No. 05-5023

In The
United States Court of Appeals
for the District of Columbia Circuit

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

v.

DONALD H. RUMSFELD, SECRETARY OF DEFENSE, *ET AL.*,
Appellees.

On Appeal from the United States District Court
for the District of Columbia

BRIEF OF APPELLANT MICHAEL G. NEW

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September 6, 2005

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), and D.C. Circuit Rule 26.1, Appellant Michael G. New states that he is unrelated to any corporation within the intendment of said rules.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici. Appellant Michael G. New was the Petitioner/Plaintiff in the case below, and Appellees Donald H. Rumsfeld, Secretary of Defense, and Les Brownlee, Acting Secretary of the Army were the Respondents/Defendants in the case below.

(B) Rulings Under Review. The Opinion and Order of December 22, 2004 by the Honorable Paul L. Friedman, District Judge, are the rulings under review. The decision is reported at 350 F. Supp. 2d 80 (D.D.C. 2004).

(C) Related Cases. The Appellant's original habeas corpus petition before the District Court was dismissed in United States *ex rel.* New v. Perry, 919 F.Supp. 491 (D.D.C. 1996), a decision that was affirmed by this court in New v. Cohen, Docket No. 96-5158, 129 F.3d 639 (D.C. Cir. 1997), *cert. denied*, 523 U.S. 1048 (1998). Appellant's previous appeals before the military courts from his court martial conviction were denied in United States v. New, 50 M.J. 729 (A.C.C.A. 1999), *aff'd*, United States v. New, 55 M.J. 95 (C.A.A.F. 2000), *cert denied*, 534 U.S. 955 (2001).

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* Cases or authorities chiefly relied on by Appellant are marked with asterisks.

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STATEMENT OF JURISDICTION

Pursuant to 28 U.S.C. §§ 1361, 2201 and 2241, as demonstrated in Kauffman v. Secretary of the Air Force, 415 F.2d 991 (D.C. Cir. 1969), the district court had jurisdiction of Appellant Michael G. New's Second Amended Complaint in which he sought a declaratory judgment and injunctive relief: (i) to vacate his illegal and unconstitutional January 24, 1996 court-martial conviction and bad conduct discharge; (ii) to reinstate him as a soldier in good standing; and (iii) to correct his military records.

Pursuant to 28 U.S.C. § 1291, this Court has jurisdiction of this appeal, Michael G. New ("New") having filed in the district court on January 24, 2005, a timely notice of appeal from the district court's December 22, 2004 final judgment in which it granted a F.R. Civ. P., Rule 12(b)(6) motion by Appellees Donald G. Rumsfeld and Les Brownlee, and dismissed all four counts of New's Complaint on the ground that each count failed to state a claim upon which relief can be granted.

STATEMENT OF THE ISSUES

1. Whether the district court **erroneously dismissed** the claim in Count I of New's Second Amended Complaint that New's court-martial conviction and sentence did not conform to Supreme Court **Fifth Amendment Due Process standards requiring proof beyond a reasonable doubt of an essential element of the charged offense.**

2. Whether the district court **erroneously dismissed** the claim in Count II of the Second Amended Complaint that New's court-martial conviction and sentence did not conform (a) to Supreme Court **Due Process standards guaranteeing New the right to a complete defense** and (b) to Supreme Court standards governing the application of **the political question doctrine.**

3. Whether the court below **erroneously dismissed** the claims in Counts III and IV of New's Second Amended Complaint that the military courts had failed to provide New a **full and fair**

opportunity to litigate his claim that the order to wear United Nations ("U.N.") insignia on his Army battle dress uniform **violated the foreign emoluments and office clause** of Article I, Section 9 of the United States Constitution.

