No. 06-691

IN THE

Supreme Court of the United States

UNITED STATES *EX REL.* MICHAEL G. NEW,

Petitioner,

v.

ROBERT M. GATES, SECRETARY OF DEFENSE, *ET AL.*

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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Contrary to the Government's argument that this case would be a "poor vehicle" to address the questions presented by Michael New's Petition ("Pet."),[1] just the opposite is true. New's Petition presents to the Court a unique opportunity to resolve existing conflicts and confusion prevailing in the federal courts for over five decades over the proper standard of review to be applied to collateral attacks on courts-martial convictions in a case of critical importance to the administration of military justice.

1. Contrary to the Government's Assertion, This Case Is Appropriate for Review.

According to the Government, the conflict among the circuits over the standard of review governing collateral attacks on courts-martial convictions has matured sufficiently for review by this Court in **habeas** collateral attacks, but that conflict has not yet emerged in **non-habeas** attacks, such as presented by New's petition. Resp. Br., pp. 13-14. However, it is precisely because New was not found to be "in custody" that this case presents a unique opportunity for this Court to clarify the standard of review in both kinds of cases. On the one hand, if the Court were to hold that the **same** standard of review applies in both habeas and non-habeas collateral attacks, it would need to clarify that standard. On the other hand, if the Court were to hold that a **different** standard of review applies in non-habeas collateral attacks, it would still be necessary to articulate that standard and clarify how it differs from the habeas standard, an analysis that would necessarily entail clarifying the Burns v. Wilson "full and fair consideration" test.

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[1] *See* Brief for the Respondents in Opposition ("Resp. Br. "), pp. 13-14.

In either event, the Court should grant certiorari to clarify the standard of review that applies in non-habeas collateral attacks. Contrary to the Government's equivocal assertion, this Court's decision in Schlesinger v. Councilman, 420 U.S. 738 (1975), does not "**seemingly support[]** the proposition that the standard of review in collateral challenges under [28 U.S.C.] Section 1331 should be more deferential" than challenges cognizable under 28 U.S.C. Section 2241. Resp. Br., p. 13 (emphasis added). Nowhere in that case did the Court indicate that the "fundamental defect" test was intended to establish a different, more deferential standard of review in non-habeas collateral attacks. Indeed, in Councilman, this Court observed that both non-habeas cases, and "habeas cases, demonstrate a **uniform** approach to the problem of collateral relief from the consequences of court-martial judgments." *Id.*, 420 U.S. at 748 (emphasis added). Further, as pointed out by New's Petition and the National Institute of Military Justice's *amicus* brief ("NIMJ Br."), the Councilman case did not involve a collateral attack on a court-martial conviction and thus did not even address what the standard of review should be in a non-habeas case. *See* Pet., p. 16. *See also* NIMJ Br., pp. 15-20.

Finally, the Government has contended that the standard of review issue raised in this case should "await further percolation," because there supposedly is no "case (other than this one) that has even discussed, much less rejected, the argument that the standards should be different." *See* Resp. Br., pp. 13-14. This effort to isolate this case into a class of one should be rejected because the court of appeals below, like all of the other courts that have dealt with a non-habeas collateral attack, wrestled with the Burns "full and fair consideration" formula before setting its standard of review. *See* U.S. *ex rel.* New v. Rumsfeld, 448 F.3d 403, 407-08 (D.C. Cir. 2006); Pet., pp. 5a-7a. The major difference between this case and the other non-habeas cases is that no other court has

gone so far in a non-habeas case as to water down the Burns standard, the other courts having applied that standard without discriminating between the two types of collateral attacks. *See, e.g.,* Bowling v. United States, 552 F. Supp. 54, 56-57 (Cl. Ct. 1982). Indeed, prior to this case, the "governing precedent" in the District of Columbia Circuit was Kauffman v. Secretary of the Air Force, 415 F.2d 991, 995, *cert. denied*, 396 U.S. 1013 (1970),[2] which had applied a far more stringent standard of review in a non-habeas collateral attack, fashioned from the Burns v. Wilson standard of "full and fair consideration"[3] developed by this Court in a habeas collateral attack.[4] By its radical and unexplained departure from Kauffman, the court below has brought the conflict and confusion over the standard of review to a culmination point. American servicemembers would not be well-served by another 50 years of "percolation." *See* Pet., pp. 16-18; NIMJ Br., pp. 2-4.

