10 Your misrepresentation of your clearance status to deploy to Honduras continues a
11 *pattern of misrepresentation* previously documented by a January 27, 2003, Reprimand
12 issued to you by MG Michael D. Rochelle, Commander, U.S. Army Recruiting
13 Command. This Reprimand states that you committed various acts of fraud and deceit
14 against the U.S. Army, including submitting a false statement in August, 1997, on a
15 [Standard Form 86] security questionnaire⁸ regarding a previous suspension of your
16 clearance.
17 [Dkt. 67, Exh. 1-1; See Dkt. 9, p.29](emphasis added).

18 Defendants allege that his recent representation involving his security clearance
19 continues a pattern of dishonesty perpetrated by Plaintiff over the past fifteen years, and
20 warrants an administrative separation hearing.

21 Defendants refer to the last paragraph in the Letter (Dkt. 54, Exh. 1), which states, in part:

22 Future actions after 20 December 2002 to extend that active duty tour or to allow that
23 tour to terminate on its end date with Captain Wright's release to the Individual Ready
24 Reserve will be in accordance with all law and regulatory standards applicable to
25 similarly situated officer of the U.S. Army Reserve who are serving on active duty.

26 As such, Defendants claim that they retained the right, pursuant to the above paragraph,
27 to terminate Plaintiff for conduct prior to and known as of December 20, 2002, even though
28 the Court dismissed the case as moot based on the fact that Plaintiff received the relief he
requested.

Reopening of the Case

⁸ Application to the National Guard, dated August 13, 1997.

1 The Court reopened this case for the limited purpose of deciding whether *new* events
2 had occurred subsequent to the Order dismissing Plaintiff's claims to justify terminating
3 Plaintiff's status in the Ready Reserve. Despite Defendants claim that Plaintiff had an
4 alleged "history" of misrepresentations, Defendants agreed in December 2002 to take no
5 action to void Plaintiff's status as a captain. However, Defendants revoked Plaintiff's
6 security clearance just twenty-three (23) days after the Court's Order, and later scheduled
7 an administrative hearing, now postponed, for February 18, 2004, to determine his status
8 as an officer in the U.S. Army Reserve.
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12 Scope of the Court's February 28, 2003 Order

13 In its February 28, 2003 Order, the Court addressed mootness because Plaintiff "ha[d]
14 received the relief he requested" with respect to his claims of Fifth Amendment and due
15 process violations. However, the Court advised Plaintiff that any First Amendment
16 retaliation claims "is properly brought in a separate action." [Dkt. 57, p.4].
17

18 On March 24, 2003, Plaintiff filed a separate action (CIV 03-555)⁹, which the Court
19 consolidated with this action (CIV 02-0967) pursuant to an Order dated February 12,
20 2004.
21

22 Plaintiff has not received the "relief he requested" with respect to his First Amendment
23 claims because the claims had not been resolved by dismissal of the case. Therefore,
24 Plaintiff's First Amendment retaliation claim is before the Court at this juncture. The
25 Court will determine whether Defendants' contention that it did "not intend to take action
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⁹ Case No. 03-0555 is consolidated with Case No. 02-0967 due to its similar issues.

