IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE UNITED STATES EX. REL. MICHAEL G. NEW,	)	
Petitioner,	)	
v.	)	Civil Action No. 96-0033 (PLF)
WILLIAM PERRY, SECRETARY OF DEFENSE, AND TOGO D. WEST, SECRETARY OF THE ARMY,	)	
Respondents.	)	

PETITIONER'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF HIS MOTION TO REOPEN PROCEEDING AND SUBSTITUTE PARTIES RESPONDENT, AND FOR LEAVE TO FILE AN AMENDED AND SUPPLEMENTAL PETITION FOR A WRIT OF HABEAS CORPUS

OF COUNSEL:
Herbert W. Titus
TROY A. TITUS, P.C.
5221 Indian River Road
Virginia Beach, Virginia 23464
Tele: (757) 467-0616
Fax: (757) 467-0834

Henry L. Hamilton
RATCHFORD & HAMILTON, LLP
1531 Laurel Street
Columbia, South Carolina 29201
Tele: (803) 779-0700
Fax: (803) 779-7006

William J. Olson (D.C. Bar # 233833)
John S. Miles (D.C. Bar # 166751)
WILLIAM J. OLSON, P.C.
8180 Greensboro Drive, Suite 1070
McLean, Virginia 22102-3860
Tele: (703) 356-5070
Fax: (703) 356-5085

Attorneys for Petitioner

TABLE OF CONTENTS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE UNITED STATES EX. REL. MICHAEL G. NEW,	)	
Petitioner,	)	
v.	)	Civil Action No. 96-0033 (PLF)
WILLIAM PERRY, SECRETARY OF DEFENSE, AND TOGO D. WEST, SECRETARY OF THE ARMY,	)	
Respondents.	)	

PETITIONER'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF HIS MOTION TO REOPEN PROCEEDING AND SUBSTITUTE PARTIES RESPONDENT, AND FOR LEAVE TO FILE AN AMENDED AND SUPPLEMENTAL PETITION FOR A WRIT OF HABEAS CORPUS

INTRODUCTION

Petitioner Michael G. New (hereinafter "New") seeks by motion to reopen his original petition for habeas corpus to review the legality and constitutionality of his court-martial conviction and sentence. Having exhausted his military appeals, New has satisfied the condition placed by this Court in its March 28, 1996 order which stated, in part, that "[o]nce the military proceedings are completed, Specialist New may … move to reopen this proceeding." United States ex rel. New v. Perry, 919 F. Supp. 491, 500 (1996).

As this Court also noted in its March 28, 1996 ruling, the issues raised then, and now, are "important" ones, "implicating the balance of power between the President as Commander-in-Chief and the Congress and the relationship between the United States and the United Nations." *Id.*, 919 F. Supp. at 499-500. To date, New has sought, but has not been able to

obtain, on the merits, a decision on his major constitutional claims, either by any military tribunal or by any Article III court. Now that New has exhausted his military remedies, such a reopening of his original habeas corpus petition would be in the interests of justice, as demonstrated below.

Likewise, New's motion to amend and to supplement his original habeas corpus petition would be in the interests of justice. According to 28 U.S.C. Section 2242, a habeas corpus petition may be amended "when justice so requires," as provided by Rule 15(a), Federal Rules of Civil Procedure. *See also* Holiday v. Johnston, 313 U.S. 342, 350 (1941). Substitution of parties respondent also appears warranted by Rule 25(d) of the Federal Rules, which provides, in pertinent part, that "[w]hen a public officer is a party to an action in his official capacity and during its pendency … ceases to hold office, the action does not abate and the officer's successor is automatically substituted as a party."

Finally, it is appropriate for New to be allowed to supplement his original petition "setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented," as provided in Rule 15(d) of the Federal Rules of Civil Procedure and as anticipated by the requirement to exhaust one's appellate remedies before seeking collateral review by habeas corpus. *See* Crawford v. Bailey, 360 F.2d 596 (4th Cir. 1966).

FACTS

I. The Original 1996 Habeas Corpus Proceeding

On January 16, 1996, Army Specialist Michael G. New (hereinafter "New") filed his original Petition for a Writ of Habeas Corpus (hereinafter "Original Petition"), asking this

court to halt a then-pending court-martial brought against New on charges that New, having refused to don a United Nations (hereinafter "U.N.") uniform as ordered in October 1995, had violated Article 92 of the Uniform Code of Military Justice.

In his Original Petition, New claimed that the October 1995 order was unlawful on several grounds, as follows:

> a. That the order required New to "wear the badge, insignia, and uniform given by a foreign government in direct conflict and in violation of: (a) Article I, Section 9 of the United States Constitution; (b) 5 U.S.C. Section 7342; and (c) 32 C.F.R. Section 578.19, and Army Regulation 670-1, *Wear and Appearance of Army Uniforms and Insignia;*
>
> b. That the order was an integral part of an order to deploy New's unit as part of a United Nations operation pursuant to Chapter VII of the United Nations Charter, contrary to 22 U.S.C. Section 287d, which requires specific Congressional approval, such approval having never been obtained;
>
> c. That the order, being an integral part of such an order to deploy, placed New under the immediate command of a United Nations officer contrary to Article I, Section 8, clauses 12, 14, and 18, and Article II, Sections 2 and 3 of the United States Constitution; and
>
> d. That the order, being an integral part of such an order to deploy, violated New's rights under the Thirteenth Amendment to the United States Constitution, thereby placing him not only into involuntary servitude, but at risk of losing his United States citizenship.
> [Original Petition, Appendix A to Amended and Supplemental Petition, Para. 18.]

Even though each of these claims had been raised previously by New in three separate pretrial motions in the pending court-martial proceedings,[1] New claimed in his Original Petition that he

---

[1] On December 5, 1995, by two separate motions, New moved to dismiss the court-martial charge brought against him on the grounds that the October 1995 order to don the U.N. uniform, insofar as it was an integral part of the deployment of his unit to Macedonia, violated Sections 6 and 7 of the United Nations Participation Act, the Appointments and Commander-in-Chief clauses of Article II, Section 2 of the United States Constitution, and the Thirteenth Amendment of the Constitution. On December 6, 1995, New moved to dismiss the court-martial charge because the order to don the U.N. uniform was illegal and unconstitutional, the patches and cap being an "emolument" or "office" of a foreign government unconsented to by Congress as required by

was entitled to an immediate honorable discharge, the United States Army having no court-martial jurisdiction over him. *See* Original Petition, Appendix A to Amended and Supplemental Petition, Paras. 20 and 21 and Prayer for Relief.

On March 28, 1996, this court ruled that New remained subject to court-martial jurisdiction, explaining that, because New had not exhausted his court-martial remedies, applicable Supreme Court precedents required it to deny New's Original Petition on grounds of comity. Thus, this court refused to address the merits of any of New's claims. United States ex rel. New v. Perry, 919 F. Supp.2d 491, 500 (D.D.C. 1996).

In its opinion, this court noted "that the issues raised in this case are within the province of the military tribunals," and further stated that it "is confident that the military tribunals and the Court of Appeals for the Armed Forces will" take New's claims "seriously." *Id.*, 919 F. Supp. 2d. at 499-500. Notwithstanding this statement of confidence in the military justice system, this court included in its Order an invitation for New to return to this court for relief, if necessary, "[o]nce the military proceedings are completed," either by filing a motion "to reopen this proceeding or [by] fil[ing] a new petition for a writ of habeas corpus." *Id.*, 919 F. Supp. 2d at 500.