2. Contrary to the Government's Assertion, There Is No "Broad Agreement" Among the Circuits on the Standard of Review.

In an attempt to minimize the conflicting interpretations and applications of the Burns test, the Government claims that the courts of appeal are in "broad agreement on two principles," namely: (1) that "only claims involving fundamental or substantial constitutional errors are cognizable on collateral review"; and (2) that "the decisions of the military courts are entitled to at least some degree of deference." Resp. Br., p. 12.

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[2] *See* U.S. *ex rel.* New v. Rumsfeld, 350 F. Supp. 2d 80, 89 (D.D.C. 2004). Pet., p. 26a.

[3] *See* Kauffman, 415 F.2d at 996-97.

[4] *See* Burns, 346 U.S. at 139.

That argument is factually incorrect, and in any event does not obviate the need for review.

First, there is **no** consensus in the courts of appeal that "**only** claims involving fundamental or substantial errors are cognizable on collateral review." Most recently, the Third Circuit applied the standard of review set forth in the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254 (2000), to a habeas petition brought by a military prisoner. Brosius v. Warden, 278 F.3d 239 (3d Cir. 2002). Under that standard, claims that a court-martial conviction was obtained "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," are cognizable, as are claims that a decision was based on an "unreasonable determination of the facts." *Id.*, 278 F.3d at 245. *See* NIMJ Br., pp. 10-11, 13. Additionally, the Fifth and Tenth Circuits have adopted the Calley test, which expressly embraces review of a court-martial conviction on a **nonconstitutional** ground where "**exceptional circumstances have been presented which are so fundamentally defective as to result in a miscarriage of justice**." Calley v. Callaway, 519 F.2d 184, 203 (5th Cir. 1975) (emphasis added). *Accord*, Cothran v. Dalton, 83 F. Supp. 2d 58, 66 (D.D.C. 1999).

Second, the existence of a consensus that "the decisions of the military courts are entitled to at least **some** degree of deference," as the Government has contended, offers no judicial standard at all, as vividly illustrated by this very case. The court of appeals below ruled "that non-habeas review is if anything **more deferential** than habeas review of military judgments," but did not articulate what that standard of deference should be, having "serious doubt whether the judicial mind really is capable of applying the sort of fine gradations of deference that the **varying formulae** may indicate." U.S. *ex*

rel. New v. Rumsfeld, 448 F.3d at 408; Pet., p. 7a. (emphasis added). Ironically, the Government's assertion that there is a consensus on the degree of deference to be accorded military courts rests upon Brosius, a habeas case, and Kauffman, a non-habeas case.[5] But this contradicts the ruling below that the degree of deference differs in the two kinds of cases — a ruling which, by its Brief in Opposition, the Government now seeks to uphold.

In short, the Government has strained at a gnat, hoping that this Court will swallow a camel. On the one hand, it asserts "broad agreement"[6] among the circuits and, on the other, admits that there are "inconsistencies" in the "different formulations of the standard of review for collateral challenges to convictions by courts-martial."[7] This difference, however, arises **not** because some of those challenges are cognizable under "the habeas statute," and others under the "general federal-question statute," but because Burns has engendered the conflict and confusion in whatever type of case it has been applied. *See* Pet., pp. 11-16; NIMJ Br., pp. 8-11.

3. Contrary to the Government's Argument, New's Claims Are Cognizable in a Collateral Attack on His Court-Martial Conviction.

