IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States *ex rel*. Michael G. New,	)	
Appellant,	)	
	)	No. 05-5023
v.	)	
Donald H. Rumsfeld, *et al.*,	)	
Appellees.	)	

APPELLANT'S RESPONSE IN OPPOSITION TO
APPELLEES' MOTION FOR SUMMARY AFFIRMANCE

Pursuant to Rule 27(a)(3), F.R.App. P., and Local Rule 27(3) of this Court, Appellant files this Response in Opposition to Appellees' Motion for Summary Affirmance. As Appellees concede, in the very opening paragraph of their motion, Appellees can only prevail on their motion by affirmatively demonstrating that the "'merits of this appeal are **so clear**'" that "'**no benefit** will be gained by further briefing and argument of the issues presented.'" *See* Appellees' Motion for Summary Affirmance ("Mot. Sum. Aff."), p. 1 (emphasis added). As demonstrated herein emphatically, Appellees have failed to carry that burden.[1] Indeed, it appears that Appellees' motion seeks to misuse the rule permitting motions for summary affirmance, mischaracterizing the facts and issues involved so as to deprive this Court of full briefing on a number of complicated, novel, and important issues on which the military judges were divided, which were erroneously resolved by the district court's extraordinary decision to

[1] Appellees' approach is reminiscent of their failed effort in 1996-1997 to obtain from this Court a summary dismissal of an earlier appeal. *See* Per Curiam Order, March 5, 1997, Docket No. 96-5158.

dismiss Appellant's complaint for failure to state a claim upon which relief can be granted.

I. APPELLEES' MOTION IS BASED UPON A MISCHARACTERIZATION OF CERTAIN FACTS RELEVANT TO THIS APPEAL.

Appellant has appealed to this Court from the district court's ruling granting Appellees' motion to dismiss for "failure to state a claim upon which relief can be granted," **not** from a finding "that appellant's claims were without merit," as Appellees contend. *See* Mot. Sum. Aff., p. 2. Not once in their motion have Appellees acknowledged that this matter came before the district court on a motion under Federal Rule of Civil Procedure 12(b)(6) which, according to this Court's standards governing such motions, required the district court: (a) to accept "**all** statement[s] of material fact" in the complaint "as true" and to rely upon **no** facts "outside the pleadings" (*see* Taylor v. Federal Deposit Insurance Corp., 132 F.3d 753, 762 (D.C. Cir. 1997) (emphasis added)); and (b) to **construe** the complaint "**liberally in** the **plaintiff['s] favor**, ... grant[ing] plaintiff[] the **benefit of all inferences** that can be derived from the facts alleged." Kowal v. MCI Communications Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994) (emphasis added). Yet, the district court's construction of Appellant's complaint is one of the issues now before this Court.

Not only do Appellees fail to apply any of these presumptions and limitations favoring Appellant's opposition to their Rule 12(b)(6) motion below, they completely disregard them. Drawing from the opinions of the Army Court of Criminal Appeals ("ACCA") and the Court of Appeals for the Armed Forces ("CAAF") — rather than from the four corners of Appellant's complaint, as required by Taylor — Appellees have detailed certain events leading up to Appellant's court-martial (Mot. Sum. Aff., pp. 2-3), none of which are relevant to Appellant's collateral attack upon the constitutionality of his court-martial conviction and of the military appellate opinions affirming that conviction, which are the sole subjects of Appellant's

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 ("2d Amend. Compl.") ¶¶ 8-38, attached hereto as Exhibit A.

To be sure, Appellees devote a short paragraph to certain facts alleged in Appellant's complaint, but provide only a brief summary of Appellant's motions at trial and the military judge's rulings on those motions. *See* Mot. Sum. Aff., p. 3. Remarkably, moreover, Appellees make no effort to deal with Appellant's numerous legal challenges to the "lawfulness" of the order at issue at Appellant's court-martial, nor the factual basis and legal grounds upon which the military judge ruled against him, as explicitly spelled out in Appellant's complaint. *See* 2d Amend. Compl. ¶¶ 9-10, 12-13, 16 (Exh. A, pp. 3-6). Furthermore, Appellees entirely omit from their motion the fact that Appellant objected to the military judge's decision to resolve the "lawfulness" of the order as an "interlocutory matter" — rather than to submit that issue as an element of the offense to be proved beyond a reasonable doubt to the military jury — which lies at the very heart of Count I of Appellant's complaint. *See* 2d Amend. Compl., ¶¶ 9-24, 39-41 (Exh. A, pp. 3-9, 12). Nor do Appellees even mention the fact that the military judge dismissed as nonjusticiable political questions Appellant's contentions that the order was unlawful because the deployment upon which it was based was unconstitutional and illegal. Yet, those contentions lie at the very heart of Count II of Appellant's complaint. *See* 2d Amend. Compl. ¶¶ 9-10, 12-13, 16, 42-44 (Exh. A, pp. 3-6, 12-13).