STATEMENT OF THE CASE

This case was initially brought in January 16, 1996, as a petition for a writ of habeas corpus, in which New sought relief from a then-pending court-martial proceeding charging him with having violated a "lawful order." *See* United States ex rel New v. Perry, 919 F. Supp. 491 (D.D.C. 1996) (hereinafter "Perry"), Civil Docket for Case No. 1:96-cv-00033-PLF, No. 1 (hereinafter "R. ___").[1] In his original petition, New claimed that the order was **not** lawful in that it violated various regulatory, statutory and constitutional provisions, including: the United Nations Participation Act ("UNPA"); the Commander-in-Chief and Appointments Clauses of Article II, Section 2 of, and the Thirteenth Amendment to, the Constitution; 5 U.S.C. Section 7342; Army Regulation 670-1; and the Foreign Emoluments and Office Clause of Article I, Section 9 of the Constitution. *See* R. 1, Joint Appendix ("J.A.") ___.[2]

On March 28, 1996, the district court denied New's petition, dismissing it as premature and expressing confidence "that the issues raised in this case are within the province of the military tribunals [and] that the military tribunals and the Court of Appeals for the Armed Forces will [take New's claims] seriously." Perry, 919 F. Supp. at 499-500. *See* R. 17. On appeal, and on November 25, 1997, this Court affirmed the district court on the grounds of comity, invoking the rule of

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[1] Record references are to the Docket Sheet entries in the district court, and are herein designated "R."

[2] References to the Joint Appendix are to the deferred Joint Appendix, and are hereinafter designated "J.A."

exhaustion of military remedies before asking an Article III court to consider his arguments that the order New was charged with having disobeyed was both illegal and unconstitutional. New v. Cohen, 129 F.3d 639, 642-45 (D.C. Cir. 1997) (hereinafter "Cohen").

At his court-martial, the military judge ruled that the lawfulness of the order that New was being accused of disobeying was not an essential element of the offense, but rather an issue of law for the judge. *See* Second Amended Complaint ¶¶ 18-19, 22 (citing *Record of Trial*, Vol. 2, pp. 443, 434, and 448-49)[3], R. 48, J.A. ___. On appeal, the Army Court of Criminal Appeals ("ACCA") unanimously affirmed (United States v. New, 50 M.J. 729, 738 (1999) (hereinafter "New I")). On further appeal, the Court of Appeals for the Armed Forces ("CAAF") affirmed. United States v. New, 55 M.J. 95, 100-05 (2000) (hereinafter "New II).

At his court-martial, the military judge ruled that New had not carried his burden of proving the unlawfulness of the order, rejecting New's claims that: (a) the U.N. uniform that New was ordered to wear was contrary to Army regulations, congressional statute, and Article I, Section 9 of the U.S. Constitution; and (b) the Macedonian deployment for which the uniform was ordered violated the UNPA, as well as the Commander-in-Chief and Appointments Clauses of, and the

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[3] All references herein to the *Record of Trial* are to the excerpts of the Accused's copy of a verbatim *Record of Trial* (including allied papers) of Army Specialist Michael G. New's special court-martial empowered to adjudge a bad conduct discharge tried at Leighton Barracks, Wurzburg, Germany on 24 October, 17 November, 8 and 13 December 1995, and 18-19 and 23-24 January 1996, and furnished to Plaintiff's military counsel. Except as otherwise noted, the excerpts from the *Record of Trial* referred to in this brief are referenced by citation to the paragraph of the Complaint citing and summarizing that excerpt, the citation and summary of which is assumed to be true on a motion to dismiss for failure to state a claim upon which relief can be granted. *See* Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 325 (1991). Copies of the excerpts of the *Record of Trial* are attached to New's Memorandum 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 and included in the record of the district court. *See* R. 25.

Thirteenth Amendment to, the Constitution. *See* Second Amended Complaint ¶¶ 16 and 17 (citing *Record of Trial*, Vol. 2, pp. 426-33), R. 48, J.A. ___.

On appeal, on April 28, 1999, ACCA affirmed, upholding on the merits the military judge's ruling that the uniform was permitted by Army regulations and affirming the military judge's ruling that the lawfulness of the deployment was a nonjusticiable political question outside the jurisdiction of the court-martial. *See* New I, 50 M.J. at 738-40. On June 13, 2001, CAAF affirmed both rulings. *See* New II, 55 M.J. at 106-09. On September 10, 2001, New filed a petition for certiorari seeking Supreme Court review of the CAAF decision as provided in 28 U.S.C. § 1259(3). On October 9, 2001, the petition was denied. New v. United States, 534 U.S. 955 (2001).