1 to void Andrew Wright's status as a captain, U.S. Army Reserve, on or after 20 December
2 2002" represented that the U.S. Army did not intend to pursue dismissal, or take any
3 action leading to dismissal, based upon Plaintiff's alleged pattern of dishonesty and
4 misrepresentations occurring prior to December 20, 2002. If Defendants' intent is
5 determined as such by the Court, then any adverse employment action against Plaintiff for
6 his alleged dishonesty and misrepresentations are suspect absent non-pretextual reasons
7 for such action.
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9
10 Defendants argued at the hearing on February 20, 2004, that Plaintiff's recent
11 misrepresentation on July 10, 2003, concerning the status of his security clearance after
12 the clearance had been revoked on March 23, 2003, precipitated the scheduling of a
13 discharge hearing to be held on February 18, 2004. However, Plaintiff's evidence at the
14 hearing reflected that the revocation process was initiated by the Army Litigation
15 Division via a Memorandum sent to Maria Di Marco ("Di Marco"), Adjudications Chief
16 at the Central Personnel Security Clearance Facility on June 24, 2002, regarding his 1987
17 criminal conviction. Plaintiff has submitted Army correspondence, including the
18 Memorandum to Di Marco, which states that the reasons for the revocation of Plaintiff's
19 security clearance is his criminal conviction. [Dkt. 67, Exh. 4-6]. Further, Defendants
20 continue to maintain that a *pattern* of dishonesty, occurring long prior to December 22,
21 2002, will be presented at the discharge hearing rather than merely the most recent events,
22 thus resurrecting the very issues resolved by the Court's February 2003 Order.
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27 First Amendment Retaliation - Revocation of Security Clearance
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1 There are three (3) ways for a retaliation claim to have merit. First, a Plaintiff can show
2 such a close proximity between the adverse employment action and the protected speech
3 as to create an inference of retaliation. Coszalter v. City of Salem, 320 F.3d 968, 977 (9th
4 Cir. 2003). Second, a Plaintiff can show his employer was opposed to his protected
5 speech. Id. Third, a Plaintiff can show that his employer's proffered explanations for such
6 "retaliation" were false and pretextual. Id.

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9 It is widely accepted that non-frivolous litigation is constitutionally-protected free
10 speech. See, e.g., Lytle v. Wondrash, 182 F.3d 1083, 1090 (9th Cir. 1999); Redish v. City
11 of Tacoma, 123 F.3d 1216, 1222-23 (9th Cir. 1997);

12
13 In the Order dismissing Plaintiff's claims, and noting that any First Amendment claim
14 be brought in a separate action, the Court stated:

15 Plaintiff contends the administrative actions taken against him are in
16 retaliation for his previous legal actions against Defendants and are an attempt to
17 harass him and remove him from the Army. As such, Plaintiff's claims are . . .
18 brought under . . . the First Amendment as retaliation claims.

19 Unlike due process claims, First Amendment retaliation claims do not
20 require a final agency action or a liberty or property entitlement. Rather, the action
21 of which a plaintiff is complaining must only be sufficiently adverse to deter the
22 exercise of First Amendment rights. Power v. Summers, 226 F.3d 815, 820-21 (7th
23 Cir. 2000); see also Nunez v. City of Los Angeles, 147 F.3d 867, 875 n.11 (9th Cir.
24 1988); Hyland v. Wonder, 972 F.2d 1129, 1134-35 (9th Cir. 1992). Thus, Plaintiff
25 arguably may assert First Amendment retaliation claims even if the Army has
26 discretion in whether to take these administrative actions against Plaintiff, assuming
27 Plaintiff's First Amendment interests outweigh the Army's need to maintain morale
28 and discipline. See Parker v. Levy, 417 U.S. 733, 94 S.Ct. 2547 (1974).
[Dkt. 57, p.3].

25 The Supreme Court has determined that:

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27 While the members of the military are not excluded from the protection granted by
28 the First Amendment, the different character of the military community and of the

1 military mission requires a different application of those protections. The
2 fundamental necessity for obedience, and the consequent necessity for imposition of
3 discipline, may render permissible within the military that which would be
4 constitutionally impermissible outside it.

Parker v. Levy, 417 U.S. at 760, 94 S.Ct at 2563.

