

## In the United States Court of Federal Claims

**MICHAEL J. FORBES,**

*Plaintiff,*

v.

**THE UNITED STATES,**

*Defendant.*

**No. 24-1953**

**(Filed: September 3, 2025)**

*Michael J. Forbes, pro se*, for Plaintiff.

*Alexander S. Brewer*, Trial Attorney, *William J. Grimaldi*, Assistant Director, *Patricia M. McCarthy*, Director, Commercial Litigation Branch, *Brett A. Shumate*, Assistant Attorney General, Civil Division, United States Department of Justice, Washington, D.C., *Adam Bradley*, Litigation Attorney, United States Army Legal Service Agency, Fort Belvoir, Virginia, for Defendant.

### **ORDER**

**HADJI, Judge.**

Plaintiff, proceeding *pro se*, filed this action alleging that the Army retaliated against him by investigating and later separating him from the Army for reporting violations of the Privacy Act, 5 U.S.C. § 552, to the Inspector General. ECF 5 ¶¶ 1, 9. Before the Court are the Government's Motion to Dismiss and Alternatively for Judgment on the Administrative Record (ECF 24), Plaintiff's Motion to Supplement the Administrative Record (ECF 27), and Plaintiff's Cross-Motion for Judgment on the Administrative Record (ECF 28). For the following reasons, the Government's Motion to Dismiss and Alternatively for Judgment on the Administrative Record (ECF 24) is **GRANTED** in **PART** and **DENIED** in **PART**. Plaintiff's Motion to Supplement the Administrative Record (ECF 27) and Plaintiff's Cross-Motion for Judgment on the Administrative Record (ECF 28) are **DENIED** as **MOOT**.

## **BACKGROUND**

In November 2022, while serving as the Brigade Intelligence Non-Commissioned Officer in Charge for the 528th Sustainment Brigade at Fort Bragg, North Carolina,<sup>1</sup> Plaintiff and all service members in his command were directed to complete a Human Performance and Wellness assessment (the Assessment). AR 412, 990. Plaintiff, concerned about disclosure of his personal information through the Assessment, represents that he alerted the Inspector General (Inspector General Complaint) about this perceived violation of the Privacy Act. ECF 5 ¶ 9. On November 30, 2022, Plaintiff also had a conversation with the brigade psychologist, Major Racaza, regarding his concerns about the Assessment. AR 725-26. The record indicates that Plaintiff became agitated and aggressive during this conversation. AR 725-26, 738, AR 74. Following this incident and two anonymous complaints, the Army initiated an investigation into Plaintiff's behavior which resulted in a formal reprimand and his later involuntary discharge from the Army. AR 91, 148, 718-20, 1070-71. On November 22, 2024, Plaintiff filed a Complaint in this action challenging his separation and alleging, among other things, violations of the Military Whistleblower Protection Act, Privacy Act, Fifth Amendment Due Process Clause, and First Amendment. ECF 1. On December 9, 2024, Plaintiff filed an Amended Complaint that set forth additional facts and clarified his claims. ECF 5.

## **LEGAL STANDARD**

This Court, like all federal courts, is a court of limited jurisdiction; its jurisdiction is generally defined by the Tucker Act, 28 U.S.C. § 1491. *See Southfork Sys., Inc. v. United States*, 141 F.3d 1124, 1132 (Fed. Cir. 1998). The Tucker Act “gives the court authority to render judgment on certain monetary claims against the United States.” *RadioShack Corp. v. United States*, 566 F.3d 1358, 1360 (Fed. Cir. 2009) (citing 28 U.S.C. § 1491(a)(1)). The Tucker Act itself, however, “does not create a substantive cause of action.” *Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005). Instead, “a plaintiff must identify a separate source of substantive law that creates the right to money damages.” *Id.* “[T]he absence of a money-mandating source [is] fatal to the court’s jurisdiction under the Tucker Act.” *Id.* at 1173.