Compounding their failure to furnish this Court with a sufficient and accurate statement of the salient events of Appellant's court-martial, Appellees have completely neglected to provide any information as to what happened to Appellant's appeal in ACCA and CAAF. *See* Appellee's Mot. Sum. Aff., pp. 1-4. Yet, those facts also are alleged with specificity in

Appellant's complaint, and those allegations, like the ones detailing the rulings of the military judge, form the basis of each of the four counts of Appellant's complaint.

With respect to Count I, Appellant alleged that, while ACCA unanimously affirmed the military judge's ruling that the lawfulness of the UN uniform was an interlocutory issue for the judge, not an element of the offense to be proved beyond a reasonable doubt, CAAF split **three to two** on that issue. 2d Amend. Compl. ¶¶ 26, 28 (Exh. A, p. 9). Indeed, **one CAAF judge** — concurring on other grounds — **charged the plurality with having "'radical[ly] depart[ed] from our political, legal and military tradition'** ... that 'lawfulness ... was an element of the charged offense, and accordingly ... should have been presented to the "military jury."'" 2d Amend. Compl. ¶¶ 28-30 (Exh. A, pp. 9-10, emphasis added). Finally, the CAAF five-judge court disagreed, dividing **three to two**, as to whether — had the issue of the lawfulness of the uniform been submitted to the military jury to be proved beyond a reasonable doubt — there was a factual basis for a verdict of acquittal. 2d Amend. Compl. ¶¶ 30-31 (Exh. A, p. 10).

With respect to Count II, Appellant alleged that both ACCA and CAAF affirmed the military judge's finding against Appellant's claims that the Macedonian deployment was both unlawful and unconstitutional on the sole ground that all of such claims were nonjusticiable political questions. *See* 2d Amend. Compl. ¶¶ 26-27 (Exh. A, p. 9). And with respect to Counts III and IV, Appellants alleged that the military courts either failed to address Appellant's claims that the U.N. uniform was illegal in violation of Article I, Section 9 of the Constitution or, in the alternative, that the military courts failed to afford Appellant a full and fair opportunity to litigate that claim. *See* 2d Amend. Compl. ¶¶11, 14-15, 17, 21-23, 26-31, 45-49, and 50-56 (Exh. A, pp. 4-10, 13-15).

Having omitted from their motion a recitation of the events that occurred at Appellant's

court-martial and appeals, Appellees have neglected to argue their Motion for Summary Affirmance by "accord[ing] the complaint the spacious interpretation prescribed by the Federal Rules" governing Rule 12(b)(6) motions. *See* Schuler v. United States, 617 F.2d 605, 608 (D.C. Cir. 1979). For that reason alone, Appellees' motion should be denied. As indicated by the more detailed recitation of the facts herein, the facts and issues of this case are complex, and it seems obvious that this Court would benefit from regular briefing of both the facts and law by both parties. Without a complete statement of facts, and a more extensive examination of the issues, this Court cannot perform its duty to ascertain whether it is "beyond doubt that [Appellant] can prove no set of facts in support of his claim which would entitle him to relief," as required by Rule 12(b)(6). *See* Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

II. APPELLEES' MOTION FOR SUMMARY AFFIRMANCE OF APPELLANT'S CLAIM IN COUNT I IS BASED UPON A MISCHARACTERIZATION OF APPELLANT'S CLAIM.

In disregard of the "liberal construction" rule in Kowal, 16 F.3d at 1276, and the "spacious interpretation" admonition in Schuler, 617 F.2d at 608, the district court and the Appellees have misconstrued Count I of Appellant's complaint as a claim of a Sixth Amendment constitutional right to a jury trial, asserting that "appellant argued that ... the military judge's failure to submit the issue [of lawfulness of the uniform order] violated his Sixth Amendment right to a jury trial." *See* Mot. Sum. Aff., p. 6.

