

18-2996

Isiah M. Doolen v. Christine Wormuth, et al.

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

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5 August Term, 2020

6
7 (Argued: June 2, 2021

Decided: July 20, 2021)

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9 Docket No. 18-2996

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13 ISIAH M. DOOLEN,

14
15 *Plaintiff-Appellant,*

16
17 v.

18-2996

19 CHRISTINE WORMUTH, IN HER OFFICIAL CAPACITY AS
20 SECRETARY OF THE ARMY, LIEUTENANT GENERAL DARRYL
21 A. WILLIAMS, IN HIS OFFICIAL CAPACITY AS
22 SUPERINTENDENT OF THE UNITED STATES MILITARY
23 ACADEMY,

24
25 *Defendants-Appellees.*¹

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29 Before: POOLER, NARDINI, *Circuit Judges*, and KAPLAN, *District Judge*.²

¹ Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Christine Wormuth is automatically substituted as Defendant-Appellee.

² Judge Lewis A. Kaplan, United States District Court for the Southern District of New York, sitting by designation.

1 Appeal from the September 11, 2018 judgment of the United States District
2 Court for the Southern District of New York (Briccetti, J.) granting the
3 government's motion to dismiss and, in the alternative, for summary judgment,
4 on Plaintiff-Appellant Isiah M. Doolen's claims that the cadet separation
5 procedures of the United States Military Academy at West Point fail to provide
6 due process and that Doolen's separation proceedings violated West Point's own
7 regulations in a manner that substantially prejudiced him. We conclude that
8 West Point's cadet separation procedures satisfy due process and that the intra-
9 military immunity doctrine, which bars judicial interference in discretionary
10 military personnel decisions, renders Doolen's regulatory claims nonjusticiable.

11 Therefore, we AFFIRM the judgment of the district court.

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13 _____
14 EDWARD G. WILLIAMS, Stewart Occhipinti, LLP,
15 New York, N.Y., *for Plaintiff-Appellant.*

16 PETER ARONOFF, Assistant United States Attorney
17 (Benjamin H. Torrance, Assistant United States
18 Attorney, *on the brief*), *for* Audrey Strauss, United States
19 Attorney for the Southern District of New York, New
20 York, N.Y., *for Defendants-Appellees.*
21

1 POOLER, *Circuit Judge*:

2 Isiah M. Doolen is a former cadet at the United States Military Academy at
3 West Point. On October 21, 2015, following a disciplinary hearing, the Deputy
4 Assistant Secretary of the Army, Military Personnel and Quality of Life, acting as
5 the Secretary of the Army's designee, approved West Point's recommendation to
6 separate Doolen and ordered Doolen to pay recoupment to the government of
7 \$226,662.00, the cost of Doolen's West Point education. Doolen sued the Secretary
8 of the Army and the Superintendent of the United States Military Academy
9 ("Defendants-Appellees") in federal court, claiming that (1) the applicable cadet
10 removal procedures fail to provide due process and (2) Defendants-Appellees
11 failed to follow West Point's own mandatory regulations in resolving Doolen's
12 case, causing him substantial prejudice. The district court granted the
13 government's motion to dismiss, and, in the alternative, for summary judgment,
14 on all of Doolen's claims. Doolen appealed.

15 We conclude that West Point's cadet separation procedures satisfy due
16 process and that the intra-military immunity doctrine, which bars judicial
17 interference in discretionary military personnel decisions, renders Doolen's

1 regulatory claims nonjusticiable. Therefore, we AFFIRM the judgment of the
2 district court.

3 **BACKGROUND**

4 Doolen challenges the constitutionality of the disciplinary procedures that
5 led to his separation from West Point in October 2015. Therefore, we begin with
6 an outline of the procedures guiding cadet discipline and adjudicating
7 punishments for any infractions. As discussed below, not every single infraction
8 is subject to formal disciplinary proceedings—known as Article 10 proceedings—
9 but Doolen’s troubled history at West Point involved multiple serious infractions
10 and, accordingly, multiple Article 10 proceedings.

11 **I. Cadet Disciplinary Procedures**

12 The Army has issued a series of regulations that govern the suspension
13 and separation of cadets from West Point. One regulation provides “policy and
14 procedures for the general governance and operation of the United States
15 Military Academy,” including procedures for cadet discipline and cadet
16 separation from the Academy. Army Reg. 210-26 ¶ 1-1. Two other sets of
17 regulations provide more detailed guidance on cadet disciplinary proceedings.

1 See United States Corps of Cadets (“USCC”) Regs. 351-1, 351-2. One of those
2 regulations, USCC Regulation 351-1, contains the Cadet Disciplinary Code
3 (“CDC”), which lists a variety of substantive offenses in Articles 1 through 9 and
4 authorizes commanders to impose punishment on cadets in Article 10. *Id.* 351-1
5 ¶ 119. Additional guidance is available in the USCC Standing Operating
6 Procedure (“SOP”).

7 Generally, each cadet is considered either proficient or deficient in
8 conduct. A cadet must be proficient to graduate. USCC Reg. 351-2 ¶ 501.
9 Deficiency means exhibiting “conduct [that] is a substantial departure from the
10 standards of conduct expected of members of the Corps of Cadets.” *Id.* ¶ 504.
11 Deficiency may lead to a cadet’s separation if “the retention of [the] cadet is not
12 considered to be in the best interests of the Corps of Cadets, the Military
13 Academy or the United States Armed Forces.” *Id.* ¶ 312(b).