If the Court determines that it lacks subject-matter jurisdiction, it must dismiss the action. Court of Federal Claims Rule 12(h)(3). Although *pro se* litigants are generally held to a lower standard in pleading, *see Hughes v. Rowe*, 449 U.S. 5, 9 (1980), they nonetheless “bear[] the burden of establishing subject matter jurisdiction by a preponderance of the evidence.” *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988). When considering a motion to dismiss for lack of subject-matter jurisdiction brought

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<sup>1</sup> Formerly named Fort Liberty, North Carolina.

pursuant to Court of Federal Claims Rule 12(b)(1),<sup>2</sup> “a court must accept as true all undisputed facts asserted in the plaintiff’s complaint and draw all reasonable inferences in favor of the plaintiff.” *Trusted Integration, Inc. v. United States*, 659 F.3d 1159, 1163 (Fed. Cir. 2011).

## **DISCUSSION**

### **I. This Court does not have jurisdiction to adjudicate claims under the Military Whistleblower Protection Act, Privacy Act, Fifth Amendment Due Process Clause, or First Amendment.**

Throughout his Amended Complaint, Plaintiff alleges that the Army violated the Military Whistleblower Protection Act (MWPA), 10 U.S.C. § 1034, by “knowingly, willfully, and deliberately retaliat[ing] via a complaint and an associated launched and corrupted investigation” against Plaintiff because of his Inspector General Complaint about alleged Privacy Act violations. ECF 5 ¶ 20. The Federal Circuit has held that this Court does not possess jurisdiction to entertain MWPA claims. *Bias v. United States*, 722 F. App’x 1009, 1013-14 (Fed. Cir. 2018). Specifically, the Federal Circuit found that: “[t]he MWPA provides for a comprehensive administrative review scheme over claims of retaliation—specifically, the correction of military records and disciplinary actions as remedies for prohibited actions—but no private right of action for money damages, which could be enforced in the Court of Federal Claims.” *Id.* at 1014. Therefore, Plaintiff’s allegations that the Army violated the MWPA are not within this Court’s jurisdiction.

Likewise, claims regarding the constitutionality of the MWPA are beyond this Court’s purview. Plaintiff asserts that “[t]he Affirmative Defense added to the MWPA ... is facially overbroad as it sweeps in the authority for any Commander to investigate limitless amount of ‘allegations of collateral misconduct’ on any Soldier that voices any concern about an unlawful, or unsafe, action that is protected by ... the First Amendment.” ECF 5 ¶ 29. From this, it appears that Plaintiff challenges a subsection of the MWPA as facially violative of the First Amendment. *See id.* A facial challenge to the validity of a statute constitutes a federal question. *See e.g., Action for Child. ’s Television v. F.C.C.*, 59 F.3d 1249, 1256 (D.C. Cir. 1995). The Court of Federal Claims “lacks the general federal question jurisdiction of the district courts.” *Crocker v. United States*, 125 F.3d 1475, 1476 (Fed. Cir. 1997); *see* 28 U.S.C. § 1331 (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”). Although this Court and its predecessor has, on rare occasion, considered the constitutionality of certain statutes, the undersigned is unaware of any time it has done so absent a simultaneous need to determine a plaintiff’s rights under a money-mandating statute. *See, e.g., Gentry v. United States*, 546 F.2d 343, 354, 355 (Ct. Cl. 1976) (holding a provision of the Civil Service Retirement Act (CSRA) violated the Fifth Amendment

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<sup>2</sup> Court of Federal Claims Rule 12(b)(1) is the same as Federal Rule of Civil Procedure 12(b)(1). *Compare* RCFC 12(b)(1) *with* Fed. R. Civ. P. 12(b)(1).

because it prevented illegitimate children from collecting CSRA benefits but denying plaintiff's request for declaratory judgment); *Davis v. United States*, 174 Fed. Cl. 563, 573 (2025) (concluding that this Court has jurisdiction under the Tucker Act to enforce a pay claim based on the Ethics Reform Act of 1989, even when that involves determining whether the legislation complies with the Twenty-Seventh Amendment). In *Davis*, the Court noted that "if a plaintiff alleges that a money-mandating statute has been unconstitutionally thwarted, the claim is based on the statute, not the Constitution .... The statute thus acts in concert with the constitutional provision to satisfy the Tucker Act's money-mandating requirement." *Davis*, 174 Fed. Cl. at 573.