To the contrary, in Paragraph 41 of his Second Amended Complaint, Appellant has plainly alleged that he "was unlawfully and unconstitutionally denied his liberty and property without due process of law, contrary to the due process standards set forth by the U. S. Supreme Court in Gaudin v. United States, 515 U.S. 506 (1995), and in Jackson v. Virginia, 443 U.S. 307 (1979)." *See* 2d Amend. Compl. ¶ 41 (Exh. A, p. 12) . Because of Appellant's reliance upon

Gaudin, both the district court and Appellees have construed Appellant's claim in Count I of his complaint as a claim of right to a jury trial based upon the Sixth Amendment. *See* New v. Rumsfeld, 350 F. Supp.2d 80, 92-93 (D.D.C. 2004) and Mot. Sum. Aff., p. 6. Such a narrow reading of Count I is wholly impermissible under this Court's standards governing a Rule 12(b)(6) motion to dismiss.

First, Count I does not even mention the Sixth Amendment; rather, it forthrightly states a claim of a denial of "due process of law." Second, although Count I refers to Gaudin, the precise holding of which rests upon the Sixth Amendment, Count I does not express reliance upon the holding in Gaudin, but upon "the **due process standards** set forth ... in Gaudin." 2d Amend. Compl. ¶ 41 (Exh. A, p. 12) (emphasis added). Although the Gaudin majority stated that the "reasonable doubt" standard of proof, as required by the due process clause, was not "directly at issue" in that case, the majority reached its conclusion that every element of an offense must be submitted to the trier of fact in order to satisfy the due process requirement of proof beyond a reasonable doubt. *See* Gaudin, 515 U.S. at 514-15, and the due process/reasonable doubt cases of Sullivan v. Louisiana, 508 U.S. 275 (1993), Court of Ulster City v. Allen, 442 U.S. 140 (1979), and In re Winship, 397 U.S. 358 (1970), cited and relied upon therein. Additionally, Chief Justice Rehnquist, for himself and two other justices, concurred in Gaudin solely on basis of the due process standard of reasonable doubt, regardless of the identity of the fact finder. *See* Gaudin, 515 U.S. at 523.

Third, in his complaint Appellant relied not only upon the "due process standards" set forth in Gaudin, but on the "due process standards set forth ... in Jackson v. Virginia, 443 U.S. 307 (1979)" (2d Amend. Compl. ¶ 41 (Exh. A, p. 12)), wherein a defendant had been convicted of first-degree murder "after a **bench trial**." Jackson, 443 U.S. at 309 (emphasis added). At

issue in Jackson was "whether there was sufficient evidence to justify a rational trier of the facts to find guilt beyond a reasonable doubt," as required by the Due Process Clause. *Id.* at 313. According to the Jackson Court, this issue could not be resolved without addressing the question whether "*any* rational trier of fact could have found the **essential elements of the crime beyond a reasonable doubt.**" *Id.* at 319 (italics original; bold added).

The claim alleged in Count I of Appellant's Second Amended Complaint did not turn on any claim of a Sixth Amendment constitutional right to a military jury trial. Rather, it rested explicitly upon the claim of a constitutional right to have **every element of the offense**, of which Appellant had been charged, to be **proved at his court-martial beyond a reasonable doubt** to the satisfaction of the trier of fact. In support of this claim, Count I incorporated by reference: (1) **Paragraph 19** of the Second Amended Complaint, wherein Appellant, citing to page 434 of Volume 2 of the Record of Trial, alleged that his defense counsel had specifically objected to the military judge's ruling that the "unlawfulness" of the order which Appellant had allegedly disobeyed was an interlocutory question for the judge, by stating that the lawfulness of such order is an "element of the offense which the government must prove **beyond a reasonable doubt,**" and that, by taking the issue from the military jury, the military judge 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..." (2d Am. Compl. ¶ 19 (Exh. A, p. 7)); (2) **Paragraph 21** of that complaint, wherein Appellant alleged, in response to the military judge's assertion that there were no "factual issues" on the lawfulness question to be resolved, and that he had raised several factual issues pertinent to the lawfulness of the order, among which were the combatant nature of the U.N. mission and the purpose of the U.N. uniform (2d Am. Compl. ¶¶ 20-21 (Exh. A, p. 8));

and (3) **Paragraph 23** of that complaint, wherein Appellant alleged that no evidence of any kind in support of the lawfulness of the order was presented by "sworn testimony" at the court martial. 2d Amend. Compl. ¶ 23 (Exh. A, p. 8).