On November 25, 1997, the United States Court of Appeals for the District of Columbia affirmed this court's decision, denying "New's Habeas Corpus Petition on grounds of comity." New v. Cohen, 129 F.3d 639, 648 (D.C. Cir. 1997). Thus, the court of appeals, like this court, did not reach the merits of New's claims "related to the legality of the

---

Article I, Section 9 of the United States Constitution. *See Record of Trial*, Volume 5, Appellate Exhibits XLVIII, LI, and XLIX, included in Appendix 5 attached hereto.

deployment of troops to Macedonia and orders to wear UN accoutrements," New having "failed to exhaust his remedies for relief in the pending court-martial action." *Id*.[2]

II. The 1995-1996 Court-Martial Pretrial Proceedings

In December 1995, and prior to filing his Original Petition, New filed three pretrial motions at his court-martial, each one contesting the lawfulness of the October 1995 order, and each resting upon one or more of the legal and constitutional grounds that New raised in his Original Petition.

A. Unlawful Deployment and Involuntary Servitude Claims

On December 5, 1995, New filed his first motion to dismiss the court-martial on the grounds that the October 1995 order to "wear the prescribed uniform for the deployment to Macedonia, i.e., the U.N. patches and cap," set forth in the court-martial specification was unlawful because "the order was issued pursuant to the unlawful deployment of Specialist New … in violation of:

> (a) 22 U.S.C. Code Sec. 287d, or in the alternative, 22 U.S.C. Section 287d-1 (Sections 6 and 7 of the United Nations Participation Act);
> (b) Article I, Section 8, Clauses 12, 13, 14, and 18 of the United States Constitution;
> (c) Article II, Section 2, Para. 1 (the "Commander-in-Chief Clause") of the United States Constitution; and
> (d) Article II, Section 2, Para. 2 (the "Appointments Clause") of the United States Constitution."
> [Appendix[3] 5, *Record of Trial*, Volume 5, Appellate Exhibit XLVIII.]

---

[2] On March 28, 1998, the United States Supreme Court denied New's petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia. New v. Cohen, 523 U.S. 1048 (1998).

[3] Excerpts from the court-martial *Record of Trial* have been included herein in attached Appendices. The *Record of Trial* is composed of six volumes. Excerpts from each of the six volumes are attached hereto in six numbered appendices, the numbering of which corresponds with the respective volume of the *Record of Trial* in which the excerpt appears. The page numbers or exhibits contained in each Appendix bear the page number or

On December 6, 1995, New filed an additional motion to dismiss the court-martial on the grounds that the order "to wear the prescribed uniform for the deployment to Macedonia, i.e., U.N. patches and cap" was an unlawful order forcing "Specialist New involuntarily to serve as a United Nations soldier thereby depriving him of his rights as a United States soldier in violation of the Thirteenth Amendment of the United States Constitution." Appendix 5, *Record of Trial*, Volume 5, Appellate Exhibit LI.

In pretrial proceedings on January 18, 1996, and in support of New's claim that the order "to wear the prescribed uniform for the deployment to Macedonia, i.e., U.N. patches and cap," was unlawful because the Macedonia deployment was unlawful, New introduced sworn testimony and numerous exhibits through retired Marine Lieutenant Colonel David Sullivan, a former CIA analyst, and a former U.S. Senate Foreign Relations Committee staff member, who, as a qualified expert in international law, testified that, in his expert opinion, the United Nations operation to which New's unit was being deployed was a United Nations Charter Chapter VII combatant operation which required congressional approval. Appendices 2, 5 and 6, *Record of Trial*, Volume 2, 323-375; Volume 5, Appellate Exhibits XXXVII-XLII; and Volume 6, Appellate Exhibits LXIII-LXIIIR, LXXIX.

In response to Lieutenant Colonel Sullivan's testimony, the prosecution introduced no sworn testimony (Appendix 2, *Record of Trial*, Volume 2, 376), preferring (i) to rely upon the unsworn representations of the President of the United States asserting that the U.N. operation in Macedonia was a noncombatant Chapter VI operation; and (ii) to maintain that all claims

---

exhibit number in the order in which they appear in the *Record of Trial*.

regarding the legality of the deployment to Macedonia based upon the nature of the U.N. operation were nonjusticiable political questions. *See* Appendix 2, *Record of Trial*, Volume 2, 405 and 410-12; *and see* Appendix 6, *Record of Trial*, Volume 6, Appellate Exhibits LXV-LXVIII.

On that pretrial record, the military trial judge denied New's motion contesting the legality and constitutionality of the Macedonian deployment, ruling as a matter of law: (a) that the deployment did not violate the United Nations Participation Act; (b) that the terms of the deployment did not violate the Commander-in-Chief Clause and the Appointments Clause of Article II, Section 2 of the U.S. Constitution; and (c) that forcing New to serve under U.N. command did not violate the prohibition against involuntary servitude contained in the Thirteenth Amendment. Additionally, the military trial judge ruled that the three statutory and constitutional claims, even if proved, were irrelevant to the charge that New had disobeyed a lawful order, as specified: "to wear the prescribed uniform for the deployment to Macedonia, i.e., U.N. patches and cap." Finally, the military trial judge ruled that all three claims, even if relevant, were nonjusticiable political questions over which the military court had no jurisdiction. *See* Appendix 2, *Record of Trial*, Volume 2, 426-433.

B. Illegal and Unconstitutional Uniform

In addition to the claims that the Macedonia deployment violated both statute and constitution, on December 6, 1996, New filed a third pretrial motion to dismiss the court-martial on the grounds that, apart from the illegality and unconstitutionality of the Macedonian deployment, the order "to wear the prescribed uniform for deployment to Macedonia, i.e., the U.N. patches and cap, was issued in violation of:

> (a) Article I, Section 9 (the "foreign emolument and office clause") of the United States Constitution;
> (b) 5 U.S.C. Section 7342;
> (c) 32 C.F.R. Section 578.19;
> (d) Army Regulation 670-1, *Wear and Appearance of Army Uniforms and Insignia* (AR 670-1);
> (e) and would subject the defendant to commit a crime under Article 134, UCMJ, and would subject the defendant to civil penalties under 5 U.S.C. Section 7342."
> [Appendix 5, *Record of Trial*, Volume 5, Appellate Exhibit XLIX.]

In support of this pretrial motion, New relied primarily upon a "Stipulation of Fact," agreed to by the prosecution, stating: (i) that the U.N. patches and cap had "not been approved by the Director of Institute of Heraldry, U.S. Army, as required and mandated under the provisions of paragraphs 27-16a and 27-16b of Army Regulation 670-1, 'Wear and Appearance of Army Uniforms and Insignia'"; (ii) that "both the Department of Defense and the Department of the Army have not authorized either informally or formally the United Nations insignia and accoutrements"; and (iii) that the "U.N. patches and cap" had been issued to New [only] for the purpose of augmenting his U.S. Army … B[attle] D[ress] U[niform]." (Emphases original.) *See* Appendix 4, *Record of Trial*, Volume 4, Defense Exhibit P, "Stipulation of Fact" dated 9 January 1996.

In response to this claim, the prosecution argued that the "U.N. patches and cap" were justified by paragraph 1-18 of AR 670-1, which provided for alterations in the authorized uniform for "safety" purposes in a "maneuver" area. Introducing no sworn testimony in support of this claim, the prosecution argued that "Macedonia … is a maneuver area," and that "the wearing of [UN] blue in a hostile environment is the best protection one can have from the boundless chaos of warfare." At the same time, the prosecution contended inconsistently

that "the Government does not concede Macedonia is a hostile environment," concluding with the argument that U.N. blue is "recognized internationally as off limits to … combatants," even while insisting that "in Macedonia, we don't have that situation," and that Macedonia is a noncombatant operation as claimed by the President of the United States in letters to the Speaker of the House. *See* Appendix 2, *Record of Trial*, Volume 2, 407-09, 411; and *see* Appendix 6, *Record of Trial*, Volume 6, Appellate Exhibits LXV-LXVIII.