14 Cadet discipline always involves input from the cadet’s chain of
15 command. Each company within the Corps of Cadets is commanded by a
16 commissioned officer of the Army, known as a “tactical officer.” Army Reg. 210-
17 26 ¶ 1-19(c). Tactical officers command at the company, battalion, regimental,

1 and brigade levels and are authorized to impose various levels of punishments
2 on cadets. USCC Reg. 351-2 tbl. 1-2. As a general rule, commanders are to “use
3 the least severe means sufficient to solve a disciplinary problem.” *Id.* ¶ 102.
4 Accordingly, less serious violations may be resolved through nonpunitive
5 remedial measures, including on-the-spot corrections, counseling, extra training,
6 and adjustment of performance grades. *Id.* ¶ 103. Commanders may punish more
7 serious infractions under Article 10 of the CDC. *Id.* ¶ 104; *see also id.* 351-1 ¶ 119,
8 art. 10. Attached to this opinion is a Sequence of Actions Timetable available
9 within USCC Regulation 351-1 that may be helpful to reference while reviewing
10 the components of an Article 10 proceeding, described below.

11 To initiate formal disciplinary proceedings under Article 10, a commander
12 provides a cadet with written notice of the alleged infraction. *See id.* 351-2, Form
13 2-3. The cadet chooses whether to appear for a hearing, at which the cadet may
14 present evidence in defense, extenuation, or mitigation of the disciplinary
15 charges. *See id.* If the commander or designee conducting the hearing finds the
16 cadet guilty of the alleged misconduct, the commander may impose various
17 types of punishments on the cadet, including reprimand, withdrawal of

1 privileges, or suspension. *See id.* The commander also must advise the cadet of
2 the right to appeal the finding. *See id.*

3 Guilty cadets automatically incur demerits. *Id.* ¶ 105. Cadets have a
4 maximum allowance of demerits within a six-month period based on their
5 seniority, *see id.* tbl. 1-4, and a cadet who exceeds the applicable maximum may
6 be subject to a more comprehensive conduct review, *see id.* ¶¶ 105, 502. Two
7 alcohol policy violations may also trigger a conduct review. *See id.* ¶ 504(b)(3).
8 During a conduct review, a cadet’s chain of command opines on the cadet’s
9 overall conduct and recommends whether to maintain the cadet’s conduct
10 standing or refer the cadet to a conduct investigation (“CI”) for further action. *See*
11 *id.* ¶ 502.

12 CIs are non-adversarial hearings where an investigating officer (“IO”)
13 determines whether a cadet is proficient or deficient in conduct. *See id.* 351-1
14 ¶ 101. Prior to the hearing, a cadet is informed of the date of the hearing and all
15 of the cadet’s rights in connection with the review process. *See id.* ¶ 203. Cadets’
16 rights include the following: to receive written notice of the alleged deficiency
17 and a list of all the actions being investigated; to have a “reasonable period of

1 time to prepare for the CI"; to consult with legal counsel, who may help prepare
2 a cadet for the hearing but may not represent the cadet at the hearing; to be
3 present during the hearing or not to appear for it; to testify or to remain silent; to
4 examine all documents to be considered by the CI; to make evidentiary
5 objections; to call "reasonably available witnesses" and question and cross-
6 examine witnesses; to present relevant evidence; and to receive a complete copy
7 of the CI's findings and recommendations. *Id.* ¶ 105. No witnesses at the CI may
8 testify as to whether the cadet should be retained or separated. *See id.* fig. 2-6 ¶ 4.
9 The IO's findings "will either confirm the deficiency in conduct and render a
10 recommendation for disposition to the chain of command or will find the cadet
11 proficient in conduct." *Id.* ¶ 102(f).

12 After the CI, the Commandant, "the immediate commander of the Corps
13 of Cadets," 10 U.S.C. § 7434(c), reviews the IO's findings and the entire record,
14 USCC Reg. 351-2 ¶ 509. In preparation, the Regulations and Discipline Officer
15 first forwards the complete CI record to the Staff Judge Advocate ("SJA"), who
16 determines whether any legal errors have materially affected the proceeding and
17 confirms that the IO's findings are supported by the evidence presented. *Id.* 351-1

1 ¶ 502(a)(3). After this “initial review,” the SJA returns the packet to the
2 Regulations and Discipline Officer, who forwards the entire packet to the
3 Commandant. *Id.* ¶ 104, Sequence of Actions Timetbl.

4 If the cadet was found deficient, the Commandant may either place the
5 cadet on conduct probation or forward a report to the Superintendent, who is
6 “the commanding officer of the Academy and of the military post at West Point,”
7 10 U.S.C. § 7434(b), for action, USCC Reg. 351-2 ¶ 509. If the Commandant
8 chooses to forward the case to the Superintendent, the Regulations and
9 Discipline Officer must first send the case packet, now with the Commandant’s
10 recommendation, back to the SJA. *Id.* 351-1 ¶ 114(m). If the SJA finds no legal
11 objection within the record, the SJA will serve a copy of the SJA’s review on the
12 cadet, who has 72 hours to submit a written response to the entire packet. *Id.*; *see*
13 *also id.* ¶ 104, Sequence of Actions Timetbl. Together with the cadet’s comments,
14 if any, the entire record is sent to the Superintendent. *Id.* ¶ 104, Sequence of
15 Actions Timetbl.