From the inception of this case, Appellant has claimed that the military judge's ruling — that the lawfulness of an order was not an element of the offense — violated his due process right to have the lawfulness of the order proved beyond a reasonable doubt to the trier of fact. Yet, the district court below summarily dismissed Appellant's due process claim, casually asserting it to have been an inventive attempt to remake Gaudin into a due process case. *See* New v. Rumsfeld, 350 F. Supp.2d at 93, n.8. Yet, in the context of a court-martial, just as in the context of a civil bench trial, the issue in Gaudin **is** one of **due process** — requiring that every element of an offense be proved beyond a reasonable doubt to the trier of fact — just as the Supreme Court recognized in Jackson v. Virginia, 443 U.S. at 318-19. After all, Article 51 of the Uniform Code of Military Justice — a statute enacted by the United States Congress — states that, while the military judge "shall rule upon all questions of law and all interlocutory questions arising during the proceedings," the military judge "shall ... instruct the [military jury] **as to the elements of the offense** and charge [the jury] — (1) that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond reasonable doubt; (2) ... if there is reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and he must be acquitted; ... and (4) that the burden of proof to establish guilt of the accused beyond reasonable doubt is upon the Government." 10 U.S.C. § 851.

Having refused even to consider the application of the due process standards in Gaudin and in Jackson as applied to a military court-martial — where the military jury serves as the **sole**

trier of fact, and where the government has the burden of proving to the military jury every element of an offense beyond a reasonable doubt — the district court erroneously and summarily concluded that "[w]ithout the jury trial guarantees of the Sixth Amendment ... due process alone is insufficient to give the petitioner that which he seeks." *See* New v. Rumsfeld, 350 F. Supp.2d at 93, n.8. According to the standards governing Rule 12(b)(6) motions, the district court's decision to grant Appellees' motion to dismiss was error, and is not worthy of affirmance, much less summary affirmance as Appellees have requested in their motion.

III. APPELLEES' MOTION FOR SUMMARY AFFIRMANCE OF APPELLANT'S CLAIM IN COUNT II IS BASED UPON A MISCHARACTERIZATION OF THE DISTRICT COURT'S RULING.

According to Appellees' Motion for Summary Affirmance, the district court "held that the lawfulness of the order to deploy to Macedonia was a nonjusticiable political question and that any challenge to such an order by appellant was without merit." *See* Mot. Sum. Aff., p. 2. To the contrary, while the district court below **addressed** the merits of the **four** substantive claims set forth in Paragraph 43 of the Second Amended Complaint, the district court **only decided** the merits of **two** claims — Appellant's Appointments Clause and Thirteenth Amendment claims — having ruled that Appellant's claims that the deployment of Appellant to the U.N. mission to Macedonia violated the United Nations Participation Act ("UNPA") and the Commander-in-Chief Clause of Article II, Section 2 of the U.S. Constitution were nonjusticiable political questions. *See* New v. Rumsfeld, 350 F. Supp.2d at 96-101.

Although Appellees acknowledge this fact later in their motion (*see* Mot. Sum. Aff., pp. 7-9), they — like the district court below — inexplicably fail to specifically address Appellant's claim that, by holding that the UNPA and Commander-in-Chief claims are nonjusticiable, the military courts denied Appellant his liberty and property without due process

of law, having "unlawfully and unconstitutionally [been] denied the right to contest the prosecution's case against him ... contrary to the Due Process standards of the United States Constitution, as set forth and confirmed ... in Crane v. Kentucky, 476 U.S. 683 (1986) and Simmons v. South Carolina, 512 U.S. 154 (1994)." *See* 2d Amend. Compl. ¶ 44.

A. The District Court Rulings that Appellant's UNPA and Commander-in-Chief Claims Were Nonjusticiable Deprived Appellant of his Due Process Right to a Complete Defense.

While the district court below acknowledged that invocation of the political question doctrine "benefit[ted]" the prosecution of Appellant's court-martial because "the doctrine prevents the normal presumption of a military order's lawfulness from being rebutted," it nevertheless refused to address Appellant's due process concerns. Instead, the district court misconstrued Appellant's due process claim as one based "based on an erroneous understanding of the policy behind the political question doctrine," which concerns separation of powers, not the "protect[ion] or advantage of government litigants." *See* New v. Rumsfeld, 350 F. Supp.2d at 95. However, Appellant's claim in Count II was not based upon the political question doctrine, but rather upon the well-settled due process "right to contest the prosecution's case against him" *See* 2d Amend. Compl. ¶ 44 (Exh. A, p. 13).