In the instant case, Plaintiff asks this Court to declare invalid a subsection of the MWPA. See ECF 5 ¶ 41 (seeking "a declaration that the added (2016) Affirmative Defense clause to the [MWPA] on its face and as applied in the this [sic] case, undermines protections of the Act."). As discussed, the Court lacks general federal question jurisdiction, *Crocker*, 125 F.3d at 1476, and the MWPA is not money-mandating. *Bias*, 722 F. App'x at 1013-14; *Rana v. United States*, 664 F. App'x 943, 948 (Fed. Cir. 2016) (agreeing that the MWPA is not money-mandating). As such, there is no jurisdictional basis for the Court to entertain any claims arising under the MWPA, including those questioning its constitutionality. See *Fisher*, 402 F.3d at 1173 ("[T]he absence of a money-mandating source [is] fatal to the court's jurisdiction under the Tucker Act.").

Nor may the Court entertain claims arising from the Privacy Act. Plaintiff alleges that the Army violated the Privacy Act by requiring him to complete the Assessment. See e.g., ECF 5 ¶¶ 17, 20, 22, 36. The Privacy Act provides that "the district courts of the United States shall have jurisdiction" over civil actions brought by individuals against an agency raised pursuant to the statute. 5 U.S.C. § 552a(g)(1). This Court is not a district Court.<sup>3</sup> Therefore, this Court does not have jurisdiction over Plaintiff's Privacy Act claims, and they must be dismissed. *Bias*, 722 F. App'x at 1013 ("[T]he Court of Federal Claims lacks jurisdiction ... [for] privacy violations under the Privacy Act of 1974, 5 U.S.C. § 552a.").

Plaintiff's constitutional claims likewise fail. First, Plaintiff asserts that he was denied due process of law under the Fifth Amendment. ECF 5 ¶ 22. The Fifth Amendment's Due Process clause, however, is not a "sufficient basis for jurisdiction because [it does] not mandate payment of money by the government." *LeBlanc v. United States*, 50 F.3d 1025, 1028 (Fed. Cir. 1995) (citing *Carruth v. United States*, 627 F.2d 1068, 1081 (Ct. Cl. 1980)). Accordingly, claims raised pursuant to the Fifth Amendment Due Process clause must be dismissed as outside the jurisdiction of this Court.

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<sup>3</sup> Congress established the Court of Federal Claims under Article I of the United States Constitution. 28 U.S.C. § 171(a). In contrast, federal district courts are created under the authority of Article III of the United States Constitution. *Int'l Longshoremen's & Warehousemen's Union v. Juneau Spruce Corp.*, 342 U.S. 237, 238 (1952) ("The words 'district court of the United States' commonly describe constitutional courts created under Article III of the Constitution..."). As such, the Court of Federal Claims is a distinct entity from a federal district court.

Second, Plaintiff's Amended Complaint also includes an allegation that the Army violated the First Amendment by ordering Plaintiff to participate in the Assessment. ECF 5 ¶ 22. The First Amendment is not a money-mandating source of law. *United States v. Connolly*, 716 F.2d 882, 887 (Fed. Cir. 1983) ("the literal terms of the first amendment neither explicitly nor implicitly obligate the federal government to pay damages ... it does not provide persons aggrieved by governmental action with an action for damages in the absence of some other jurisdictional basis."); *Cooper v. United States*, 771 F. App'x 997, 1000 (holding that the First Amendment is "not money-mandating and thus do[es] not provide a cause of action under the Tucker Act"). Because this Court's jurisdiction is based on a waiver of sovereign immunity to money-mandating claims, Plaintiff's First Amendment claims must be dismissed as they are not within this Court's jurisdiction.

## **II. Transfer is not in in the interest of justice.**

In response to the Government's Motion to Dismiss, Plaintiff asks this Court to transfer his claims to a district court in the event this Court determines that it does not have jurisdiction. ECF 28 ¶ 13. Pursuant to 28 U.S.C. § 1631, a federal court shall transfer an action to another federal court when (1) the transferring court finds that it lacks jurisdiction; (2) the proposed transferee court is one in which the case could have been brought at the time it was filed; and (3) the transfer is in the interest of justice. Here, transfer is not in the interest of justice.