16 The Superintendent, in turn, may direct the cadet’s retention with or
17 without probation, transfer to a lower class, or suspension. *Id.* 351-2 ¶ 509. If the

1 Superintendent instead decides separation is appropriate, the Superintendent
2 must recommend it to the Secretary of the Army, the only officer authorized to
3 direct separation. *Id.* ¶ 513(d). However, the Secretary has delegated separation
4 authority to certain other positions at Army Headquarters. After a cadet enters
5 the Second Class year (junior year), the applicable separation authority is the
6 Deputy Assistant Secretary of the Army (Military Personnel and Quality of Life).
7 Army Reg. 210-26 tbl. 7-2. If the delegated authority enters an order of
8 separation, the cadet may appeal to a civilian review board, the Army Board for
9 the Correction of Military Records (“ABCMR”), which may conduct an
10 evidentiary hearing and accept new evidence. *See* 32 C.F.R. § 581.3(c)(2)(iii); *see*
11 *also* 10 U.S.C. § 1552(a)(1) (explaining that “[t]he Secretary of a military
12 department may correct any military record” if it is “necessary to correct an error
13 or remove an injustice” through “boards of civilians of the executive part of that
14 military department”). The ABCMR’s decision is reviewable in federal court. *See*
15 10 U.S.C. § 1558(f).

16 Because West Point cadets receive a college education at no cost to them,
17 they must sign agreements requiring them to repay the cost of their education if

1 they do not complete the educational program or a period of active duty. *See id.*
2 § 2005(a)(3). Separated cadets are considered in breach of their service
3 agreement, Army Reg. 210-26 ¶ 7-9, tbl. 7-1, and thus “shall repay to the United
4 States an amount equal to the unearned portion of the bonus or similar benefit,”
5 37 U.S.C. § 303a(e)(1)(A). A “bonus or similar benefit” includes an educational
6 benefit. *Id.* § 303a(e)(5)(A).

7 **II. Factual Background**

8 In 2006, Doolen enlisted in the Army National Guard for a period of six
9 years. Doolen also enlisted in the Army Reserve as a cadet in the New Mexico
10 Military Institute’s Reserve Officer Training Program. After two years at the
11 Institute’s college program, Doolen entered the United States Military Academy
12 Preparatory School. Following that, Doolen enrolled in the Academy at West
13 Point as a member of the class of 2013. Doolen’s tenure at West Point included
14 multiple disciplinary infractions and proceedings. Over the course of his time
15 there, Doolen was subject to proceedings related both to alcohol violations and
16 accumulation of excessive demerits.

1 During Doolen’s second semester at West Point, he snuck alcohol into the
2 barracks using a Taco Bell cup and a water bottle. Drinking or possessing alcohol
3 on the West Point Military Reservation without specific authorization from the
4 Commandant is considered “Major Misconduct.” Army Reg. 210-26 ¶ 6-7.
5 Doolen underwent disciplinary proceedings at the Brigade level for this
6 infraction, was found guilty, and was subjected to a number of punishments,
7 including 35 demerits.

8 By February 2013, Doolen, who was in his First Class Year (senior year) at
9 the Academy, had accumulated 90 demerits, which exceeded his six-month
10 demerit maximum allowance of 72. This triggered a CI. Major Timothy Carignan,
11 the IO of that CI, found Doolen deficient in conduct and recommended
12 “suspended separation through a delayed graduation.” App’x at 828. As part of
13 that hearing, multiple officers in Doolen’s chain of command opined on Doolen’s
14 conduct. Doolen’s Company Tactical Officer (“CTO”) recommended immediate
15 separation from the Academy. The Brigade Tactical Officer (“BTO”) also
16 recommended separation. Brigadier General Richard D. Clarke, the
17 Commandant of Cadets, recommended Doolen be separated and discharged

1 from the Army and required to pay recoupment for his education expenses.
2 Doolen was given the full record, along with the SJA's legal review, and he
3 submitted a rebuttal, dated May 3, 2013.

4 Five days later, while the ultimate resolution of the CI was still pending,
5 Doolen stumbled into the barracks of Cadets Jillian Collins and ND, his former
6 girlfriend, and approached ND.³ Cadet Collins wrote in a sworn statement that,
7 at first, she expected a typical argument between ND and Doolen, something
8 "that they [were] known for throughout this school year[,] and that they would
9 go away quickly." App'x at 568. Doolen asked ND why she had stopped
10 speaking to him and returned his belongings to him. ND shrugged her shoulders
11 and told Doolen to leave, at which point Doolen started cursing and yelling at
12 her, calling her a "F\$%#ing Whore." App'x at 568. ND attempted to take the
13 argument into the hallway, but Doolen grabbed her and physically blocked her
14 from leaving. ND nevertheless managed to get out of the room, where Doolen
15 continued to yell and blocked the door so that ND could not get back inside. ND

³ Cadet ND's initials were substituted for her full name pursuant to a protective order in district court.

1 then raised her voice and asked bystanders for help. People started to pay
2 attention to the altercation, at which point Doolen angrily stormed away, while
3 “becoming physical with inanimate objects.” App’x at 568. According to Collins,
4 Doolen appeared intoxicated during the encounter; he was stumbling, slurring
5 his words, and smelled of alcohol.

6 On May 13, 2013, Army Superintendent, Lieutenant General David H.
7 Huntoon, Jr., completed his review of Doolen’s CI, which, at that point, did not
8 reference Doolen’s altercation with ND. General Huntoon concluded that a call
9 to active duty would not be appropriate and recommended separation and
10 discharge. He suspended Doolen from the Academy until final action could be
11 taken by Army Headquarters. He also recommended an investigation into
12 whether Doolen had breached his service requirement and would be required to
13 pay recoupment of his education benefits. In November 2013, the investigation
14 concluded that Doolen should repay \$203,160 in education benefits. In March
15 2014, Doolen filed objections to the proceedings and pointed out some
16 procedural irregularities. The Office of the Judge Advocate General raised legal
17 objections to the CI and Doolen was reinstated as a cadet and returned to the

1 Academy in June 2014. The specific procedural deficiencies are unclear from the
2 record. However, Doolen was warned that, upon his return to the Academy, new
3 disciplinary actions could be taken for the May 8, 2013 incident with ND.