5 As such, "even if there are marginal applications to which [a statute] would infringe on
6 First Amendment values, facial invalidation is inappropriate if the 'remainder of the
7 statute covers a whole range of easily identifiable and constitutionally proscribable
8 conduct.'" Id. (citing United States Civil Svc. Comm'n v. Nat'l Assn. of Letter Carriers,
9 413 U.S. 548, 580-81, 93 S.Ct. 2880, 2898 (1973)). Soldiers must show a respect for
10 duty and a discipline without counterpart in civilian life. See Brown v. Glines, 444 U.S.
11 348, 354, 100 S.Ct. 594, 599 (1980). Therefore, a soldier's rights "must yield somewhat
12 to meet certain overriding demands of discipline and duty. . . ." Id. (quoting Parker v.
13 Levy, 417 U.S. at 758, 94 S.Ct. at 2563)(internal quotations omitted). Because the
14 military's right to command and the duty to obey must be unquestioned, the military must
15 possess substantial discretion over its internal discipline. Id. at 357, 601.

16 Here, the specific First Amendment right that Plaintiff claims was violated is the
17 prohibition of retaliation for free speech. As will be addressed, *infra*, the statute on which
18 Defendants rely, namely the Smith Amendment, does not apply to security clearance
19 revocations. As such, Defendants will not be afforded the liberal application of the
20 statute that the Supreme Court envisioned.

21 Procedurally, Plaintiff states a claim of retaliation that fits into the first prong of the
22 Coszalter test, *supra*, by alleging that the U.S. Army initiated proceedings to revoke his
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1 security clearance just a few weeks after the Army's assurance that they had no intention
2 of taking any action to void Plaintiff's status as Captain, and by relying on a statute that
3 has no application to Plaintiff at this time.
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5 "The precise nature of the retaliation is not critical to the inquiry in First Amendment
6 retaliation cases. The goal is to prevent, or redress, actions by a government employer that
7 chill the exercise of protected First Amendment rights." Coszalter, 320 F.3d at 974-75 (9th
8 Cir. 2003) (internal quotations omitted). Further, a time period of three (3) to eight (8)
9 months after the protected speech is not too lengthy a time to support an inference of
10 retaliation.¹⁰ See id. at 977.
11

12 Here, the U.S. Army's issuance on January 17, 2003, of the "Intent to Revoke"
13 Memorandum, notifying Plaintiff that a preliminary decision had been made to revoke his
14 security clearance pursuant to the Smith Amendment, and the ultimate revocation of
15 Plaintiff's security clearance just three (3) weeks after the Court's Order of February 28,
16 2003, supports an inference of retaliation.
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19 The Smith Amendment (10 U.S.C. § 986)

20 The Smith Amendment provides that "[a]fter October 30, 2000, the Department of
21 Defense may not grant or renew a security clearance for a person to whom this section
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24 ¹⁰ The Ninth Circuit rejected any bright-line rule that would be applied to the timing
25 of retaliation. Instead, the Circuit held that "[i]n some cases, the totality of the facts may
26 form such a clear picture that a district court would be justified in granting summary
27 judgment, either for or against a plaintiff, on the issue of retaliatory motive; but the length
28 of time, considered without regard to its factual setting, is not enough by itself to justify a
grant of summary judgment." Id. at 978.

1 applies who is described in subsection (c)." 10 U.S.C. § 986(a). Section (c) provides, in
2 relevant part, that "[a] person is described in this subsection if any of the following
3 applies to that person: (1) The person has been convicted in any court of the United States
4 of a crime and sentenced to imprisonment for a term exceeding one year." 10 U.S.C. §
5 986(c)(1).¹¹ The statute does not provide for the revocation of an existing security
6 clearance.
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9 Here, Plaintiff was charged with a felony in 1987 and sentenced to eighteen months for
10 his conviction.¹² As such, the Smith Amendment applies to Plaintiff and his security
11 clearance, but only upon the expiration of his security clearance.¹³
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13 The Smith Amendment gives the Department of Defense and, therefore, Defendants in
14 this case, broad discretionary power to grant or renew security clearances. Nickelson v.
15 United States, 284 F.Supp.2d 387, 392 (E.D. Va. 2003). Section (d) allows, in a
16 meritorious case, for "Secretary of Defense or the Secretary of the military department
17 concerned [to] authorize an exception to the prohibition in subsection (a) for a person
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20 ¹¹ The Smith Amendment cannot be regarded as *ex post facto* because the statute does
21 not permit the revocation of an existing security clearance. Rather, the Amendment prohibits
22 the Department of Defense from granting a new security clearance, or renewing an expiring
23 one, *after October 30, 2000*. An *ex post facto* law is "[a] law that applies retroactively, esp.
24 in a way that negatively affects a person's rights, as by criminalizing an action that was legal
25 when it was committed." Black's Law Dictionary, 7th ed., p.601 (1999).