Had the district court paid attention to well-settled due process principles, it would have recognized that any rule, whether it be based upon the political question doctrine or otherwise, that "prevents" the rebuttal of an evidentiary "presumption" brings the Due Process Clause into play, because such a device may very well unconstitutionally "curtail[] the factfinder's freedom to assess the evidence independently" to the degree that it "undermine[s] the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt." *See* County Court of Ulster County v. Allen, 442 U.S. at 156. Indeed, any

mandatory presumption that an order is lawful, without regard to whether that order conformed with the UNPA or the Commander-in-Chief Clause of the Constitution, surely would deny Appellant of the due process guarantee of "'a meaningful opportunity to present a **complete** defense,'" as the Due Process Clause requires. *See* Crane v. Kentucky, 476 U.S. 683, 690 (1986) (emphasis added). As Justice O'Connor wrote in her concurring opinion in Simmons v. South Carolina, 512 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.

According to the district court below due process is dispensable, trumped by the political question doctrine which "exists 'to assure that the federal courts will not intrude into areas committed to the other branches of government.'" New v. Rumsfeld, 350 F. Supp.2d at 95. Instead of addressing the substantive issue whether the invocation of the political question doctrine created such an unconstitutional "mandatory presumption," the district court cavalierly faulted Appellant for having "refus[ed] to obey an order he thought illegal, [thereby] putting his liberty on the line to make an arguably political statement." Indeed, the district court appeared to chide Appellant for having refused to obey when there were other avenues to communicate his grievance. *See* New v. Rumsfeld, 350 F. Supp.2d at 95-96, and n.10. In doing so, the district court completely overlooked the fact that, in order to pursue these other avenues, Appellant would have been placed in a Catch-22 position — having to obey an order that in good conscience he believed to be illegal or facing a charge of disobedience of an irrebuttably-presumed lawful order. Additionally, the district court gave no consideration to the fact that the Army had a **real** choice, to forego court-martialing Appellant, by reassigning him to another unit or by administratively processing him out of the service. But it chose to court-martial him for disobedience of an order that it well knew would be challenged as unlawful.

If due process of law is to mean anything, it ought to preclude a court-martial prosecution, like the one here, that rests its claim of lawfulness of an order to wear the U.N. uniform on the ground that it is a "safety" measure necessitated by the "maneuver" area to which Appellant was to be deployed, while denying any opportunity to Appellant to show that the prerequisite deployment to such an area was unlawful. *See* 2d Amend. Compl. ¶¶ 15-17.

B. The District Court Rulings On Appellant's Claims under the UNPA, the Commander-in-Chief and Appointments Clauses of Article II, Section 2, and the Thirteenth Amendment Were Erroneous.

In an apparent attempt to trivialize Appellant's substantive claims that the U.N. deployment of Appellant to Macedonia was both unlawful and unconstitutional, Appellees devote only a little more than two pages of their motion to the district court's 14-page disposition of those claims. Even though the district court's disposition was erroneous, it ruled that each of Appellant's four claims — that the Macedonian deployment violated the UNPA, the Commander-in-Chief and Appointments Clauses of Article II, Section 2 of the Constitution, and the Thirteenth Amendment prohibition against involuntary servitude — had been "improperly aggregated" by CAAF, and deserved full and individual consideration by the court. New v. Rumsfeld, 350 F. Supp.2d at 96. Appellant's claims were, for the first time, addressed individually — albeit erroneously — in the court below, and those claims deserve to be fully briefed and addressed.

1. The District Court Erred in Dismissing Appellant's UNPA Claim.

In their motion, Appellees commit only one brief paragraph to the district court's two and one-half page discussion of Appellant's UNPA claims in which the district court — without citing statutory language, legislative history or judicial precedent — concluded that the UNPA: (a) "does not vest any personal rights in petitioner"; (b) "does not implicate in any fashion the

conduct of court-martial or other military disciplinary proceedings"; but only (c) "allocat[es] ... war-making power between the political branches"; and, thus, (d) is violated only if there is a "conflict between the [executive and legislative] branches on [any particular] matter" as it may arise. *See* New v. Rumsfeld, 350 F. Supp.2d at 96-97. This ruling was clearly erroneous.