On January 19, 1996, the military trial judge ruled, as a matter of law, that the October 1995 order to "wear the U.N. patches and cap" was lawful on the following grounds:

> The wearing of distinctive uniforms or uniform accessories easily recognizable and identifiable in a combat environment or potential combat environment has a practical combat function which may enhance both safety and/or tactical effectiveness of combat-equipped soldiers performing operations. As such, the modification of 1/15th Infantry soldiers' military uniforms … to include the adding of U.N. military uniform accoutrements, had a function specifically to enhance the safety of United States armed forces in Macedonia.
> [Appendix 2, *Record of Trial*, Volume 2, 426.]

On the same date, the military trial judge also indicated that he intended to rule that the October 1995 order "to wear the prescribed uniform for the deployment to Macedonia, i.e., U.N. patches and cap" was, as a matter of law, an issue to be resolved wholly by the judge, not to be submitted to the military jury.[4] *See* Appendix 2, *Record of Trial*, Volume 2, 433. Prior to the entry of an order to that effect, New objected on the grounds that the lawfulness of an order is an "element of the offense which the government must prove beyond a reasonable doubt" and that, by taking the lawfulness issue from the military jury, the military trial judge

---

[4] Technically, the "court-martial panel" or "court-martial members." The term "military jury" is used throughout this memorandum in accordance with the common parlance of military judges and lawyers. *See* United States v. New, 55 M.J. 95, 117, n.2 (2001).

has "effectively taken away … the due process guaranteed to Specialist New under the 5th Amendment, by which the government must, beyond a reasonable doubt, prove each and every element of the offense in order to convict …." Appendix 2, *Record of Trial,* Volume 2, 434.

In response, the prosecution maintained that there were no "factual" issues for a military jury to resolve, every issue being a question of law only. Appendix 2, *Record of Trial*, Volume 2, pp. 440-41. In reply, New catalogued a number of factual issues, including but not limited to: (a) whether the Macedonia deployment was a combatant operation under Chapter VII of the U.N. Charter, or a noncombatant operation under Chapter VI of that charter; and (b) whether the Macedonian area to which Petitioner New would be deployed was a maneuver area, and if so, whether the "U.N. uniform [would] enhance safety." Appendix 2, *Record of Trial*, Volume 2, 443-45.

Notwithstanding these disputed factual matters, the military trial judge announced that the lawfulness of the October 1995 order, the very specification in which New was charged, was "nothing more than an interlocutory issue … purely a question of law," not only outside the purview of the military jury, but, was, "as a matter of law … a lawful order." Appendix 2, *Record of Trial,* Volume 2, pp. 448-49.

III. The 1996 Court-Martial Trial

The prosecution limited its case at trial to sworn testimony establishing only: (a) that on October 2, 1995, and then again on October 4, 1995, New was ordered by his commanding officers to report to duty on October 10, 1995, wearing the U.N. patches and cap; and (b) that New appeared in company formation on October 10, 1995, without the U.N. patches and cap. The prosecution did not introduce any testimony that the U.N. patches and cap served a

"safety" purpose in a "maneuver" area, whether that area be the situs of the formation, Schweinfurt, Germany (where the order was issued and disobeyed), or Macedonia, the ultimate deployment destination. Appendices 2 and 3, *Record of Trial*, Volume 2, 578-617; Volume 3, 618-629.

At the conclusion of all of the testimony, the military trial judge instructed the military jury that the order to wear the U.N. patches and cap was lawful, and that New had a duty to obey that order, unless the jury found either that New had no knowledge of the order or that New was reasonably mistaken as to his duty to obey the order. Appendix 3, *Record of Trial*, Volume 3, 782-85. Not surprisingly, on the basis of these instructions, New was convicted as charged, and sentenced to a bad conduct discharge. Appendix 6, *Record of Trial*, Volume 6, Appellate Exhibits CVI and CVII.

IV. The 1999 and 2001 Military Appellate Court Rulings

After conviction and sentence, New appealed to the United States Army Court of Criminal Appeals (hereinafter "ACCA"). On April 28, 1999, the ACCA upheld the military trial court's decision, affirming the military judge's ruling that, as a matter of law, the October 10, 1995 order was lawful, but declining to rule on the merits of the claims raised by New in his December pretrial motions,[5] having concluded that such claims were either irrelevant or nonjusticiable political questions. United States v. New, *supra*, 50 M.J. at 736-40.

Thereafter, New sought review of his conviction and sentence by the United States Court of Appeals for the Armed Forces (hereinafter "CAAF"). On October 13, 1999, CAAF

[5] As noted above, the statutory and constitutional issues raised by New's pretrial motions were identical to the issues presented to this Court in New's Original Petition.

granted New's petition for review of four issues, three of which are pertinent to New's amended petition for habeas corpus and are as follows:

> II. WHETHER APPELLANT'S CONSTITUTIONAL AND STATUTORY RIGHTS TO BE TRIED BY COURT-MARTIAL MEMBERS AND TO HAVE THE MEMBERS DETERMINE WHETHER THE GOVERNMENT HAS PROVED EVERY ESSENTIAL ELEMENT OF THE CHARGED OFFENSE BEYOND A REASONABLE DOUBT WERE VIOLATED BECAUSE THE MILITARY JUDGE RULED THAT THE ORDER GIVEN TO APPELLANT WAS LAWFUL WITHOUT SUBMITTING THE ISSUE TO THE MEMBERS, AND BECAUSE THE MILITARY JUDGE INSTRUCTED THE MEMBERS THAT THE ORDER WAS LAWFUL AS A MATTER OF LAW.
>
> III. WHETHER THE MILITARY JUDGE ERRED BY FINDING THAT THE ORDER TO DEPLOY IN THE UNITED NATIONS UNIFORM WAS LAWFUL.
>
> IV. WHETHER THE MILITARY JUDGE ERRED BY AVOIDING THE QUESTION OF LAWFULNESS OF THE ORDER AND HOLDING THAT LAWFULNESS WAS A NONJUSTICIABLE POLITICAL QUESTION. [United States v. New, *supra*, 55 M.J. at 97.]

On June 13, 2001, CAAF rendered its decision. With respect to Issue IV, the court unanimously affirmed the military judge's ruling that the lawfulness of the order to wear the U.N. patches and cap, insofar as that order was dependent upon the lawfulness of the Macedonian deployment, was a nonjusticiable political question. *Id.*, 55 M.J. at 108-09, 116, 129-30. Thus, the court did not reach the merits of Issue III, i.e., whether the Macedonian deployment was unlawful.

With respect to Issue II, CAAF divided, three to two, on whether the lawfulness of the order to wear the U.N. patches and cap at the time and place set forth in the court-martial specification was a legal question solely for the military judge, or whether it was an essential element of the offense and thus a question for the military jury. *Id.*, 55 M.J. at 100-06, 115-

16, 117-26, 129, 130. A plurality of three CAAF judges affirmed the military trial judge, concluding that the lawfulness of an order "is not a discrete element of an offense under Article 92," the article under which New had been charged. *Id.*, 55 M.J. at 100.

Accusing the plurality of "a radical departure from our political, legal and military tradition," one concurring CAAF judge maintained that there was no question that "lawfulness … was an element of the charged offense, and accordingly under Article 51(c) [of the Uniform Code of Military Justice] and United States v. Gaudin, 515 U.S. 506, 522-23 … should have been presented to the 'military jury.'" *Id.*, 55 M.J. at 115. Nevertheless, he and his concurring colleague voted with the plurality to affirm Petitioner New's conviction, concluding that, because there was no "evidence" that the order was unlawful, the failure of the military judge to submit to the military jury the issue of lawfulness of the October 1995 order was "harmless error." *Id.*, 55 M.J. at 120, 126-28, 130.