26 ¹² Plaintiff's state convictions for conspiracy and manufacture of controlled substances
27 were expunged in 1996. However, Plaintiff served eighteen (18) months for the federal
28 charge of conspiracy to manufacture a controlled substance, to which Plaintiff pleaded guilty.
A third charge for fraud, stemming from a check tendered with insufficient funds, was
dismissed.

¹³ Plaintiff's security clearance does not expire until 2007.

1 described in . . . subsection (c)." 10 U.S.C. § 986(d). As such, Section (d) "confers upon
2 the Secretary the ability in a 'meritorious case' to abrogate this prohibition, entirely at his
3 discretion." Nickelson, 284 F.Supp.2d at 392. These exceptions, however, are not to be
4 issued lightly. Id. In passing the Smith Amendment, Congress' concern stemmed from
5 the idea that too many convicted felons were receiving security clearances, not that some
6 convicted felons may unjustly be denied a security clearance. Id. at 392-93.

9 The Smith Amendment Vis-a Vis the First Amendment

10 "It is clearly unconstitutional to enable a public official to determine which expressions
11 of view will be permitted and which will not or to engage in invidious discrimination
12 among persons or groups either *by use of a statute providing a system of broad*
13 *discretionary licensing power* or, as in this case, the equivalent of such a system by
14 selective enforcement of an extremely broad prohibitory statute." Cox v. State of
15 Louisiana, 379 U.S. 536, 557-58, 85 S.Ct. 453, 466 (1965)(emphasis added). Further, a
16 statute which, on its face, is so vague and indefinite as to permit the punishment of
17 protected free speech, is anathema to the Fourteenth Amendment concept of liberty. Id. at
18 552, 463. The Supreme Court has "recognized that the lodging of such broad discretion
19 in a public official allows him to determine which expressions of view will be permitted
20 and which will not." Id. at 557, 466. Thus, "[i]t is clearly unconstitutional to enable a
21 public official to determine which expressions of view will be permitted and which will
22 not or to engage in invidious discrimination among persons or groups. . . by use of a
23 statute providing a system of broad discretionary licensing power. . ." Id.

1 Here, the military arguably could, in meritorious cases, renew the security clearances
2 of persons with convictions and imprisonments of more than one year, but choose to
3 renew only when those who exercised protected free speech did so with actions advocated
4 by the military. Such an implementation of the statute would clearly be unconstitutional.
5 While the revocation, or non-renewal, of a soldier's security clearance, or fear of same,
6 would not prevent the speech at issue here, namely litigation, the possibility of revocation
7 or non-renewal could severely discourage, and be retaliation for such speech, regardless
8 of whether the revocation or non-renewal was in accordance with the Smith Amendment.
9

10 Although the Smith Amendment does not permit Defendants to revoke Plaintiff's
11 security clearance, Plaintiff still has the burden of showing that the U.S. Army revoked
12 his security clearance to retaliate against him. The U.S. Army catalogued a history of
13 alleged lies and misrepresentations by Plaintiff, committed by falsifying applications for
14 active duty. However, Defendants waived objections in December 2002 to Plaintiff's
15 alleged history, pursuant to the Letter, *supra*, and indicated no intention of discharging
16 Plaintiff based on that history. They assert an entirely different posture now. There is
17 sufficient evidence to support the inference that Defendants' mistaken application of the
18 Smith Amendment, just three weeks after the Court's Order dismissing his claims as
19 moot, was in retaliation for Plaintiff's litigation.
20