The United States District Court for the Eastern District of North Carolina already dismissed Plaintiff's MWPA, Privacy Act, and Constitutional claims. *Forbes v. United States Army*, No. 5:24-CV-00176-BO-RJ, 2024 WL 4817138, at \*4 (E.D.N.C. Nov. 18, 2024). Specifically, that court dismissed Plaintiff's Privacy Act Claims for failure to state a claim and held that no private right of action exists under the MWPA. *Id.* at \*2, 3. It also rejected Plaintiff's First Amendment and Fifth Amendment due process claims for failure to state a claim and as soundly left to the discretion of the Army. *Id.* at \*3. Because these causes of action have already been considered and dismissed by a district court, transfer of the same claims to a district court once again would undermine the efficient administration of justice. Accordingly, the Court finds that transfer is not in the interest of justice.

## **III. Plaintiff's remaining claims may be amended in the interest of justice.**

Throughout his responsive briefing, Plaintiff raises new allegations surrounding his separation not included in his Amended Complaint. *See e.g.*, ECF 28 ¶¶ 19-22. Even affording leniency given Plaintiff's *pro se* status, the Amended Complaint did not sufficiently put the Government on notice of these newly raised allegations, nor has the Government had an appropriate opportunity to respond to those claims. Furthermore, "asserting claims for the first time in a response brief is no substitute for formally amending a complaint." *Jarvis v. United States*, 154 Fed. Cl. 712, 718 (2021); *see Movahedi v. U.S. Bank, N.A.*, 853 F. Supp. 2d 19, 27 (D.D.C. 2012) ("because this allegation appears nowhere in the Complaint, it cannot defeat the motion to dismiss."). Court of Federal Claims Rule 15(a)(2) authorizes the Court to grant leave to amend "when justice so

requires.”<sup>4</sup> In applying this rule, the Supreme Court has stated that courts should afford plaintiffs an opportunity to amend their complaints where: “the underlying facts or circumstances relied upon ... may be a proper subject of relief.” *Foman v. Davis*, 371 U.S. 178, 182 (1962). In light of Plaintiff’s later filings, Plaintiff *could* plausibly raise claims within the jurisdiction of this Court.<sup>5</sup> Accordingly, in the interest of justice and in affording deference as required given Plaintiff’s *pro se* status, *Hughes*, 449 U.S. at 9, Plaintiff is granted leave to file a second amended complaint removing the claims dismissed herein and incorporating any new allegations within the jurisdiction of this Court. Additionally, because the new Amended Complaint shall become the operative pleading, Plaintiff’s Cross-Motion for Judgment on the Administrative Record and Plaintiff’s Motion to Supplement are moot.

### CONCLUSION

For the reasons stated above, the Government’s Motion to Dismiss and Alternatively for Judgment on the Administrative Record (ECF 24) is **GRANTED** in **PART** with respect to Plaintiff’s MWPA, Privacy Act, Fifth Amendment due process, and First Amendment claims, and **DENIED** in **PART** without prejudice with respect to all other claims. Plaintiff is **GRANTED** leave to file a second amended complaint on or before **October 3, 2025**, removing the claims dismissed herein and incorporating any new allegations within the jurisdiction of this Court. Plaintiff’s Motion to Supplement the Administrative Record (ECF 27) and Plaintiff’s Cross-Motion for Judgment on the Administrative Record (ECF 28) are thus **DENIED** as **MOOT**.

**IT IS SO ORDERED.**



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PHILIP S. HADJI  
Judge

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<sup>4</sup> Court of Federal Claims Rule 15(a) is substantively the same as Federal Rule of Civil Procedure 15(a). Compare RCFC 15(a) with Fed. R. Civ. P. 15(a).

<sup>5</sup> The Court’s decision to allow Plaintiff leave to further amend his Complaint does not reflect the Court’s position as to the merits or jurisdictional bases of any remaining claims.