4 Indeed, after Doolen returned to West Point, Article 10 proceedings were
5 commenced in relation to the May 8, 2013 incident. Doolen was notified that the
6 CI would consider his violations of Articles 1, 6, and 7, the IO would evaluate the
7 evidence by a preponderance of the evidence standard, and Doolen could speak
8 and present evidence and witnesses on his behalf. The proceedings occurred on
9 June 10, 2014, at the brigade level. Doolen was found guilty and indicated that he
10 would not appeal the finding.

11 On July 9, 2014, Doolen's tactical officer recommended that he be referred
12 to a CI for a deficiency hearing for receiving two alcohol-related Article 10
13 violations. On July 17, 2014, the Regulations and Discipline Officer notified
14 Doolen via memorandum that he would be referred to a CI for a reported
15 conduct deficiency for "Receiving Two Alcohol Boards." App'x at 548. Doolen
16 elected to appear for the CI and indicated that he intended to dispute the board
17 proceedings and would present witnesses. Doolen wrote a memorandum, dated

1 July 29, 2014, contesting the validity of the June 2014 Brigade board proceeding.
2 Namely, Doolen argued that the IO was biased and intentionally left out
3 evidence pertaining to his alcohol consumption the night of the May 8, 2013
4 incident, he was not notified that the June 2014 proceeding would be considered
5 an alcohol board, and Brigadier General Clarke was biased because of his
6 previous recommendation for Doolen's separation.

7 In August 2014, Captain Nicholas Forlenza was appointed as the IO for
8 Doolen's upcoming CI. During the hearing, Doolen again indicated that he did
9 not believe that his most recent Article 10 proceeding was an alcohol board.
10 Doolen called Colonel Nick Mauldin, the BTO who imposed the second Article
11 10 proceeding against Doolen, as a witness. However, Doolen only asked
12 Mauldin about his finding that Doolen had consumed alcohol the night of the
13 May 8, 2013 incident, not about whether the Article 10 proceeding was an alcohol
14 board. When the IO asked Mauldin about the latter issue, Mauldin stated that the
15 proceeding was "[a]bsolutely" an alcohol board and referenced the fact that
16 Doolen had admitted that he had consumed alcohol that night. App'x at 387.
17 Doolen also called multiple witnesses to provide testimony about his character.

1 For example, Cadet William Majors, who had known Doolen for three months,
2 testified that Doolen was focused on his duties and a good leader to the class of
3 2017. Cadet Elliot Chal, who had also known Doolen since June 2014, testified
4 that Doolen never lost his temper and was professional throughout his
5 interactions with him.

6 On August 30, 2014, Forlenza found Doolen deficient. In his written
7 decision, Forlenza concluded that the second Article 10 proceeding was, in fact,
8 an alcohol board. Forlenza also found that Doolen “has not demonstrated that he
9 possesses the attributes essential to lead as an officer in the United States Army,”
10 citing his lack of self-control, disciplinary record, and below average academic
11 performance. App’x at 495. Forlenza also noted that almost all of Doolen’s
12 character witnesses had only known him for three months, and the one witness
13 who had known him from before his original suspension testified that “she did
14 not trust him, nor would she willingly go to combat with him.” App’x at 495.
15 Despite expressing some accountability for his actions, Doolen, according to
16 Forlenza, “is immature, selfish, and exhibits an attitude that is not compatible

1 with good order and discipline, the basic foundation for service in the United
2 States Army.” App’x at 496. Forlenza recommended separation.

3 In October 2014, Doolen received a copy of the CI, legal review, chain of
4 command recommendations, and updated recoupment paperwork. Doolen
5 subsequently submitted a response to the IO’s findings and recommendations.
6 Doolen’s counsel suggested that Forlenza was not impartial during the
7 proceedings and did not accurately summarize the import of all the witness
8 testimony.

9 While the separation process was still pending, Doolen’s tactical officer
10 received an email from a civilian who alleged that Doolen was abusive to her and
11 that Doolen had told her he used heroin with another cadet. A military
12 prosecutor concluded that probable cause existed to support the assault
13 allegation but not the allegation that Doolen used illegal drugs. Doolen’s counsel
14 later informed the SJA that the civilian had brought an action for a temporary
15 restraining order against Doolen in family court but had since withdrawn her
16 petition.

1 In March 2015, the SJA completed the legal review of the CI and
2 recommended approving the IO’s findings and forwarding Doolen’s case to the
3 Secretary of the Army for separation. Later that month, the Superintendent,
4 Lieutenant General Robert L. Caslen, Jr., approved the IO’s findings and
5 recommended separation. He noted that Doolen should pay recoupment of his
6 educational benefits in the amount of \$226,662. In October 2015, the separation
7 authority, Deputy Assistant Secretary of the Army, Military Personnel and
8 Quality of Life, Anthony J. Stamilio, approved the recommendation to separate
9 Doolen and directed Doolen to pay \$226,662 in recoupment to the United States.