21 The U.S. Army's revocation of Plaintiff's security clearance twenty-three (23) days
22 after the Court's Order supports an inference of retaliation that Defendants have failed to
23 rebut. Further, Plaintiff has offered evidence of his exemplary service, including a letter
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1 of recommendation from Lieutenant Colonel Scott A Wesley praising Plaintiff's service
2 in to the Army, and recommending the reinstatement of Plaintiff's security clearance.
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4 Accordingly, the Court will order reinstatement of Plaintiff's security clearance effective
5 the date of this Order.

6 Discharge Proceedings
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8 Defendants' argument that an alleged pattern of lies and misrepresentations for over a
9 decade can be forgiven, as it was in December 2002, yet his action on July 10, 2003,
10 which Plaintiff contends was based on a false assumption concerning his security status,
11 is grounds for a show cause hearing to terminate his status, is unpersuasive. First,
12 Defendants fail to offer a credible reason for revoking Plaintiff's security clearance *before*
13 his July 2003 representation occurred. Second, Defendants offer no evidence as to what
14 occurred between February 28, 2003, the date of the Court's Order dismissing Plaintiff's
15 claims as moot, and March 23, 2003, the date Defendants revoked Plaintiff's security
16 clearance, to warrant such a revocation. Third, Defendants offer no basis, aside from the
17 July 2003 alleged misrepresentation, to proceed with a separation hearing.
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21 The Court dismissed Plaintiff's claims on February 28, 2003, in reliance on the U.S.
22 Army's intent not to pursue discharge proceedings against Plaintiff as stated earlier in this
23 Order. The Court found that Plaintiff had received the relief requested. The U.S. Army
24 effectively and knowingly waived its right to rely upon the alleged pattern of lies and
25 misrepresentations by Plaintiff prior to December 2002 in any subsequent effort to
26 discharge him. The Court does not erect an "impenetrable shield" for Plaintiff for
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1 significant misdeeds in the future, as Defendants suggest, but it does foreclose the U.S.
2 Army from considering the same alleged pattern of lies and misrepresentations that
3 Defendants agreed not to pursue in the Letter of December 2002, and from relying on the
4 Smith Amendment until after the expiration of Plaintiff's security clearance.
5

6 During the evidentiary hearing, Army counsel argued that Plaintiff's misrepresentation
7 of the status of his security clearance on July 10, 2003, in voluntarily seeking deployment,
8 is "all it takes to require an officer to show cause for retention." However, Defendants, in
9 their December 7, 2003 letter, *supra* at page 6, to Plaintiff, contend that, in addition to the
10 Smith Amendment, other reasons existed to revoke Plaintiff's security clearance, such as
11 "submitting false documents, submitting false information and your fraudulent enlistment
12 in the Texas Army National Guard" on June 27, 1996. [Dkt. 67, Exh. 6-1].
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15 Based on the Court's Order of February 28, 2030, Defendants may not initiate
16 discharge proceedings based upon the alleged pattern of lies and misrepresentations that
17 occurred prior to December 2002.
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19
20 Legal Standard - Contempt

21 "The standard for finding a party in civil contempt is well settled: The moving party
22 has the burden of showing by clear and convincing evidence that the contemnors violated
23 a specific and definite order of the court." *In re Dyer*, 322 F.3d 1178, 1190-91 (9th Cir.
24 2003)(quoting *In re Bennett*, 298 F.3d 1059, 1069 (9th Cir. 2002)). "The burden then
25 shifts to the contemnors to demonstrate why they were unable to comply." *F.T.C. v.*
26 *Affordable Media*, 179 F.3d 1228, 1239 (9th Cir. 1999).
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Revocation of Security Clearance as Contempt

The Court finds that Defendants' revocation of Plaintiff's security clearance was in contravention to the Court's Order of February 28, 2003. However, while Defendants' reliance on the Smith Amendment, shortly after the Order, supports an inference of retaliation, the issue of contempt will not be resolved at this stage of the proceedings.