Rejecting the concurring judges' finding of "harmless error," the CAAF plurality insisted that New had "clearly produced a large volume of material contesting the lawfulness of the order … which would be more than sufficient to go before a [military jury], if this were an element for resolution by [such jury]." *Id.*, 55 M.J. at 106. Indeed, one concurring CAAF judge conceded that the Stipulation of Fact, introduced into evidence, supported New's claim "that [the] order to wear U.N. badges was 'patently illegal.'" *Id.*, 55 M.J. at 127. Nevertheless, that same judge dismissed the stipulation on the ground that "there was no real contest on the unlawfulness of the order" because New had "proffered no evidence that the safety conditions in Macedonia did not make wearing of [the U.N. badges] appropriate or that

the deployment was not a maneuver within the meaning of AR 670-1." *Id.*, 55 M.J. at 127-28.

ARGUMENT

I. This Court Has Jurisdiction of This Petition.

At the time of the filing of the Original Petition, New was in physical custody of the United States Army awaiting court-martial. As a direct consequence of his court-martial conviction and sentence to a bad conduct discharge, New is now disqualified from substantially all benefits administered by the United States Department of Veterans Affairs and the United States Army establishment, as well as several benefits administered by other federal agencies. Additionally, New is now limited in his employment opportunities and is suffering from the ineradicable stigma of a punitive discharge adversely affecting his legal rights, economic opportunities and social acceptability. *See* Appendix 7, *Military Judges' Benchbook,* Department of the Army, Pamphlet 27-9, 69-70 (Sept. 30, 1996).

Among the benefits administered by the Veterans Administration and denied to New is the educational support offered by the G.I. Bill of Rights. Among the benefits administered by the Army and denied to New are payments for accrued leave, wearing of the military uniform, admission to soldiers' home, and burial in Army National or Post cemeteries. Among the employment opportunities administered by other federal agencies and denied to New are civil service veteran's preference, civil service retirement credit, unemployment compensation for ex-servicemembers and naturalization benefits. *See* Appendix 7, Benefits-Discharges Chart.

New has suffered, and continues to suffer, from loss of his G.I. Bill for education. Rather than pursuing full-time a degree in management information systems, the denial of such

benefits has directly resulted in New's having to work, necessitating part-time study. Additionally, New has suffered, and will continue to suffer, from social disapprobation occasioned by his conviction, even among members of the public who agree with his position that an American soldier should not serve under United Nations command.

Accordingly, because of the law's complexities, including having to exhaust his military remedies, and not because of his fault, New is suffering, and will continue to suffer, serious disabilities on account of the court-martial conviction and sentence. According to the rule of Carafas v. LaVallee, 391 U.S. 234, 238, 239 (1968), jurisdiction having previously "attached" in this court at the time of the filing of New's Original Petition, such jurisdiction "is not [now] defeated by release of the petitioner prior to completion of proceedings on such application." By virtue of the continuing disabilities under which New suffers, including deprivation of benefits by government agencies, limitations upon employment opportunities, and the ineradicable social stigma on account of his court-martial conviction and bad conduct discharge, New is entitled to collateral review of all of "the constitutional rulings" of the military tribunals in accordance with "prevailing Supreme Court standards." Kauffman v. Secretary of the Air Force, 415 F.2d 991, 995, 997 (D.C. Cir. 1969), *cert. den.*, 396 U.S. 1013 (1970).

II. New Has Exhausted His Military Remedies.

New has exhausted his military remedies, having appealed to the United States Army Court of Criminal Appeals and to the United States Court of Appeals for the Armed Forces.[6]

[6] Although New sought Supreme Court review, the duty to exhaust one's military remedies does not require New to seek such direct review. *See* Fay v. Noia, 372 U.S. 391, 435-36 (1963), overruling on that point Darr v. Burford, 339 U.S. 200 (1950). The facts that, pursuant to 28 U.S.C. Section 1259(c), New sought

There is no other administrative avenue available for New to obtain a substantive review of his claim that he was unconstitutionally convicted by court-martial of disobedience of an unlawful order. New's petition may not, therefore, be denied for reasons of comity, as this court recognized in its order dismissing the Original Petition. United States ex rel. New v. Perry, *supra*, 919 F. Supp. at 499-500. Thus, in response to this court's express invitation in its dismissal order, New has returned to this court for relief. *Id.*, 919 F. Supp. at 500 ("Once the military proceedings are completed, Specialist New may either move to reopen this proceeding or file a new petition for a writ of habeas corpus.")

III. The Constitutional and Interrelated Statutory Rulings of the United States Court of Appeals for the Armed Forces Do Not Conform to U.S. Supreme Court Standards, and The Military Courts Have Not Shown that Conditions Peculiar to Military Life Require a Different Rule

A. Introduction

According to Burns v. Wilson, 346 U.S. 137, 142 (1953), a court-martial conviction must be upheld "when a military decision has dealt fully and fairly with an allegation raised in [an] application [for a writ of habeas corpus]." According to Kauffman v. Secretary of the Air Force, *supra*, "the test of fairness," in turn, requires "the constitutional rulings" of the United States Court of Appeals for the Armed Forces ("CAAF") to "conform to Supreme Court standards, unless it is shown that conditions peculiar to military life require a different rule." *Id.*, 415 F.2d at 997.

---

review of the CAAF ruling in the United States Supreme Court on a petition for writ of certiorari, and that the United States Supreme Court denied New's petition (New v. United States, ___ U.S. ___, 151 L.Ed.2d 269 (2001)), have no bearing on New's right to habeas corpus or upon the substantive merits of New's claims here. *See* Darr v. Burford, *supra*, 339 U.S. at 223-228 (Frankfurter, J., dissenting).

In testimony supporting the Military Justice Act of 1983 Act, the United States Department of Defense, through its general counsel, William Howard Taft, IV, noted that "the … trend has been to conform where possible the projections and schemes of the military justice system to the criminal justice system in the civilian world." *Hearing on S. 974 before the Military Personnel and Compensation Subcommittee of the Committee on Armed Services*, House of Representatives 38 (98th Cong., 1st Sess. Nov. 9. 1983). In reporting out S. 974 with a do-pass recommendation, the full House Armed Services Committee not only endorsed Mr. Taft's statement, but noted that one purpose of the bill was to enhance the "fundamental rights" of "military members," including the right to the administration of justice free from "command control." H. Rep. No. 98-549, *supra*, reprinted in 3 U.S.C.C.A.N. 2177-2178 (98th Cong., 1st Sess. Nov. 15, 1983).

The Senate Committee Report was even more emphatic, stressing that "any vehicle of military discipline cannot ignore the tenets of fundamental fairness which are the standards of a democratic society":

> To do so, and create the potential for a capricious exercise of broad authority commanders have over their subordinates, would risk disrespect and disobedience in the ranks and possibly the dilution of public support for our military system. [S. Rep. No. 98-53, p. 2 (98th Cong., 1st Sess. Apr. 5, 1983).]

Thus, Congress has indicated its intent that the rulings of the CAAF, the highest military tribunal, conform as closely as possible to rulings of Article III courts in the administration of criminal justice in civil society. This did not occur in the case of Michael New.

B. New was Denied his Liberty and Property without Due Process of Law contrary to United States v. Gaudin and Jackson v. Virginia because the military courts did not conform to the rule of Neder v. United States

1. The Military Courts Disregarded the U.S. Supreme Court's Plain Meaning Rule of Statutory Construction

New stands convicted of having violated 10 U.S.C. Section 892(2), which reads, in pertinent part, as follows:

> Any person … who … (2) having knowledge of any … lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order … shall be punished as a court-martial may direct.

CAAF divided three to two over the question whether the prosecution was required to prove, as an element of the offense, that the order issued to New to don the U.N. uniform was lawful. According to the CAAF plurality, the "lawfulness of an order, although an important issue, is not a discrete element of the offense." United States v. New, *supra,* 55 M.J. at 100. Rather, the plurality reasoned that, according to military **tradition**, issues of law are always to be decided by the military judge, not by the military jury. *Id.*, 55 M.J. at 100-04 (emphasis added). Therefore, the plurality rationalized, Congress must have "inserted the word lawful in the statutes governing disobedience" to address "the judicial role of the court-martial panel rather than creating an element for consideration by the factfinder." *Id.,* 55 M.J. at 104.