Neither the statute governing the detailing of American troops to serve under U.N. command in a combatant operation under Chapter VII of the U.N. Charter, nor the statute governing the detailing of such troops to serve the U.N. in a noncombatant operation under Chapter VI of the Charter, implicates "the allocation of war-making power" between the Congress and the President. Indeed, even Section 287d, Title 22, United States Code — which "authorizes the President to negotiate a military agreement or agreements" and, thereby, "record[s] [Congress's] views "**in advance"** of any negotiation by the President of an agreement to furnish American armed forces to a U.N. peace enforcement operation and requires the President to obtain congressional approval of "**precise details** of [any such] obligation," — was not considered by Congress under its war power, as the district court below assumed. *Contrast H. Rep. No. 1383*, reprinted in U.S. Code Cong. Serv., p. 934 (79th Cong., 1st Sess. 1945) ("Preventive or enforcement action by these forces upon the order of the Security Council would not be an act of war, but would be international action for the preservation of the peace and for the purpose of preventing war. Consequently, the provisions of the Charter do not affect the exclusive power of the Congress to declare war.") *with* New v. Rumsfeld, 350 F. Supp.2d at 97 ("Petitioner raises a question of the allocation of war-making power between the political branches: must the President have obtained consent of Congress before initiating this operation in Macedonia?").

Rather, Section 287d of the UNPA was the product of an expressed congressional

exercise of "its constitutional powers to raise and support armies, to provide and maintain a navy and to make rules and regulations for the government and regulation of the land and naval forces." *See H. Rep. No.1383* at U.S. Code Cong. Serv., pp. 933-34. Likewise, the provisions of Section 287d-1, in that they "relate solely to the peaceful settlement of disputes and ... not ... to the use of armed forces as contemplated by Chapter VII of the Charter,"[2] contain rules governing the detailing of American armed forces to **noncombatant** operations, a subject over which Congress has authority under their powers to raise and support armed forces and to make rules and regulations for their government.[3]

In short, the district court's conclusion — that neither Section 287d-1 nor 287d "vests any personal rights " in Appellant, or "impact in any fashion the conduct of court-martial proceedings" — finds no support in the UNPA statutory texts or legislative history. Like the Uniform Code of Military Justice, both sections of the UNPA were the products of Congress's exercise of its power to raise and support the armed forces of the United States and to lay down the rules and regulations governing members of those forces even though they would be detailed to U.N. command. And further, like the Uniform Code of Military Justice, Sections 287d-1 and 287d of the UNPA present justiciable issues concerning whether the President complied with the rules contained therein and, therefore, whether the order issued to Appellant to submit to the U.N. operation in the former Republic of Macedonian was a "lawful" one.

2. The District Court Erred in Dismissing the Commander-in-Chief Claim.

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[2] *See Sen. Rep. No. 510*, p. 6 (81st Cong., 1st Sess. 1949).

[3] Thus, Section 287d-1 provides that "while ... detailed" under U.N. command, American armed forces "personnel shall be considered for all purposes as acting in the line of duty, including the receipt of pay and allowances as personnel of the armed forces of the United States, credit for longevity and retirement, and all other perquisites appertaining to such duty."

For like reasons, Appellant's claim that the President's decision detailing him to serve under U.N. "operational control" violated the President's nondelegable duty to exercise exclusive control over American armed service members, as commanded by the Commander-in-Chief Clause, deserves full briefing and oral argument before this Court. While the district court below concluded that the issue was "nonjusticiable" because the court believed it lacked "judicially discoverable and manageable standards," it nonetheless wrestled with the substantive merits of Appellant's claim. Remarkably, however, the district court did not address that claim by an examination of the constitutional text, nor by consideration of any commentaries on that text. Instead, it primarily placed reliance upon a single case — Gilligan v. Morgan, 413 U.S. 1 (1973) — that dismissed as a nonjusticiable political question a lawsuit brought in the aftermath of the Kent State tragedy, seeking an injunction restraining the governor of Ohio from calling out the National Guard prematurely and an order instructing the governor how to train and equip the Guard so as to minimize the use of fatal force in suppressing civil disorder. *See id.*, 413 U.S. at 10.

In apparent recognition of the weakness of the district court's reliance upon the Gilligan case, Appellees rely solely on Fleming v. Page, 50 U.S. 603, 615 (1850), cited only by the district court in passing. According to the district court and the Appellees, Fleming stands for the proposition that the Commander-in-Chief Clause vests in the President "the discretion to command the Armed Forces of the United States 'in the manner he may deem most effectual to harass and conquer and subdue the enemy.'" *See* Mot. Sum. Aff., p. 8; New v. Rumsfeld, 350 F. Supp.2d at 99. But that is not how Fleming reads; rather the opinion states:

> As commander-in-chief, [the President] is authorized to **direct** the movements of the naval and military forces by law **at his command,** and to **employ** them in the manner he may deem most effectual to harass and conquer and subdue the enemy. [Fleming, 50 U.S. at 615 (emphasis added)].