On May 8, 2002, New filed a motion in the United States District Court for the District of Columbia to reopen the 1996 habeas corpus proceeding. R. 25. On June 18, 2002, the district court granted New's motion to reopen, with leave to file an amended complaint. R. 31. On July 1, 2002, New filed his First Amended Complaint, including a claim for damages in the form of back pay and allowances. R. 32. On March 5, 2004, in response to Defendants' motion to dismiss the First Amended Complaint, or in the alternative to transfer the complaint to the United States Court of Federal Claims, on the grounds of sovereign immunity, New sought leave to file a Second Amended Complaint, eliminating his prayer for monetary relief. R. 45. On March 17, 2004, leave having been granted, New's Second Amended Complaint was filed with the district court. R. 48, J.A. ___.

On April 30, 2004, Defendants — the Secretary of Defense and the Secretary of the Army — filed their motion to dismiss each of the four counts of New's Second Amended Complaint for failure to state a claim upon which relief can be granted. R. 50. On October 19, 2004, following the filing of memoranda in opposition and in support of the motion, the matter was argued before the district court. R. 52, 53, and 55. On December 22, 2004, the district court entered final judgment dismissing New's Second Amended Complaint from its docket and entering judgment for Defendants. United States ex

rel Michael G. New v. Rumsfeld, et al., 350 F. Supp. 2d 80 (D.D.C. 2004) (hereinafter "Rumsfeld"), R. 57, J.A. ___. This appeal followed.

This case presents for decision whether the district court improperly dismissed — for failure to state a claim upon which relief can be granted — each of the four counts of New's Second Amended Complaint (hereinafter "Complaint"), collaterally attacking his January 25, 1996 court-martial conviction and bad conduct discharge for having violated an allegedly lawful order contrary to Article 92(2) of the UCMJ (10 U.S.C. § 892(2)).

STATEMENT OF FACTS

A. The Deployment Order.

In August 1995, while stationed in Schweinfurt, Germany, Army Specialist Michael G. New ("New") first learned that his unit, Company A, 1/15 Infantry, was to be deployed to a United Nations operation in the Former Yugoslavian Republic of Macedonia ("Macedonian deployment") where he would be required to wear a U.N. uniform and to submit to a foreign field commander. New I, 50 M.J. at 733-34; Perry, 919 F. Supp. at 493; Cohen, 129 F.3d at 641. After New orally communicated to his superiors his belief that obedience to such an order "represented an involuntary change of allegiance from the United States to the United Nations," New's noncommissioned officer leaders, company commander, and battalion commander counseled New in an effort "to alleviate his doubts concerning the lawfulness of both the ... Army participating in the UN ... mission and the prescribed uniform." New I, 50 M.J. at 734; Perry, 919 F. Supp. at 493.

Unpersuaded by this counsel, New submitted a written remonstrance to his superiors reiterating: (a) his legal and constitutional position that as an American soldier, bound by "oath to support and defend the Constitution of the United States," he could not serve as "a United Nations Fighting Person[,] hav[ing] never taken an oath to the United Nations"; (b) his "request[] [for] a

transfer to a unit that is not required to wear the U.N. uniform" or "an honorable discharge"; and (c) his determination that he would "strongly contest any discharge that is less than honorable." Perry, 919 F. Supp. at 493. In response, on October 2, 1995, New's unit was provided with an "'Information Briefing' on the legal bases for the [Macedonian] deployment of American troops."

Following this legal briefing, on October 2 and 10, 1995, in Schweinfurt, Germany, New was ordered to appear in company formation in his Army battle dress uniform ("Army BDU") augmented by the prescribed Macedonian deployment U.N. patches and cap. New I, 50 M.J. at 735. New appeared in formation at the appointed time in his Army BDU without the required "U.N. patches and cap." *Id.*

B. The Court-Martial.

On October 24, 1995, New was court-martialed, charged with having violated Article 92(2) of the UCMJ (10 U.S.C. § 892(2)), to wit:

> In that New ... having knowledge of a lawful order issued ... on 2 OCT 95 and ... on 4 OCT 95, to wear the prescribed uniform for the deployment to Macedonia, i.e., U.N. patches and cap, an order which it was his duty to obey did, at or near Schweinfurt, Germany, on or about 10 OCT 95, fail to obey the same." [Complaint ¶ 8, R. 48, J.A. ___.]