Concurring CAAF Judges Sullivan and Everett vehemently disagreed, the former calling the plurality's opinion a "radical departure from our political, legal and military tradition." *Id.,* 55 M.J. at 115. Judge Sullivan stated that the plain words of the statute indicated that "lawfulness" is an element of the offense, and hence to be decided by the military jury, not the judge. *Id.*, 55 M.J. at 120. Furthermore, he pointed out that the Manual for Courts-Martial "has repeatedly identified the lawfulness of the order … as an element of this offense." *Id.,* 55 M.J. at 121. Finally, Judge Sullivan noted that the CAAF had, in 1989,

"unanimously stated that '[i]n a prosecution for disobedience, lawfulness of the command is an element of the offense….'" *Id.*, 55 M.J. at 121.

According to the Supreme Court, the framework within which the elements of a federal statutory offense are to be ascertained requires one "first [to] look to the text of the statute." Neder v. United States, 527 U.S. 1, 13 (1999). This salutary rule is designed to insure that courts "construe the language so as to give effect to the intent of Congress," not to that of judges. United States v. American Trucking Ass'ns, 310 U.S. 534, 542-43, 544 (1940). Thus, courts are not to "look beyond" the "plain meaning" of the words of a statute, unless that meaning leads to "absurd or futile results" or "an unreasonable one 'plainly at variance with the policy of the legislation as a whole.'" *Id.*, 310 U.S. at 543.

The CAAF plurality opinion completely disregarded the Supreme Court's rule, construing 10 U.S.C. Section 692(2) not according to the text, but according to the plurality's own view of the inappropriateness of submitting questions of law to a military jury, instead of a judge, and then substituting its policy for the congressional policy embodied in the statute. United States v. New, *supra*, 55 M.J. 100-104. Not only did the CAAF plurality fail to search relevant legislative history to discern Congress' intent when it inserted "lawful" into 10 U.S.C. Section 692(2), but, as Judge Sullivan pointed out in his concurrence, the plurality disregarded the historic role that "lawful" has always played as an element of the offense in modern military practice and military legal history.

2. In an Attempt to Avoid Gaudin v. United States, the Military Courts Disregarded 10 U.S.C. Section 851(c)

At stake in the battle within CAAF was not only the proper interpretation of 10 U.S.C. Section 892(2), but also the application of the decision in Gaudin v. United States, 515 U.S. 506 (1995), to courts-martial. According to Gaudin, a statute that makes an issue of law an element of a criminal offense gives rise to a mixed law/fact question for the jury, not for the judge. *Id.*, 515 U.S. at 511-19.

The CAAF plurality candidly confessed that Gaudin "compelled" it "to choose" in this case "between treating lawfulness as an issue of law for the military judge or an element for the [military jury]." United States v. New, *supra,* 55 M.J. at 102. To justify its decision to delete lawfulness from the elements of the offense specified in 10 U.S.C. Section 692(2), the plurality insisted that the Gaudin rule must be applied only to civilian criminal cases where the right to trial by jury is constitutionally guaranteed. *Id.*, 55 M.J. at 104. To justify this limit on Gaudin, the plurality maintained that military policy dictated that "the validity of regulations and orders of critical import to the national security" should be matters of law for the judge, because, if they were submitted to the military jury, they "would be subject to unreviewable and potentially inconsistent treatment by different court-martial panels." *Id.,* 55 M.J. at 105.

It is not for CAAF to use military policy as a tool to extract an element from a congressionally-defined offense. As Judge Sullivan pointed out in his concurring opinion, Congress also enacted 10 U.S.C. Section 851(c), which prescribes that the military jury, like its civilian counterpart, must "decide whether the elements of an offense have been proved beyond a reasonable doubt." *Id.,* 55 M.J. at 122-23. Thus, as Judge Everett noted, whatever the CAAF plurality thought to be the proper role of military juries, Congress, by statute, has

dictated that, with respect to the elements of an offense, the military jury must perform the same role as a constitutionally-guaranteed jury. *Id.*, 55 M.J. at 129.

As was true of the CAAF plurality's failure to interpret 10 U.S.C. Section 892(2) to discern the substantive elements of the offense, so the plurality has disregarded congressional intent regarding the role of the military jury in adjudicating the elements of that offense, as prescribed by 10 U.S.C. Section 851(c).

3. The Harmless Error Rule of Neder v. United States Does Not Apply

Even though concurring CAAF Judges Sullivan and Everett concluded that the military judge had erred in his ruling that the lawfulness of the order to don the UN uniform was a legal question, exclusively for the judge, they decided that, under Neder v. United States, 527 U.S. 1 (1999), the judge's error was "harmless." 55 M.J. at 126-28, 130. Not only was this conclusion not supported by the record, but it was a serious misapplication of the Neder "harmless error" rule.

As the CAAF plurality pointed out, the Neder rule applies only when the verdict of guilt is "supported by uncontroverted evidence" introduced at trial on every element of the offense, even the element not submitted to the jury. United States v. New, *supra*, 55 M.J. at 106; Neder v. United States, *supra*, 527 U.S. at 45. Otherwise, no appellate court could rule, as the U.S. Supreme Court did in Neder, that it was "beyond a reasonable doubt that the jury verdict would have been the same absent the error." *Id*. at 52. Neither Judge Sullivan nor Judge Everett made such a ruling, nor could either have so found upon the record.

Judge Sullivan maintained that "the judge **at trial** … found as fact that the disobeyed order was issued for "safety" purposes and while on "maneuver." United States v. New,

supra, 55 M.J. at 119 (emphasis added). This statement is patently erroneous. The military judge made his findings on safety and maneuver area in support of his decision to deny New's **pretrial** motions, not "at trial." (Emphasis added.) *See* Appendix 2, *Record of Trial*, Vol. 2, 422-33. It was error, therefore, for Judge Sullivan to have presumed, as he did, that the military judge's ruling — that the order to don the U.N. uniform fit within the Army Regulation 670-1 exception permitting additions to the authorized uniform for "safety" purposes in a "maneuver" area — was based upon trial testimony. *See* United States v. New, *supra*, 55 M.J. at 119-20. For clearly, that ruling was based upon the unsworn arguments of the prosecution and the Army's Office of Chief of Legislative Liaison, the latter of which was contained in a document marked Appellate Exhibit IV.[7] Appendices 2 and 4, *Record of Trial*, Volume 2, 407-10; and Volume 4, Appellate Exhibit IV. Under the governing court-martial rules, an appellate exhibit may not even be considered by a military jury. *See* Rules of Practice Before Army Courts-Martial, Paragraph 15A (Jan. 1, 2001). According to Neder, then, such pretrial materials could not have constituted the basis of a trial verdict.

The Neder "harmless error" rule does not apply here for yet another reason. Evidence introduced at trial as Defense Exhibit P contained stipulated facts supporting New's claim that the U.N. uniform was unauthorized. Appendices 3 and 4, *Record of Trial*, Volume 3, 740-43 and Volume 4, Defense Exhibit P. Even CAAF Judge Sullivan conceded that this was "evidence that [the] order to wear U.N. badges was 'patently illegal.'" United States v. New, *supra*, 55 M.J. at 127. Inexplicably, Judge Sullivan later asserted that there was "no real

[7] In courts-martial, pretrial exhibits are called Appellate Exhibits ("App. Exh.") and are marked with Roman numerals. Trial exhibits are marked with capital letters for the defense ("Exh. A") and with arabic numerals for the prosecution ("Exh. 1").

contest on the unlawfulness of the order," because New had "proffered no evidence that the safety conditions in Macedonia did not make wearing of [the U.N. uniform] appropriate or that the deployment was not a maneuver within the meaning of AR670-1." *Id.* at 127-28.