By turning Appellant's military unit over to the "operational control" of the United Nations under the command of a foreign officer, the President no longer "**direct[ed]** the movements" of that unit, nor "**employ[ed]** [that unit] in the manner he ... deem[ed] most effectual, but retained only a veto over how Appellant's units would be "directed" and "employed." *See* Appellate Exhibit IV from *Record of Trial of Michael G. New*, attached hereto as Exhibit B. In divesting himself of "operational control," the President unconstitutionally delegated his authority as commander in chief to the U.N. Secretary-General and a foreign military officer. *See* 2 J. Story, Commentaries on the Constitution, § 1491, p. 327 (5th ed., 1891) ("Of all the ... concerns of government, the **direction** of war most peculiarly demands those qualities which distinguish the exercise of power by a **single** hand. Unity of plan, promptitude, activity, and decision are indispensable to success; and these can scarcely exist, except when a **single** magistrate is entrusted **exclusively** with the [commander-in-chief] power.") (Emphasis added.)

3. The District Court Erred in Dismissing the Appointments Claim.

Both Appellees in their Motion for Summary Affirmance and the district court below maintain that Appellant's claim — that his deployment to Macedonia violated the Appointments Clause of Article II, Section 2 of the Constitution — is misplaced because the foreign officer commanding the U.N. operation to which Appellant's unit was detailed was not an "officer of the United States" and, therefore, was not subject to the constrictions of that clause. Mot. Sum. Aff., pp. 7-8; slip op. at pp. 27-28; New v. Rumsfeld, 350 F. Supp.2d at 98. To reach this conclusion, the district court heavily relied upon United States v. Germaine, 99 U.S. 508 (1878), which held that a surgeon, under contract to "to procure information needed to aid" an officer of the United States in the performance of the officer's duties, was not an "officer of the United States," but an agent of the officer and, thus, not subject to the Appointments Clause. *See* New

v. Rumsfeld 350 F. Supp.2d at 98. But the U.N. field officer commanding the U.N. operation in Macedonia was not under contract with the President, nor was he limited in authority to "procure information" so as to enable the President or some other duly appointed officer of the United States to carry out a government function. To the contrary, the foreign officer in charge of the U.N. Macedonian operation was carrying out the very government function that would otherwise have been carried out by an American military officer who concededly would have been subject to the Appointments Clause. *See* Weiss v. United States, 510 U.S. 163, 170 (1994).

In an attempt to escape from this precedent, the district court claimed that the foreign officer in Macedonia was exercising such power "only under a temporary arrangement limited in both scope and duration." New v. Rumsfeld, 350 F. Supp.2d at 99. According to Printz v. United States, 521 U.S. 898 (1997), however, the Appointments Clause of Article II, Section 2 of the Constitution applies to a law delegating federal executive power to state officials — even when that delegation is on an interim basis, concluding that even a temporary delegation of such power "transfers" the President's constitutional "responsibility" to "'take Care that the Laws be faithfully executed [to officers] who are left to implement the [federal] program without meaningful Presidential control (if indeed meaningful Presidential control is possible without the power to appoint and remove)." *Id.* 521 U.S. at 922. If delegation of Presidential authority to state and local officials — who are under oath to support the United States Constitution — is unconstitutional, certainly the President cannot delegate his power as Commander-in-Chief to a foreign military officer who is not only not bound by oath to support the United States Constitution, but has sworn allegiance to the United Nations Charter.

4. The District Court Erred in Dismissing the Thirteenth Amendment Claim.

According to the district court, the President may deploy any member of the United

States armed forces to serve in whatever capacity that, in his judicially-unreviewable discretion, is in the "'national interest.'" *See* New v. Rumsfeld, 350 F. Supp.2d at 98. Under such a capacious view of presidential discretion, it is not surprising that the court below rejected Appellant's claim that the order impressing him into the service of the U. N. did not violate the Thirteenth Amendment's prohibition against involuntary servitude. *See id.* at 100-101.