Conclusion

Plaintiff has met his burden for issuance of a preliminary injunction, by showing the possibility of success on the merits of his retaliation claim and the possibility of irreparable injury. Defendants have failed to rebut the inference of retaliation. As such, Plaintiff's security clearance shall be reinstated. Defendants are not found in contempt of the Court's Order dated February 28, 2003, at this time. However, Defendants will be enjoined from taking any action to discharge, demote, or otherwise voiding or suspending Plaintiff's status as Captain, or to revoke Plaintiff's security clearance, based upon Plaintiff's actions prior to December 2002.

Accordingly, and pursuant to the hearing held on February 20, 2004,

IT IS ORDERED that all pending motions as of February 20, 2004, in the case numbered CIV 03-0555-PHX-EHC are **DENIED** without prejudice. [Dkts. 18-1, 18-2, 18-3, 19-1, 20-1, 20-2, 33-1, 34-1, 35-1, 35-2, 35-3, 40-1, 41-1, 42-1, 42-2, 42-3, 43-1].

1 **IT IS FURTHER ORDERED** that all pending motions as of February 20, 2004, in
2 the case numbered CIV 03-1252-PHX-EHC are **DENIED** without prejudice. [Dkts. 5-1,
3 6-1].
4

5 **IT IS FURTHER ORDERED** that cases numbered CIV 03-0555-PHX-JAT, CIV 03-
6 1252-PHX-JAT, CIV 03-1321-PHX-JAT, CIV 03-1693-PHX-JAT shall be consolidated
7 into case number CIV 02-0967-PHX-EHC, and all future filings in any of these cases
8 should reflect the case number **CIV 02-0967-PHX-EHC**.
9

10 **IT IS FURTHER ORDERED** that Plaintiff's Motion for Preliminary Injunction is
11 **GRANTED**. [Dkt. 75-3].
12

13 **IT IS FURTHER ORDERED** that Defendants are enjoined from taking any action to
14 discharge, demote, or otherwise voiding or suspending Plaintiff's status as Captain, or to
15 revoke Plaintiff's security clearance, based upon Plaintiff's alleged history of lies and
16 misrepresentations prior to December 2002. [Dkt. 75-3].
17

18 **IT IS FURTHER ORDERED** that Plaintiff's Motion for Declaratory Judgment is
19 **STAYED** without prejudice to consideration at an appropriate time. [Dkt. 75-4].
20

21 **IT IS FURTHER ORDERED** that Plaintiff's Motion to Find Defendant's in
22 Contempt will be addressed, if necessary, at a future hearing. [Dkt. 75-5].
23

24 DATED this 8 day of March, 2004.
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26 

27 Earl H. Carroll
28 United States District Judge

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APPENDIX

Chronology of Events

Wright v. U.S. Army Total Personnel Command, et al.
(02 CIV 967)

May 24, 2002: Complaint filed (numbered CIV 02-0967-PHX-EHC).

December 12, 2002: Letter from Lieutenant Colonel Rafe R. Foster to U.S. Attorney Paul K. Charlton, which was attached as Exhibit 1 to Defendants' Motion to Dismiss [Dkt. 54], and states, in relevant part:

Based on the reasoning of the U.S. District Court in issuing the preliminary injunction, this command does not intend to take action to void Andrew Wright's status as a captain, U.S. Army Reserve, on or after 20 December 2002.

Captain Wright is currently serving on a tour of extended active duty. Future actions after 20 December 2002 to extend that active duty tour or to allow that tour to terminate on its end date with Captain Wright's release to the Individual Ready Reserve will be in accordance with all laws and regulatory standards applicable to similarly situated officers of the U.S. Army Reserve who are serving on active duty.