The Government contends "that under any plausible formulation of the applicable standard, petitioner would not prevail on either of the underlying claims that he continues to advance." Resp. Br., p. 14. However, not only has the

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[5] *See* Resp. Br., p. 12.

[6] *See id.*

[7] *See id.*, p. 13.

Government failed to articulate that "plausible" standard, but it has proposed a disputed standard of review by which it then purports to assess the adequacy of New's collateral attack.

The Government asserts that New's claim that he was denied due process by the military court's ruling — that the lawfulness of the uniform-modification order need not be proved beyond a reasonable doubt — "is not of constitutional dimension," but only a matter of statutory interpretation and, therefore, "not ... cognizable on collateral review." Resp. Br., pp. 15-16. Citing Bowling, 713 F.2d at 1562, and Calley, 519 F.2d at 199, the Government has assumed that any "plausible" standard of review would foreclose any review of a claimed error in statutory interpretation, no matter how egregious that error may have been. But the Calley standard squarely contradicts the Government's position.

As Judge Friedman — the district court judge before whom New's Petition was initially presented — has already pointed out, the Calley court stated:

> "Most habeas corpus cases have provided relief only where it has been established that errors of constitutional dimension have occurred. But the Supreme Court **held** in a recent decision that **nonconstitutional errors of law** can be raised in habeas corpus proceedings where 'the claimed error of law was "a fundamental defect which inherently results in a complete miscarriage of justice,"' and when the alleged error of law "'presented exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.'" *Davis v. United States*, 417 U.S. 333, 346 ... (1974), quoting *Hill v. United States*, 368 U.S. 424, 428 ... (1962). Thus, an essential

> prerequisite of any court-martial error we are asked to review is that it present a substantial claim of constitutional dimension *or* that **the error be so fundamental as to have resulted in a gross miscarriage of justice**. *Calley v. Callaway* ... [U.S. *ex rel.* New v. Rumsfeld, 350 F. Supp. 2d 80, 91 (D.D.C. 2004), Pet., pp. 29a-30a. (italics original) (bold added).]

Moreover, Judge Friedman went out of his way to remind the Government that "[a]t oral argument, [the Government] **incorrectly** interpreted" Cothran v. Dalton, 83 F. Supp. 2d 58 (D.D.C. 1999), "as limiting collateral review to fundamental constitutional errors":

> But consistent with *Davis* v. *United States*, 417 U.S. 333 ... (1974), Judge Flannery actually held in Cothran that *any* constitutional or jurisdictional error is subject to review on collateral attack, **while statutory claims are subject to such review only if they are so fundamental as to render the court-martial proceeding unfair....** [U.S. *ex rel.* New v. Rumsfeld, 350 F. Supp. 2d at 91 n.6; Pet., p. 30a (italics original) (bold added).]

Additionally, the AEDPA standard applied in Brosius would permit a collateral attack based upon a claim that a court-martial conviction was obtained "contrary to, or involv[ing] an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." Brosius, 278 F.3d at 245.

Thus, under either the Calley or the Brosius standards, New has clearly alleged a cognizable claim in Count I of his complaint. *See* Second Amended Complaint for Declaratory

Judgment, Injunctive Relief and an Order in the Nature of a Writ of Mandamus Amending Petition for Writ of Habeas Corpus ("Compl.") ¶¶ 40-41; Pet., p. 181a.

4. Contrary to the Government's Argument, New's Due Process Claims Are Meritorious and of Substantial Constitutional Dimension.