10 **III. District Court Decision**

11 Doolen brought suit in federal court. The district court granted the
12 government’s motion to dismiss Doolen’s second amended complaint, or, in the
13 alternative, for summary judgment, pursuant to Federal Rules of Civil Procedure
14 12(b)(1), (b)(6), and 56. *Doolen v. Esper*, No. 16 CV 8606 (VB), 2018 WL 4300529, at
15 *1 (S.D.N.Y. Sept. 10, 2018). The court held that it had jurisdiction to resolve
16 Doolen’s facial challenge to West Point’s separation proceedings under the Fifth
17 Amendment and the Administrative Procedure Act (“APA”) because the claim

1 fell within one of the exceptions to the intra-military immunity doctrine, which
2 generally protects the government from suit relating to military service. *Id.* at *5.
3 As for Doolen’s claim that West Point failed to follow its own mandatory
4 regulations, the district court held that it would first have to determine whether
5 the violations caused substantial prejudice. *Id.* at *6.

6 On the latter question, the court found that some of the regulations to
7 which Doolen pointed were not mandatory procedural rules at all; any violations
8 of the regulations did not cause substantial prejudice; and some of the asserted
9 regulations did not even create procedural rights and therefore fell outside the
10 scope of the applicable exception to the intra-military immunity doctrine. *Id.* at
11 *7-10. On the question of whether Forlenza properly applied West Point’s
12 preponderance of the evidence standard, the district court held that the question
13 essentially “require[d] the wholesale reconsideration of a discretionary military
14 personnel decision,” which the court could not do. *Id.* at *10. As for the facial
15 challenges to West Point’s separation procedures, the district court held that the
16 existence of both pre-deprivation (the CI hearing) and post-deprivation (appeal

1 to the ABCMR) procedures satisfied both the Fifth Amendment's and the APA's
2 due process requirements. *Id.* at *12.

3 In the alternative, the court addressed Doolen's argument that the court
4 should reverse West Point's decision because it was arbitrary and capricious.
5 First, the court held that plaintiffs do not need to exhaust administrative
6 remedies prior to seeking judicial review under the APA unless a statute or
7 agency regulation clearly mandated exhaustion as a prerequisite and that none
8 did so here. *Id.* at *12. Then, the court evaluated the merits of Doolen's challenges
9 to the administrative proceedings and concluded that West Point's determination
10 of separation with recoupment was not arbitrary, capricious, or contrary to law.
11 *Id.* at *12-17.

12 DISCUSSION

13 On appeal, Doolen first argues that West Point's separation procedures do
14 not meet due process requirements. Next, he argues that West Point violated its
15 own mandatory regulations by failing to (1) provide Doolen with the SJA's legal
16 review before his case file was forwarded to the Superintendent and the
17 Secretary of the Army to complete separation and (2) accurately apply the

1 preponderance of the evidence standard. The government argues that West
2 Point's procedures are consistent with due process requirements. It also argues
3 that Doolen's claims that West Point failed to follow its own regulations are
4 barred because he failed to administratively exhaust them, but that, in any event,
5 they are nonjusticiable claims because none of the purported violations caused
6 Doolen substantial prejudice.

7 We review a district court's grant of a motion to dismiss or for summary
8 judgment de novo. *Ashmore v. CGI Grp., Inc.*, 923 F.3d 260, 271 (2d Cir. 2019).

9 **I. The Intra-Military Immunity Doctrine**

10 Federal courts have long recognized that "[t]he military constitutes a
11 specialized community governed by a separate discipline from that of the
12 civilian." *Chappell v. Wallace*, 462 U.S. 296, 301 (1983) (quoting *Orloff v. Willoughby*,
13 345 U.S. 83, 94 (1953)). Courts grant "greater deference" in the context of national
14 defense and military affairs than perhaps any other area. *Id.* (quoting *Rostker v.*
15 *Goldberg*, 453 U.S. 57, 65 (1981)). "[T]he doctrine of intra-military immunity . . .
16 generally protects the government from suit for injuries arising from activities
17 incident to military service." *Overton v. N.Y. State Div. of Mil. & Naval Affs.*, 373

1 F.3d 83, 89 (2d Cir. 2004) (citation, brackets, and internal quotation marks
2 omitted). Accordingly, “[f]ederal courts will not normally review purely
3 discretionary decisions by military officials which are within their valid
4 jurisdiction.” *Jones v. N.Y. State Div. of Mil. & Naval Affs.*, 166 F.3d 45, 52 (2d Cir.
5 1999) (brackets and citation omitted).

6 Nevertheless, “non-justiciability of discretionary military decisions is not
7 absolute.” *Id.* Two major exceptions to the intra-military immunity doctrine exist.
8 First, we review facial challenges to the constitutionality of military regulations.
9 *See Dibble v. Fenmore*, 339 F.3d 120, 126-27 (2d Cir. 2003). Second, we review
10 claims that “the military has failed to follow its own mandatory regulations in a
11 manner substantially prejudicing a service member.” *Jones*, 166 F.3d at 52. Both
12 exceptions are relevant to Doolen’s claims, and we may review only the portions
13 of Doolen’s claims that fit within them.

14 **II. The Facial Challenge: Whether West Point’s Cadet Separation**
15 **Procedures Meet Due Process Requirements**

16 Doolen argues that, in addition to the CI hearing adjudicating whether a
17 cadet is deficient in conduct, due process requires the Army to provide a cadet

1 with a separate hearing prior to ordering his separation and recoupment. We
2 disagree with Doolen and hold that West Point's cadet removal procedures
3 satisfy due process.

4 To successfully state a due process violation, a plaintiff must point to a
5 deprivation of "life, liberty, or property." U.S. Const. amend. V. The Supreme
6 Court's seminal case on due process, *Mathews v. Eldridge*, instructs courts to
7 balance three factors when considering whether a particular procedure is
8 constitutionally adequate:

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

16 424 U.S. 319, 335 (1976).