It was not New's burden, however, to disprove the prosecution's case; rather, in light of the facts stipulated to by the prosecution, the U.N. uniform was unauthorized, and thus, the prosecution had the burden to come forward with evidence proving beyond a reasonable doubt that the uniform fit within the "safety" exception of AR 670-1. But the prosecution did not do so. Judge Sullivan attempted to make up for the prosecution's shortfall, citing to testimony elicited from two defense witnesses and claiming that such testimony established the "uncontroverted" fact that the "order to wear [the U.N.] badges was given by [New's] commanders … for safety purposes." *Id.* at 127. But that was not the testimony of the JAG officer who told New and his fellow soldiers at an October 4, 1995 briefing that the reason for wearing the U.N. uniforms was "Because they look fabulous!" Appendix 3, *Record of Trial*, Volume 3, 658; Appendix 4, *Record of Trial*, Volume 4, Defense Exhibits I and J.[8] Had the **real** reason for the U.N. uniform been "safety" in a "maneuver" area, as the prosecution later claimed it to be, the JAG officer had ample opportunity to testify to that effect. Instead, at trial, the officer vigorously defended his answer as a joke, indicating that New's question about the Army's reason for requiring the U.N. uniform did not deserve a serious answer. *See* Appendix 3, *Record of Trial*, Volume 3, 658-63.

---

[8] The JAG officer's entire visual presentation is included in Appendix 4, *Record of Trial*, Volume 4, Appellate Exhibit VII.

But New did deserve a serious answer, not only at the October 1995 briefing, but at his trial. Unlike the defendant in Neder, New vigorously contested the fact issues of "safety" and "maneuver area" at the court-martial, noting his objections to the military judge's interlocutory ruling that such issues were matters for the judge alone, and listing those issues as among the facts in dispute to be resolved by the military jury. Appendix 2, *Record of Trial*, Volume 2, 424-44. By the military judge's ruling excluding such evidence at the trial, New was clearly prejudiced. Unlike Neder, the prosecution did not introduce any evidence to establish the missing element of the lawfulness of the order. Hence, there was no way to know, as required by Neder, whether the military jury would have acquitted New on such evidence. The "harmless error" rule of Neder simply does not apply. *See* Neder v. United States, *supra*, 527 U.S. at 46-47.

C. The Military Courts Disregarded the Due Process Standards of Crane v. Kentucky and Simmons v. South Carolina

As Justice O'Connor observed in her concurring opinion in Simmons v. South Carolina, 521 U.S. 154, 175 (1994), "one of the hallmarks of due process in our adversary system is the defendant's ability to meet the State's case against him." And as the full U.S. Supreme Court has observed, the due process clause obligates the Government to prove beyond a reasonable doubt every element of an offense. Jackson v. Virginia, 443 U.S. 307, 316 (1979). Yet, CAAF unanimously agreed that this Court's "political question doctrine" precluded SPC New from adjudicating his claims that the order to don the UN uniform was unlawful because it was issued pursuant to a presidential order to deploy an American soldier in violation of Sections 6 and 7 of the United Nations Participation Act and Section 2 of Article

II of the United States Constitution. This ruling was contrary to precedent, and it is plainly wrong. Applying the political question doctrine in this case constituted a violation of Due Process of Law, having created an irrebuttable presumption of the legality of the military order in disregard of the constitutionally-required standard of proof beyond a reasonable doubt.

1. The Application of the Political Question Doctrine Denied Due Process to New

Prior to United States v. New, the CAAF consistently required that, before it would presume that an order was lawful, the prosecution must prove that the order at issue "required the performance of a military duty." *See* United States v. McDaniels, 50 M.J. 407 (1999); United States v. Nieves, 44 M.J. 96, 98 (1996); Unger v. Ziemniak, 27 M.J. 349, 350, 358-59 (1989); United States v. Smith, 21 U.S.C.M.A. 231, 45 C.M.R. 5 (1972); United States v. Gentle, 16 U.S.C.M.A. 437, 37 C.M.R. 57 (1966); United States v. Musguire, 9 U.S.C.M.A. 67, 25 C.M.R. 329 (1958); and United States v. Robinson, 6 U.S.C.M.A. 347, 350-53, 20 C.M.R. 63 (1955). These rulings are reflected in the Military Judge's Benchbook, which instructs that "[a]n order, to be lawful, must relate to specific military duty and be one which the member of the armed services is authorized to give." Military Judge's Benchbook, para. 3-16-3d (Dept. Of Army Pamphlet 27-9: 1996). Similarly, the Manual for Courts-Martial states that, for an order to be lawful, the officer who issued the order "must have authority to give such an order. Authorization may be based on law, regulation, or custom of the service…." Manual for Courts-Martial, 1969 (Rev. ed.), para. 14.c.(2)(a)(ii). *See* W. Winthrop, Military Law and Precedents 572 (U.S. War Dept., Wash., D.C., 2d ed. 1920).

In this case, the prosecution predicated the lawfulness of the order to don the U.N. uniform upon the authority of a commander to alter the normal Army uniform for "safety" purposes in a "maneuver" area. In response, the military judge ruled that "the adding of [the] UN uniform has a function specifically designed to enhance the safety of United States armed forces in Macedonia." Appendix 2, *Record of Trial,* Volume 2, 426. Had there been no impending order to deploy the 1/15 Infantry as part of the U.N. deployment to Macedonia, there would have been no order to don the U.N. uniform at all, there being no justifying "safety" reason. The order to deploy, therefore, "generated" the order to don the U.N. uniform, as the specification of which New was charged and convicted expressly stated: "[T]hat New … having knowledge of a lawful order … to wear the prescribed uniform for the deployment to Macedonia … which it was his duty to obey, did … fail to obey the same." Appendix 1, *Record of Trial,* Volume 1, 15 and Charge Sheet.

In United States v. Noyd, 18 U.S.C.M.A. 483, 489, 40 C.M.R. 195 (1969), CAAF proclaimed that "[a]n order, apparently valid on its face, may be illegal because it is based on, **or has its generating source in, an unlawful command of a superior**" (emphasis added). *See also* United States v. Voorhees, 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1969). Had CAAF applied its ordinary rule, New's claim that the Macedonian deployment was unlawful, if sustained, would have defeated the presumption that the order to don the U.N. uniform was a lawful safety measure. Thus, the prosecution would have failed to prove a violation of 10 U.S.C. Section 892(2).

CAAF refused, however, to apply its normal rule, holding instead that the "political question doctrine" precluded the military courts from addressing the lawfulness of the order to

deploy. Whether the lawfulness of an order is for the military judge (as the CAAF plurality concluded) or an element of the offense for the military jury (as the two concurring CAAF judges maintained), surely CAAF Judge Effron was correct, when he stated in his separate opinion, that "the political question doctrine may not be used as an excuse for avoiding issues committed by law to the court-martial process … [w]here the legal principles are directed at the rights and responsibilities of servicemembers." United States v. New, *supra*, 55 M.J. at 110-11.

The CAAF plurality concluded that the "rights and responsibilities" of New were not implicated by its decision to avoid his claims concerning the illegality and unconstitutionality of the Macedonian deployment, because those claims, like a soldier's claim of "conscientious objection," are outside the jurisdiction of the court-martial. *Id*. at 106-08. That ruling, however, directly conflicts with prior rulings of this court and the United States Court of Appeals for the District of Columbia in the original habeas corpus proceeding. *See* U.S. ex rel. New v. Perry, 919 F. Supp. 491 (D. D.C. 1996); New v. Cohen, 129 F.3d 639 (D.C. Cir. 1997). Both this court and the court of appeals said just the opposite, distinguishing New's claim from that of a conscientious objector, and noting that the latter's claim, if sustained, entitled the objector to immediate discharge from the military. In the original habeas proceeding, however, this court and the court of appeals, fully anticipating that the military courts would rule on the merits of New's claims, ruled that a soldier who is charged with disobedience of a lawful order remains subject to court-martial jurisdiction. Perry, 919 F. Supp. at 496-97, 499; Cohen, 129 F.3d at 642-44, 646.