In December 1995, New filed three motions to dismiss. The first two challenged the lawfulness of the order on the grounds that the U.N. deployment, for which the U.N. uniform was prescribed, violated, *inter alia,* two sections of the United Nations Participation Act (22 U.S.C. §§ 287d and 287d-1); the Commander-in Chief and Appointments Clauses of Article II, Section 2 of, and the Thirteenth Amendment to, the Constitution. Complaint ¶¶ 9 and 10, R. 48, J.A. ___. The third motion challenged the lawfulness of the uniform, itself, as violative of the Foreign Emoluments and Office Clause of Article I, Section 9 of the Constitution and enumerated congressional statutes and regulations. Complaint ¶ 11, R. 48, J.A. ___.

In support of his claim that the uniform was unlawful because the U.N. deployment was unlawful, New introduced sworn testimony of an expert in international law concerning the combatant nature of the Macedonian deployment. Complaint ¶ 12, R. 48, J.A. ___. The prosecution responded by producing letters from the President of the United States that asserted that the Macedonian deployment was a noncombatant one, and arguing that the lawfulness of the Macedonian deployment was a nonjusticiable political question outside the jurisdiction of the court-martial. Complaint ¶ 13, R. 48, J.A. ___. The military judge agreed with the prosecution, ruling as a matter of law that the Macedonian deployment was lawful, irrelevant to the court-martial charge, and a nonjusticiable political question. Complaint ¶ 14, R. 48, J.A. ___.

In support of his claim that the uniform violated Article I, Section 9 of the Constitution and statutes and regulations governing Army uniforms, New submitted a Stipulation of Fact, agreed to by the parties, establishing that the U.N. patches and cap were neither approved nor constituted an authorized augmentation to his Army BDU. Complaint ¶ 14, R. 48, J.A. ___. The prosecution responded with the argument — unsupported by affidavit or sworn testimony — that the "prescribed U.N. patches and cap" were justified by an Army regulation which permitted alterations to the authorized Army BDU for "safety" purposes in a "maneuver" area: (a) insisting that "the wearing of [U.N.] blue in a hostile environment is the best protection that one can have from the boundless chaos of warfare," and at the same time, contending that Macedonia was not a "hostile environment"; and (b) asserting that U.N. blue is "recognized internationally as off limits to ... combatants," and at the same time, maintaining that the Macedonian deployment was a "noncombatant" one. Complaint ¶ 15, R. 48, J.A. ___.

Without requiring a supporting affidavit or sworn testimony in support of the prosecution's position, the military judge ruled as a matter of law against New's motion to dismiss, finding the U.N. patches and cap were justified as a "safety" measure in a "maneuver" area, in that the U.N. patches

and cap have "in a combat environment or potential combat environment a practical combat function which may enhance safety and/or tactical effectiveness of combat-equipped soldiers performing operations." Complaint ¶ 17, R. 48, J.A. ___.

Having ruled against New's motions, the military judge informed the parties of his further ruling that the issue of the lawfulness of the order was solely for the judge, not for the military jury, to which New objected on the ground that lawfulness, being an essential element of the offense, must be proved to the jury beyond a reasonable doubt, and that any ruling to the contrary would "take[] away ... the due process guaranteed to New under the 5th Amendment." Complaint ¶¶ 18, 19, R. 48, J.A. ___. In response, the prosecution contended that there were no "factual" issues involving the order's lawfulness for the military jury to resolve, to which New replied, *inter alia*, that the lawfulness of the order turned on a number of factual matters, including whether the Macedonian operation was a combatant or noncombatant one, and whether the U.N. patches and cap were a "safety" measure in a "maneuver" area. Complaint ¶¶ 20, 21, R. 48, J.A. ___. The military judge ruled against New, taking the issue of lawfulness away from the military jury, thereby dispensing with the requirement that lawfulness, as an element of the offense, would have to be proved beyond a reasonable doubt. Complaint ¶¶ 22-24, R. 48, J.A. ___.

C. The Military Appeals.

After conviction and sentence, New appealed first to ACCA and then to CAAF, contending that the military judge had wrongfully ruled: (1) that unlawfulness was not an element of the offense, thereby denying him his statutory right to have the issue of lawfulness submitted to the military jury and his constitutional right to have lawfulness proved beyond a reasonable doubt; and (2) that, in any event, the order was, as a matter of law, unlawful both because the Macedonian deployment was unlawful and unconstitutional and because the U.N. uniform itself was unlawful and unconstitutional.