Although the Government has acknowledged that this Court has ruled that, "**in a criminal case"** the Due Process Clause requires the prosecution to "'pro[ve] beyond a reasonable doubt ... every fact necessary to constitute the crime with which [the defendant] is charged,"[8] the Government has contended that this standard does not apply to a court-martial "in light of the more limited role that the Due Process Clause plays in the military justice system," citing Weiss v. United States, 510 U.S. 163, 176-78 (1994). Resp. Br., p. 16. But Weiss involved a due process claim **challenging** the constitutionality of a clearly established **congressional policy** to which "courts 'must give particular deference to [in light of] Congress['s] ... authority to regulate the land and naval forces.'" *Id.*, 510 U.S. at 177. In contrast, New's due process claims do **not** challenge congressional policy. Rather, those claims **rest on constitutional norms** embodied in statutory provisions governing court-martial practice and procedure, and in statutory provisions limiting the president's authority to deploy American armed forces in the service of the United Nations, all of which were enacted by Congress in pursuance of its authority to "make Rules for the Government and Regulation of the land and naval forces." *See* Pet., pp. 22-29.

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[8] *See* Resp. Br., p. 15 (emphasis added).

With respect to New's claim that he was denied due process of law by the court-martial ruling that "lawfulness" was not an element of the offense charged, the military courts misconstrued an offense **defined by Congress** in 18 U.S.C. Section 892(2), in disregard of the "rule of [statutory] construction ... in Neder v. United States, 527 U.S. 1 (1999)." *See* Compl. ¶ 40, Pet., p. 181a. Further, New has claimed that, by eliminating the order's "lawfulness" as an element of the offense — consigning it as an issue of law for the judge, rather than a mixed question of law and fact for the military jury — the military courts have "evaded" the due process requirement of proof of every element of an offense beyond a reasonable doubt, embraced by Congress in 18 U.S.C. Section 851(c). *See* Compl. ¶¶ 19, 30; Pet., pp. 177a, 179a. As the Navy-Marine Corps Court of Criminal Appeals stated in United States v. Myers, 51 M.J. 570 (N.M.C.C.A. 1999), "the Due Process Clause of the Constitution requires the prosecution to prove each and every element of every offense alleged against an accused by legal and competent evidence beyond a reasonable doubt." *Id.,* 51 M.J. at 578. Yet, in New's case — in violation of this due process principle — the uniform-modification order was justified not by the introduction of any evidence, but solely by the contradictory and unsupported arguments of the prosecutor. *See* Compl. ¶¶ 15, 17, 19, 23; Pet., pp. 175a-178a. As Judge Sullivan of the United States Court of Appeals for the Armed Forces ("CAAF") observed, in so doing, New's court-martial represented a "**radical departure** from our political, legal and military tradition."[9] United States v. New, 55 M.J. 95, 115 (2001) (Sullivan, J., concurring) (emphasis added).

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[9] *See, e.g.,* Judge Sullivan's analysis of the text of 18 U.S.C. § 892(2), treatises, courts-martial manuals, and cases establishing "lawfulness" as an element of the offense alleged in the charge against New. United States v. New, 55 M.J. 95, 120-22 (2001); Pet., pp. 108a-115a.

Although the Government disputes New's claim that he was denied due process by the misuse of this Court's political question doctrine, it ignores the fact that New's challenge to the legality of the Macedonian deployment was primarily based upon explicit statutory grounds, supported by expert testimony that the Macedonian deployment violated the United Nations Participation Act. Yet, the military courts refused to address the merits of this statutory claim, indiscriminately sweeping it aside as a nonjusticiable political question.

The Government's response blithely claims that using "the political question doctrine to prohibit [New] from challenging the validity of the underlying *deployment* order constituted a reasonable restriction on the scope of [New's] defense and thus did not offend due process." Resp. Br., p. 19. In reality, however, the military courts denied New his fundamental right to a fair trial, having deprived him of any meaningful opportunity to contest the legality of the ordered Macedonian deployment,[10] while allowing the prosecution to rely upon the supposed legality of that same deployment to justify what, as CAAF Judge Sullivan observed, would otherwise have been a "patently illegal" order. *See* United States v. New, 55 M.J. at 127.

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[10] *See* Compl. ¶¶ 9, 12, 16, 26, 27, 44; Pet., pp. 172a-176a, 178a-179a, 182a. *See also* Pet., pp. 27-30.

Respectfully submitted,

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