[Dkt. 54, Exh. 1].

January 17, 2003: "Intent to Revoke" Memorandum issued by the Department of the Army Central Personnel Security Clearance Facility, notifying Plaintiff that a preliminary decision had been made to revoke his security clearance pursuant to the Smith Amendment.

February 25, 2003: Letter from Lieutenant Colonel Scott A. Westley recommending that Plaintiff's security clearance be reinstated and opining that he does not doubt Plaintiff's loyalty to the United States or his willingness to serve in the Army.

February 28, 2003: Court Order dismissing Plaintiff's Fifth Amendment and due process claims because "Plaintiff has received the relief he requested" pursuant to the Letter from Lieutenant Colonel Rafe R. Foster to U.S. Attorney Paul K. Charlton. [Dkt. 57, p.4].

March 23, 2003: Defendants revoke Plaintiff's security clearance pursuant to the Smith Amendment.

1 **July 10, 2003:** Plaintiff submits Application for Active Duty, in which he fills in the box
2 under "Security Clearance" with the word "Secret." [Hearing Exh. 29, p.7]. Both parties
3 stipulate to the fact that Plaintiff's security clearance had been revoked at the time. Plaintiff
4 alleges he believed that the Court's Order, dated February 28, 2003, required Defendants to
reinstatement Plaintiff's security clearance.

5 **October 17, 2003:** Plaintiff sends email correspondence to Colonel Bruce Berwick
6 requesting his security clearance be reinstated. [Dkt. 67, Exh. 4-6].

7 **October 21, 2003:** Colonel Bruce Berwick responds via email correspondence to Plaintiff's
8 request for a waiver to the requirement that his security clearance be revoked. Colonel
9 Berwick writes that "[g]iven your criminal conviction, and the determination of the Personnel
10 Security Advisory Board, [Secretary Brownlee] will not consider a meritorious waiver at this
time." [Dkt. 67, Exh. 4-6].

11 **October 23, 2003:** Plaintiff sends email correspondence to Colonel Bruce Berwick
12 requesting an exception to his security clearance revocation pursuant to the Court's Order
13 dated February 28, 2003, which Plaintiff contends "estopped [the Army] from using my
conviction against me in any personnel action." [Dkt. 67, Exh. 4-6].

14 **December 7, 2003:** Memorandum from Major General James R. Scholar, U.S. Army
15 Reserve, notifying Plaintiff that "... I am initiating involuntary separation against you. . ."
16 [Hearing Exh. 1].

17 **December 19, 2003:** Plaintiff files a Motion for Order to Show Cause why Defendants
18 should not be held in contempt of court for violating the Order dated February 28, 2003.

19 **January 7, 2004:** Plaintiff files a Motion for Temporary Restraining Order and Preliminary
20 Injunction. [Dkt. 63].

21 **February 3, 2004:** Defendants notify Plaintiff of upcoming hearing to take place at the
22 Armed Forces Reserve Center in North Little Rock, Arkansas, on February 18, 2004. The
23 "subject" of the Memorandum is listed as "Notification of Show Cause Board." The
24 Memorandum, issued by the Department of the Army, states that "[t]he hearing [is] to
25 consider CPT Andrew K. Wright. . . for administrative separation for intentional
misstatement of facts in official statements or records, for the purpose of misrepresentation
and conduct unbecoming an officer. . ."

26 **February 12, 2004:** Order granting Plaintiff's Motion for Temporary Restraining Order.
27 [Dkt. 81].

28

1 **February 20, 2004:** Evidentiary hearing conducted by the Court regarding Plaintiff's Motion
2 for Preliminary Injunction and the activities leading up to the U.S. Army's decision to hold
3 an administrative separation hearing at the Armed Forces Reserve Center in North Little
4 Rock, Arkansas.
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