17 As to the first factor, Doolen has a significant private interest in the
18 recoupment he must pay to the government as a result of his separation.⁴

⁴ The government concedes that the recoupment Doolen was ordered to repay is a cognizable property interest. Accordingly, we need not address the question of whether an individual has a constitutional property interest in future military

1 As to the second factor, the value of requiring an additional hearing after a
2 finding of deficiency but prior to an order of separation is minimal. And as
3 to the third factor, the military has a very strong interest in “govern[ing] its
4 own affairs” and determining who would best meet uniquely important
5 standards of conduct and discipline. *Hagopian v. Knowlton*, 470 F.2d 201, 208
6 (2d Cir. 1972) (citation omitted). As explained below, West Point’s current
7 cadet separation procedures successfully balance these three concerns.

8 The Army provides a robust combination of pre- and post-deprivation
9 procedures for cadets facing separation from West Point. By the time the Army
10 begins considering separation, the cadet has already appeared in person before
11 an IO, presented live testimony, and cross-examined witnesses at the CI. *See*
12 USCC Reg. 351-1 ¶¶ 104, Sequence of Actions Timetbl., 113(d), 114(m). Because
13 the primary purpose of the CI is to assess the veracity of the allegations and
14 possible deficiency in conduct, a cadet may not present witnesses on the final
15 question of separation during a CI. But this bar also applies to the CI generally;

service. *Cf. MacFarlane v. Grasso*, 696 F.2d 217, 219, 222 (2d Cir. 1982) (finding no
“legitimate claim of entitlement” to a position as a “stock control officer” in the
Connecticut Army National Guard).

1 that is, the IO also may not hear or call witnesses to testify on separation either,
2 as that question is left for the Commandant to resolve. *See id.* fig. 2-6 ¶ 4.
3 Moreover, a cadet may present general character witnesses who can opine on his
4 behavior and fitness to serve, as Doolen did here. This testimony remains part of
5 the record before the Superintendent, who may recommend separation, and the
6 Deputy Assistant Secretary, who ultimately has the authority to order separation.
7 A cadet may also make additional written submissions prior to the separation
8 decision. Adding another hearing to this framework would contribute little
9 value, as the initial CI already provides the benefits of a live hearing.

10 In addition to pre-deprivation procedures, a cadet also has post-
11 deprivation remedies. A cadet may appeal a separation decision to the ABCMR,
12 which can order a hearing and has the authority to hear new evidence or request
13 new opinions. *See* 32 C.F.R. § 581.3(c)(2)(iii). Doolen speculates that the ABCMR
14 cannot be objective because its members are appointed by the Secretary of the
15 Army. However, many agency adjudicative authorities are appointed by the
16 agency itself, and without some specific showing of conflict of interest or reason
17 for disqualification, we assume they are unbiased. *See Schweiker v. McClure*, 456

1 U.S. 188, 195-96 (1982). Doolen also points out that, if the ABCMR holds a
2 hearing, the ABCMR may only recommend a disposition to the Secretary of the
3 Army, who ordered the initial separation and may ignore the recommendation.
4 But Doolen offers nothing more than speculation that the Secretary would not
5 seriously contemplate a recommendation to overturn a separation order. In any
6 event, ABCMR decisions, along with any subsequent Secretary determinations,
7 are appealable to federal courts, 10 U.S.C. § 1558(f), which further eases concerns
8 about purported bias. Where, as here, a given procedure includes “some form of
9 pre-deprivation hearing” and post-deprivation remedies with “the opportunity
10 to obtain full judicial review,” the “combination” of the two provide due process.
11 *Rivera-Powell v. N.Y.C. Bd. of Elections*, 470 F.3d 458, 466-67 (2d Cir. 2006).

12 Doolen’s principal argument—that the Army must provide a hearing not
13 only during the CI but also after the CI if a West Point official recommends a
14 cadet’s separation from the Academy—is premised on three cases we decided
15 several decades ago, all of which address the procedural safeguards protecting
16 cadets at that time: *Andrews v. Knowlton*, 509 F.2d 898 (2d Cir. 1975); *Hagopian v.*
17 *Knowlton*, 470 F.2d 201 (2d Cir. 1972); and *Wasson v. Trowbridge*, 382 F.2d 807 (2d

1 Cir. 1967). *Andrews* and *Wasson* explain that, prior to separation, a cadet should
2 “be apprised of the specific charges” and “given an adequate opportunity to
3 present his defense both from the point of view of time and the use of witnesses
4 and other evidence.” *Andrews*, 509 F.2d at 904 (quoting *Wasson*, 382 F.2d at 812).
5 In *Hagopian*, we further held that cadets are entitled to a “full hearing” prior to
6 separation, even if the grounds for separation are the automatic accumulation of
7 excessive demerits. 470 F.2d at 211. “[W]e conclude[d] that at a hearing at which
8 Academy officials will determine whether or not a cadet will be expelled[,] the
9 cadet must be allowed to appear and present evidence, including witnesses, on
10 his behalf.” *Id.*

11 Doolen’s argument misconstrues our precedent. Although *Hagopian*
12 emphasized the importance of hearing evidence and resolving credibility issues
13 in person rather than through written submissions, it did so in the context of the
14 initial adjudication of guilt, not the imposition of a sanction after guilt has
15 already been determined. *See id.* at 205-06 (explaining that, at that time, cadets
16 with excessive accumulated demerits received no hearing, were automatically
17 considered deficient in conduct, and could only submit written paperwork to the

1 Academic Board, which gave its recommendation for retention or separation to
2 the Secretary of the Army). At the time, West Point provided little to no
3 opportunity for cadets to defend themselves in person during disciplinary
4 proceedings. As already explained, today's cadets (including Doolen) have the
5 opportunity to appear for a live hearing during their CI, where they may present
6 and cross-examine witnesses and make arguments on their behalf. This satisfies
7 "the rudiments of a fair hearing" that we outlined in *Hagopian*, which also
8 specified that cadets need not be given the same "opportunity" multiple times
9 throughout the disciplinary decision-making process. *Id.* at 210 (quoting *Wasson*,
10 382 F.2d at 812). *Hagopian*, *Andrews*, and *Wasson* do not affirmatively require the
11 Army to provide a separate, live hearing dedicated entirely to the question of
12 separation.