According to this court's and the court of appeals' rulings on New's Original Petition, CAAF's reliance on conscientious objector cases such as United States v. Johnson, 17 U.S.C.M.A. 246, 38 C.M.R. 44 (1967), and United States v. Lenox, 21 U.S.C.M.A. 314, 319, 45 C.M.R. 88, 93 (1972), was totally misplaced. As those cases demonstrate, and as this court and the court of appeals observed in New's original habeas proceeding, a conscientious objector whose request for discharge has been wrongfully denied may avail himself of an administrative process for relief. United States v. Johnson, *supra*, 17 U.S.C.M.A. at 92; United States v. Lenox, *supra*, 21 U.S.C.M.A. at 317-19; Perry, *supra*, 919 F. Supp. at 497; Cohen, 129 F.3d at 646-47. Also, in New's original habeas proceeding, both this court and the court of appeals found no such administrative means available to New to present his claim of unlawfulness of an order. Perry, 919 F. Supp. at 497; Cohen, 129 F.3d at 646. The military tribunals' use of the political question doctrine to deny New his day in court clearly deprived New of his right to challenge the unlawfulness of the order to don the U.N. uniform on the ground that it was "generated" by an earlier unlawful order.[9]

CAAF's ruling — that the political question doctrine justified denying SPC New the right to have his claim of the unlawfulness of the Macedonian deployment adjudicated on the merits — while at the same time affirming the lawfulness of the order to don the U.N. uniform

---

[9] CAAF's reliance on United States v. Huet-Vaughn, 43 M.J. 105 (1995), is equally misplaced. Huet-Vaughn was not even charged with disobedience of a lawful order, but with "desertion with intent to avoid hazardous duty and shirk important service…." *Id.*, 43 M.J. at 115. As part of her defense that she did not have the requisite intent, Huet-Vaughn claimed that by her actions avoiding service in the Persian Gulf, she intended "to contest the legality of the decision to employ military forces in the .. Gulf." The CAAF ruled her claim to be "a nonjusticiable political question" and "irrelevant" to the offense charged. *Id.*, 43 M.J. at 115. Under the Noyd rule, however, New's claim that the Macedonian deployment was unlawful goes to the heart of the charge of disobedience of a lawful order when the order at issue, as here, "has its generating source in … an unlawful command of a superior." United States v. Noyd, *supra*, 18 U.S.C.M.A. at 489.

because it was required for "safety purposes" during that same deployment, is simply indefensible. At the very heart of the constitutional prohibition against the deprivation of life, liberty and property except by Due Process of Law is the rule of law, not politics. To permit the prosecution to rely upon the Macedonia deployment to establish its case that the U.N. uniform was ordered for "safety" purposes in a "maneuver" area, and at the same time deny New the right even to be heard on his challenge to the legality and constitutionality of that deployment, unquestionably deprives New of his liberty and property in violation of the Due Process Clause. *Cf.* Crane v. Kentucky, 476 U.S. 683, 690 (1986).

Surely, the application of the political question doctrine here, when it deprives New of a critical defense, is "too blunt an instrument for advancing" the Government's claimed interests. *Cf.* Degen v. United States, 517 U.S. 820 (1996). Moreover, because lawfulness is an element of the offense, the CAAF ruling contradicts the Due Process Clause, which obligates the Government to prove beyond a reasonable doubt every element of an offense. Jackson v. Virginia, 443 U.S. 307, 316 (1979).

2. The Military Tribunals' Misapplication of the Political Question Doctrine Denied Due Process of Law to New

In his pretrial motions, New laid out a fivefold challenge to the legality of the Macedonian deployment. Two challenges were based upon claims of violation of Sections 6 and 7 of the United Nations Participation Act (UNPA). The others interposed constitutional claims, alleging violations of the Commander-in-Chief and Appointments Clauses of Section 2, Article II, and of the Thirteenth Amendment. The CAAF dismissed all five of these claims as nonjusticiable political questions.

To reach this conclusion, the plurality mischaracterized New's five distinct claims as a single challenge to the "constitutionality of the President's decision to deploy Armed Forces in [Macedonia]." United States v. New, *supra,* 55 M.J. at 109, 110-11. Both concurring judges agreed with this erroneous description. *Id*. at 116, 129-30. Not only did CAAF mischaracterize New's claims, but it did not resolve any of them in conformity with U.S. Supreme Court standards governing the application of the political question doctrine.

First, CAAF misapplied the political question doctrine to preclude review of New's claims that the order to deploy violated Sections 6 and 7 of the UNPA. According to Section 6 of the UNPA, the President may commit American soldiers to participate in a U.N. combatant operation undertaken pursuant to Chapter VII of the U.N. Charter only after securing "by Appropriate Act or joint resolution" Congressional approval of an agreement between the President and the U.N. 22 U.S.C. Section 287d. According to Section 7 of the UNPA, the President is authorized by Congress to commit American soldiers to a noncombatant role as "observers [or] guards" in a peacekeeping effort pursuant to Chapter VI of the U.N. Charter, limiting the President to assign no more than 1,000 such soldiers at any one time and requiring formal assurance from the President that the soldiers so detailed would not participate in combatant roles "contemplated by Chapter VII of the [U.N.] Charter." 22 U.S.C. Section 287d-1.

In support of these two statutory claims, SPC New presented, through a qualified expert witness, a large volume of evidence, including U.N. Resolutions related to the combatant nature of the Macedonian deployment and the absence of Congressional approval. Appendices 2, 5, and 6, *Record of Trial*, Volume 2, 323-75; Volume 5, Appellate Exhibits

XXXVII-XLII; and Volume 6, Appellate Exhibits Exh. LXIII-LXIIIR. Thus, New placed before the military judge credible evidence related to questions of statutory interpretation and application, and of construction and application of a treaty. The Supreme Court has ruled that issues of interpretation and application of statutes and treaties are **not** nonjusticiable political questions. Japan Whaling Ass'n. v. American Cetacean Society, 478 U.S. 221, 229-30 (1986) ("[T]he courts have authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts."). Therefore, any claim "that [the President] acted in excess of powers granted him by Congress" is entitled to "judicial relief," even when it touches on the military. Harmon v. Brucker, 355 U.S. 579, 581-82 (1958).

As for New's three constitutional claims, Baker v. Carr, 369 U.S. 186 (1962), established that whether a constitutional claim raises a nonjusticiable political question depends primarily upon "the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination." *Id.*, 369 U.S. at 210. The CAAF ignored this directive, failing to examine properly each of New's constitutional claims.

As for New's claim that the order to deploy under U.N. command and control constituted "involuntary servitude" contrary to the Thirteenth Amendment, the issue is clearly justiciable. *See* Bailey v. Alabama, 219 U.S. 219 (1911); Butler v. Perry, 240 U.S. 328 (1916); Arver v. United States, 245 U.S. 366, 390 (1918).