In support of this ruling, the district court relied, in part, on the proposition that, notwithstanding the Thirteenth Amendment, "the Government [has the power] to compel a citizen to render public service," citing Selective Service Cases, 245 U.S. 366, 374 (1918). The quoted sentence, however, **does not appear in the actual opinion of the Court**, but rather in a summary of "the ... brief of the United States," preceding the opinion in the official court report. *See id.* at 366-374. The Court did not agree to such an expansive claim of power, but limited its Thirteenth Amendment holding to "the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation as the result of a war declared by the great representative body of people." *Id.* at 390. Thus, Selective Service Cases offers no support for the district court's contention that the Thirteenth Amendment permits the President **unilaterally** to send an American armed service member on a "public service" mission under the auspices of the United Nations. Nor does Butler v. Perry, 240 U.S. 328 (1916), support the district court's assertion that "compulsory military service is generally outside the scope of the Thirteenth Amendment." New v. Rumsfeld, 350 F. Supp.2d at 100. Instead, Butler, like Selective Service Cases, requires proof that the public service obligation imposed upon the citizen is one, like jury service, "existing since the foundation of our government." *See* Butler, 240 U.S. at 333 and Selective Service Cases. 245 U.S. at 378-82. Forcing an American soldier into service of the United Nations to defend the

international peace and security of another nation is **not** such a time-honored public obligation, but rather a modern-day innovation unknown to America's founders.

IV. THE APPELLEES' MOTION FOR SUMMARY AFFIRMANCE RESTS UPON A MISCHARACTERIZATION OF THE THIRD AND FOURTH COUNTS OF APPELLANT'S COMPLAINT.

Both Appellees and the district court misread Appellant's claims in Count III and IV, contending that Appellant seeks a "reweigh[ing]" of the evidence. *See* New v. Rumsfeld, 350 F. Supp.2d at 101 and Mot. Sum. Aff., p. 9. In doing so, the district court and the Appellees have failed to honor this Court's rule that, when considering a Rule 12(b)(6) motion, the plaintiff's complaint should be given a "spacious interpretation." *See* Schuler, 617 F.2d at 608.

In Count III, Appellant has alleged that the Stipulation of Fact, agreed to by the prosecution at the court-martial, established a prima facie case that the U.N. uniform, having not been authorized by Congress, was a foreign "emolument" and/or "office" not authorized by Congress and, therefore, that the order to wear the uniform violated the foreign "emoluments" and "office" provision of Article I, Section 9 of the Constitution. *See* 2d Amend. Compl., ¶¶ 45-47. Appellant further alleged that neither the military judge at the court-martial nor any military appellate court had ever addressed this claim on the merits. *See* 2d Amend. Compl. ¶¶ 48-49. In the alternative, Appellant alleged in Count IV that he was denied due process of law in that the military judge — without receiving any competent evidence supporting the prosecution's claims that the uniform was a "safety" measure, or that the order to wear the uniform was made in a "maneuver" area, and without affording Appellant any opportunity whatsoever to rebut those claims — found the U.N. uniform was justified as a "safety" measure in a "maneuver" area. *See* 2d Amend. Compl. ¶¶ 50-56.

In support of these allegations, Appellant alleged: (a) that the prosecution's claims that

the U.N. uniform was a "safety" measure in a "maneuver" area were wrongly based upon the prosecutor's unsworn and contradictory representations that "the wearing of [UN] blue in a hostile environment is the best protection one can have from the boundless chaos of warfare" and that the U.N. uniform would not be worn in a "hostile environment" (2d Amend. Compl. ¶ 15); and (b) without requiring the prosecution to adduce any sworn or competent evidence, or affording Appellant any opportunity of cross-examination, the military judge erroneously ruled that the U.N. uniform "had a function specifically to enhance the safety of United States armed forces in Macedonia." 2d Amend. Compl. ¶¶ 17, 21, 23.

Thus, the military court dismissed Appellant's claim that the uniform violated the foreign emoluments and office provision of Article I, Section 9 of the Constitution without making any finding that Congress had authorized the wearing of the uniform, but only that the army regulations permitted it. *See* 2d Amend. Compl. ¶¶ 11,14, 15,17, 18, 22. On appeal, neither ACCA nor CAAF addressed the lawfulness of the uniform under Article I, Section 9; rather, both simply affirmed the military court's finding that the U.N. uniform was lawful as a "safety" measure in a "maneuver" area as provided in Army regulations. Clearly, by his allegations of constitutional violations, Appellant is not asking the district court to "reweigh" the evidence, because there was no "evidence" to reweigh.

CONCLUSION

Clearly, normal briefing procedures should apply. The Appellees have failed to carry their heavy burden of demonstrating that the issues herein are not worthy of full briefing on the merits and oral argument, and the Appellees' Motion for Summary Affirmance should be denied.

Respectfully submitted,

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Herbert W. Titus

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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 Appellant

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