13 We also disagree with Doolen's argument that we should now require an
14 additional separation hearing. "[O]rderly government requires us to tread lightly
15 on the military domain, with scrupulous regard for the power and authority of
16 the military establishment to govern its own affairs within the broad confines of
17 constitutional due process." *Id.* at 208 (citation omitted). Even particularly

1 “severe” penalties may be appropriate in the military context. *Andrews*, 509 F.2d
2 at 908. Indeed, in *Andrews*, we explained that, where a cadet receives a hearing, is
3 informed of the relevant allegations, and is able to present a defense through the
4 use of witnesses and other evidence, the military has operated “within [the]
5 bounds of procedural due process” and the procedure is “immune from
6 constitutional infirmity.” *Id.* at 905. All of those opportunities are available to
7 cadets in the current separation procedure.

8 Despite Doolen’s best efforts to distinguish a deficiency finding from a
9 separation order, they are inextricably linked. Without being found deficient
10 through a CI—a procedure that complies with the requirements of *Hagopian*,
11 *Andrews*, and *Wasson*—a cadet cannot be subject to separation. After a deficiency
12 finding, a cadet may still make written submissions to mitigate the punishment.
13 Even after a potential separation decision occurs, a cadet may appeal to the
14 ABCMR and ultimately to a federal court. Indeed, the very procedure Doolen
15 challenges prevented his separation and readmitted him to the Academy after
16 his first alcohol violation in 2013. We agree with the district court that West

1 Point's robust pre- and post-deprivation procedures guiding a separation
2 decision satisfy due process. Therefore, Doolen's facial challenge fails.

3 **III. Substantial Prejudice**

4 Doolen further argues that West Point violated its own mandatory
5 procedural regulations during his separation proceedings. However, to
6 circumvent the general "non-justiciability of discretionary military decisions,"
7 Doolen must show that the regulatory deviations "substantially prejudic[ed]"
8 him. *Dibble*, 339 F.3d at 128. He has not done so.

9 It is undisputed that Doolen was never served the SJA's legal review
10 before it was forwarded to the Superintendent for action, even though West
11 Point's regulations provide him with an opportunity to comment on the legal
12 review. *See* USCC Reg. 351-1 ¶ 114(m); *see also* Appellees' Br. at 47. Doolen claims
13 that the SJA's legal review contains prejudicial factual errors that he would have
14 contested and corrected had he been properly served. Specifically, the SJA
15 included in its legal review (1) the 2015 allegations from Doolen's ex-girlfriend
16 that Doolen had been physically abusive towards her and that he had used
17 illegal drugs and (2) the fact that Doolen was arrested in 2013 for driving under

1 the influence (“DUI”) in Missouri. A document attached to the SJA
2 memorandum indicates that military personnel had found “insufficient evidence
3 to determine whether probable cause exists to believe . . . Doolen committed the
4 offense of wrongful use of a controlled substance.” App’x at 88. Also attached is
5 the incident report documenting Doolen’s 2013 DUI arrest in Missouri.

6 We acknowledge that Doolen should have had an opportunity to comment
7 on the SJA’s legal review. He was entitled to that process, and the government
8 offers no explanation for why it did not happen. However, the legal standard
9 requires Doolen to show more than the mere existence of a procedural violation;
10 he must also show the violation caused substantial prejudice.

11 Having reviewed the reasons leading to Doolen’s separation, we conclude
12 that Doolen’s inability to comment on the SJA’s legal review did not substantially
13 prejudice him. At the outset, with regard to the drug and assault issues, the SJA
14 did not report these incidents as fact; instead, the legal review characterized
15 them as allegations and clarified that USCC trial counsel had found probable
16 cause only as to the assault allegations. Moreover, Doolen was indeed arrested in
17 Missouri for a DUI charge. Although Doolen claims that the charge was incurred

1 while Doolen was suspended from the Academy and that authorities later
2 dismissed the charge, these additional facts do not render the SJA's statements
3 about the incident inaccurate.

4 The Superintendent's stated reasons for recommending separation fortify
5 our conclusion that substantial prejudice did not occur. The Superintendent
6 clarified that his decision to recommend separation took into consideration
7 Doolen's "failure to disclose the arrest to his chain of command," not the arrest
8 itself. App'x at 75. Therefore, the subsequent dismissal of the DUI charge is of no
9 matter; it was Doolen's lack of transparency upon returning to the Academy that
10 played a role in the Superintendent's decision. That Doolen was suspended from
11 the Academy at the time he was arrested for the DUI charge also bears little
12 relevance; clearly, it was important to West Point leadership that Doolen disclose
13 any updates to his criminal history upon returning. Finally, the Superintendent's
14 recommendation did not refer to the 2015 allegations at all, so Doolen fails to
15 show how an opportunity to cure any purported errors as to those statements
16 would have changed the outcome. Doolen has not demonstrated that correcting
17 (or perhaps, more accurately, contextualizing) the SJA's statements would have

1 altered the Superintendent’s conclusion, based on the findings in the underlying
2 disciplinary hearing itself, that “the retention of [Doolen] is not considered to be
3 in the best interests of the Corps of Cadets, the Military Academy or the United
4 States Armed Forces.” USCC Reg. 351-2 ¶ 312(b).