As for New's claim that, by the order to deploy to Macedonia as a member of a U.N. military force, New was placed under the command and control of a foreign military officer

who had not been appointed in accordance with the procedural provisions set forth in Section 2, Article II, of the US Constitution, the Supreme Court has not declined to address on the merits a variety of similar claims of violations of the Article II Appointments Clause. *See*, *e.g.*, Shoemaker v. United States, 147 U.S. 282 (1893); Buckley v. Valeo, 424 U.S. 1, 124-41 (1976); Morrison v. Olson, 487 U.S. 654 (1988); Freytag v. Commissioner, 501 U.S. 868 (1991); Weiss v. United States, 510 U.S. 163 (1994). Included among these adjudicated claims is whether an appointee in question is an "officer of the United States," that is, a person "exercising significant authority pursuant to the laws of the United States." Buckley v. Valeo, *supra*, 424 U.S. at 126. Whether the U.N. officer in command and control of the Macedonian deployment exercises significant authority over American soldiers so deployed is, therefore, a justiciable question. *Cf*. Riley v. St. Luke's Hospital, 252 F.3d 749 (5th Cir. 2001).

Finally, as for New's claim that, by deploying American soldiers under the command and control of foreign military officers, the order violated the constitutional mandate that "[t]he President shall be Commander-in-Chief of the Army and Navy of the United States," this, too, is a justiciable question. The constitutional text states that the presidential role as Commander-in-Chief is mandatory, not discretionary, indicating on its face that the President's role as Commander-in-Chief is a matter of obligation, not a matter of personal will. New's claim is that, contrary to his constitutional **duty**, the President wrongfully **delegated** his authority as Commander-in-Chief, not that, contrary to his constitutional **discretion**, the President unwisely **exercised** that power.

As Justice Scalia recently observed in Printz v. United States, 521 U.S. 898, 936 (1997), wrongful delegation of executive power "effectively transfers [power] without

meaningful Presidential control…." With respect to the President's constitutional powers over America's armed forces, Chief Justice Taney wrote over 150 years ago that the very heart of the role of Commander-in-Chief is "to direct the movements of the naval and military forces placed in his command, and to employ them in the manner that he may deem most effectual…." Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1850). Turning American soldiers over to U.N. command and control of foreign officers who neither report to, nor take orders from, the President, however "limited" or "temporary" the situation may be (Appendix 4, *Record of Trial*, Volume 4, Appellate Exhibit IV), "shatter[s]" both the "vigor and accountability" that the constitutionally-prescribed "unity in the Federal Executive" was designed to preserve. *See* Printz v. United States, *supra*, 521 U.S. at 936.

D. The Military Courts did not Comply with Burns v. Wilson

According to Burns v. Wilson, 346 U.S. 137, 142 (1953), "it is not open to a federal civil court to grant [a writ of habeas corpus] simply to reevaluate the evidence." But where a military tribunal has not dealt "fully and fairly" with a constitutional claim raised by the defendant, and alleged in the habeas corpus petition, then it is incumbent upon the habeas corpus court to address that claim on the merits. Such is the case with respect to New's claim that the order "to wear the prescribed uniform for the deployment to Macedonia, *i.e.*, the U.N. patches and cap" violated the foreign emoluments clause of Article I, Section 9 of the United States Constitution.

In both his pretrial motions and his appellate briefs, New contended that, even if the order to don the U.N. uniform met the "safety" and "maneuver" exception of AR 670-1, the order, nevertheless, violated the foreign "emoluments" and "office" prohibition of Article I,

Section 9 of the United States Constitution. Not once did any military judge specifically address this claim. The CAAF plurality may have attempted to treat it, but, if they did, they did so by miscasting New's "transfer of allegiance" claim as though New were arguing that he had a right to "substitut[e his] personal judgment of the legality of an order for that of his superiors and the Federal Government." United States v. New, *supra,* 55 M.J. at 107.

Just the opposite is the case. Article I, Section 9, Clause 8, of the United States Constitution makes clear that receipt of any "present, emolument, office, or title … from any … foreign state" by a "person holding any office … of trust" under the United States is **not** a matter for the "personal judgment" of any officer of the federal government, even when that officer is the President, but requires the explicit "consent of Congress." By the order to wear the U.N. patches and cap, the "prescribed uniform for the Macedonia deployment," New was being ordered to transfer his allegiance as an American soldier to a U.N. soldier, from serving under the President of the United States as his Commander-in-Chief, to serving under the U.N. Secretary-General. There is no Act of Congress authorizing the President of the United States, much less New's commanding officer, to order an American citizen soldier to assume such a foreign office. To the contrary, Section 6 of the UNPA requires specific congressional approval before the President may order an American soldier to participate in a combatant-type deployment, such as the one in Macedonia. Appendix 2, *Record of Trial,* Volume. 2, 345-49; Reinhardt, "The United States Military and United Nations Peacekeeping Operations," 19 HOUS. J. INT'L. L. 245, 267-68 (1996). *See* Fink, "The Blurring of the Mandate for the Use of Force in Maintaining International Peace and Security," 19 MD. J. OF INT'L. TRADE 1, 25-

44 (1995); Glennon, "The Constitution and Chapter VII of the United Nations Charter," 85 AM. J. INT'L. L. 74 (1991).

In short, by refusing to acknowledge that New was court-martialed for refusing to receive and wear the uniform of allegiance to a foreign government, the military courts ignored the very purpose of Article I, Section 9, Clause 8, which is to ensure that "officers of the U.S. [are] independent of external influence." J. Madison, NOTES OF THE DEBATES IN THE FEDERAL CONVENTION 516 (Reprint Tansill edition, Norton: N.Y. 1987).

E. Separation of Powers Requires the Granting of New's Motion to Reopen These Proceedings and for Leave to File an Amended Petition for Writ of Habeas Corpus.

The military order involved in this case was no ordinary order. Rather, the order that New don the UN uniform came as the direct consequence of the decision of the President of the United States to commit United States troops to a United Nations combatant operation. At stake in this case, then, from the moment that New indicated to his superiors that he could not obey the order, was the lawfulness of the President's actions. By pretrial motions in his court-martial, New pressed his claim that the President had acted unlawfully, both under the UNPA and Article II of the US Constitution, and thus supported his claim that he had not disobeyed a lawful order, as charged under Article 92(2) of the UCMJ.

If a military judge were to rule in New's favor on any one of these claims, that judge would, in effect, overrule the President, his Commander-in-Chief. Likewise, on appeal before the ACCA, the Army officers deciding his case were equally subject to the President's command influence. Even the CAAF is not immune. Although the judges serving on CAAF are civilians, and therefore not under the direct authority of the President as Commander-in-

Chief, they are part of the executive branch with limited terms of office, subject to removal by the President, and, thus, subordinate to the President. More than once the authority of the CAAF to act independently of the executive branch has been questioned, prompting Robinson O. Everett, once the court's chief judge, to urge Congress to reconstitute the court under Article III. *Written Statement of Hon. Robinson O. Everett,* Hearing on S. 974 Before the Military Personnel and Compensation Subcommittee of the Committee on the Armed Forces, House of Representatives 49 (98th Cong., 1st Sess. Nov. 9, 1983).

In a case, such as the one here, in which the lawfulness of the President's action is at issue, our constitutional system of separation of powers requires, if justice is to be done, that the critical statutory and constitutional issues be determined by an Article III court, completely independent from the President's command or executive influence.

CONCLUSION

For the reasons stated above, New's motion to file an amended and supplemental petition for a writ of habeas corpus should be granted, and an order to show cause why the amended and supplemental writ should not be granted should be issued to the respondents.

Respectfully submitted,

William J. Olson (D.C. Bar # 233833)

John S. Miles (D.C. Bar # 166751)
WILLIAM J. OLSON, P.C.
8180 Greensboro Drive, Suite 1070
McLean, Virginia 22102-3860
Tele: (703) 356-5070
Fax: (703) 356-5085

Attorneys for Petitioner

OF COUNSEL:

Herbert W. Titus
TROY A. TITUS, P.C.
5221 Indian River Road
Virginia Beach, Virginia 23464
Tele: (757) 467-0616
Fax: (757) 467-0834

Henry L. Hamilton
RATCHFORD & HAMILTON, LLP
1531 Laurel Street
Columbia, South Carolina 29201
Tele: (803) 779-0700
Fax: (803) 779-7006