5 Doolen also argues that Forlenza, the IO presiding over Doolen’s final CI,
6 violated the West Point regulation dictating that IO findings “must be supported
7 by a preponderance of the evidence.” *Id.* 351-1 ¶ 116. This argument essentially
8 seeks to circumvent the intra-military immunity doctrine by framing an internal
9 military judgment as a procedural irregularity. As the district court explained,
10 considering this question would require “the wholesale reconsideration of a
11 discretionary military personnel decision.” *Doolen*, 2018 WL 4300529, at *10. This
12 issue is unlike true procedural deviations in that it “involves a fact-specific
13 inquiry into an area affecting military order and discipline,” which is exactly the
14 type of review that the intra-military immunity doctrine bars. *Dibble*, 339 F.3d at
15 127 (citation omitted). It reaches the heart of the question that Forlenza was
16 authorized to answer – whether Doolen’s conduct was “a substantial departure
17 from the standards of conduct expected of members of the Corps of Cadets.”

1 USCC Reg. 351-2 ¶ 504(b). Forlenza acknowledged the preponderance of the
2 evidence standard, weighed the evidence accordingly, and reached a
3 discretionary decision that he was authorized to make. Multiple layers of
4 military review affirmed that decision. For our purposes, this is sufficient. We
5 will not review “discretionary decisions by military officials which are within
6 their valid jurisdiction.” *Smith v. Resor*, 406 F.2d 141, 145 (2d Cir. 1969).

7 Doolen refers to other details from the disciplinary hearing and appears to
8 suggest that they are also procedural errors or deviations. For example, he
9 highlights Forlenza’s statements that he would assess Doolen’s present, not past,
10 conduct, based on the witnesses and evidence presented at the CI. Despite
11 Forlenza’s statement that he would not use “anything in the past to determine
12 the outcome,” App’x at 345, Doolen was also aware that the triggering event for
13 the CI was receiving two alcohol boards, which made at least some of his past
14 conduct inherently relevant. Moreover, Forlenza further explained that he would
15 base a deficiency or proficiency finding based on witnesses presented at the CI
16 hearing. Forlenza’s subsequent written decision relied on evidence pertaining to
17 the two alcohol boards and the character witnesses presented at the hearing, so it

1 is not clear how any of his statements amounted to error. Doolen also asserts that
2 there was some confusion as to whether the June 2014 hearing was an alcohol
3 board, but Mauldin, who presided over that hearing, testified that the June 2014
4 proceeding “[a]bsolutely” was an alcohol board. App’x at 387. Moreover, Doolen
5 fails to connect these—or any other passing references to—purported procedural
6 flaws to any mandatory regulation, much less demonstrate that they caused
7 substantial prejudice to the ultimate conclusion that Doolen’s conduct indicated
8 that his retention was not “in the best interests of the Corps of Cadets, the
9 Military Academy or the United States Armed Forces.” USCC Reg. 351-2
10 ¶ 312(b). Without such a showing, Doolen’s regulatory claims fall outside the
11 scope of the two exceptions to the intra-military immunity doctrine. Therefore,
12 we may not reach them.

13 We note that the government also argued that Doolen failed to exhaust
14 administrative remedies on his claims that West Point failed to follow its own
15 mandatory regulations. We decline to consider this question as the exhaustion
16 issue does not affect our subject-matter jurisdiction generally, and, in any event,
17 Doolen’s claims fail for lack of substantial prejudice.

1 **CONCLUSION**

2 We conclude that West Point’s cadet removal procedures facially satisfy
3 due process requirements. We also conclude that the intra-military immunity
4 doctrine renders nonjusticiable Doolen’s claims that West Point did not follow its
5 own regulations because (1) Doolen was not substantially prejudiced by any
6 purported regulatory deviation and (2) we may not circumvent the doctrine to
7 engage in a fact-specific inquiry as to whether military personnel properly
8 applied the military’s own evidentiary standard.

9 Accordingly, the judgment of the district court is **AFFIRMED**.

10

Appendix to the Opinion of the Court

1

2 App'x at 979, USCC Reg. 351-1 ¶ 104.

Sequence of Actions Timetable		
Action/Responsibility	Working Days	Cumulative Working Days
Deficiency identified (date of RXO's letter); Cadet, TAC CoC, and R&D Officer notified (RXO).	0	0
Cadet notified; regiment package recommendation received (RXO).	3	3
BTO reviews regiment package- Conduct Review (BTO).	1	4
Cadet notified of referral to CI (R&D).	2	6
CI convenes (IO).	5	11
IO delivers completed CI packet to R&D (IO).	5	16
R&D reviews and forwards case to SJA for initial review. R&D also forwards summary of proceedings to TAC and RTO for preparation of disposition recommendations (R&D).	3	19
SJA reviews and returns case to R&D Officer (SJA).	3	22
R&D forwards CI packet with TAC and RTO recommendations to BTO for disposition recommendation (BTO).	2	24
R&D forwards CI packet to COM for review and recommendation to Superintendent on cadet's disposition (COM).	5	29
R&D forwards Commandant's recommendation to the Superintendent through SJA (R&D).	1	30
Legal review completed; respondent served (SJA).	3	33
Respondent submits response within 72 hours.	3	36
SJA prepares case for Superintendent's action (SJA).	1	37
Superintendent reviews case, takes action, and if appropriate, case is forwarded to HQDA.	5	42

3