See New I, 50 M.J. at 733; New II, 55 M.J. at 97. Both ACCA and CAAF affirmed the military judge's ruling that lawfulness was not an element of the offense and, consequently, need not be proved beyond a reasonable doubt to the military jury. Complaint ¶¶ 26, 28-29, R. 48, J.A. ___. Having ruled that the issue of lawfulness was a matter of law, the ACCA and CAAF each concurred with the military judge's finding that the uniform, itself, was lawful. Complaint ¶¶ 26, 31, R. 48, J.A. ___. Each also upheld the military judge's ruling that the order was lawful, insofar as it rested upon the lawfulness of the Macedonian deployment, on the sole ground that all of New's legal and constitutional claims concerning the deployment's lawfulness were nonjusticiable political questions outside the jurisdiction of the court-martial. Complaint ¶¶ 26, 27, R. 48, J.A. ___.

D. The District Court.

In a four-count Complaint filed in the district court, New has waged a collateral attack on his court-martial conviction and sentence, claiming that it was reached in contravention of Supreme Court standards governing due process of law and of fundamental fairness. The district court dismissed all four counts on the ground that, as a matter of law, each failed to state a claim upon which relief can be granted.

SUMMARY OF ARGUMENT

The district court failed to construe New's Complaint in accordance with the rules established in this circuit governing motions to dismiss for failure to state a claim upon which relief may be granted, and erred in its application of the rules by which this circuit applies Supreme Court standards governing collateral attacks on court-martial convictions.

On its face, Count I of the Complaint alleges a claim expressly based upon Supreme Court standards that the Fifth Amendment guarantees that every element of a criminal offense must be proved beyond a reasonable doubt. The district court, however, erroneously refused to address New's

claim as a Fifth Amendment Due Process claim, misconstruing and, then, dismissing the claim as one based upon the Sixth Amendment jury trial guarantee. Having mistakenly transformed New's claim from a Fifth Amendment claim to a Sixth Amendment one, the district court erroneously ruled that whether an issue is an essential element of an offense defined in the UCMJ is a matter of military jurisprudence within the discretion of the military to which an Article III court must defer.

Had the district court properly read New's claim in Count I as a Fifth Amendment Due Process claim, it would have been required by Supreme Court standards to assess whether the military courts had applied the correct rule of construction governing criminal offenses defined by Congress. According to such standards, the military courts erred in their determination that the lawfulness of an order under Article 92(2) of the UCMJ (10 U.S.C. § 892(2)) is not an essential element of the defined offense. Having so erred, the military courts denied New his liberty and property in violation of the Fifth Amendment Due Process Clause and Article 51(c) of the UCMJ (10 U.S.C. § 851(c)), contrary both to Supreme Court standards and fundamental fairness, resulting in a miscarriage of justice by shifting the prosecution's burden to prove the lawfulness of an order beyond a reasonable doubt to placing the burden of proving the unlawfulness of an order upon New.

With respect to Count II of the Complaint, the district court erroneously failed to address New's claim that the military courts' misuse of the Supreme Court's political question doctrine denied New his liberty and property without due process of law. Had the district court addressed New's Due Process claim, it should have found that the military courts' political question ruling transformed an otherwise rebuttable presumption into an irrebuttable one, thereby depriving New of his due process right to present a complete defense to the charge against him.

Additionally, the district court erroneously upheld the military courts' ruling excluding from consideration, as a nonjusticiable political question, New's claim that the Macedonian deployment for which the U.N. uniform had been prescribed violated the UNPA. Contrary to the district court's

conclusion that the UNPA merely allocates the war power between the legislative and executive branches, Sections 287d and 287d-1 of the UNPA lay down rules of law limiting the president's power to detail a member of the American armed forces pursuant to Congress's authority to "make Rules for the Government and Regulation of the land and naval forces." Had the district court addressed the merits of New's proffer of evidence at his court-martial that the Macedonian deployment violated Sections 287d and 287d-1 of the UNPA, it would have found that New's conviction and sentence did not conform to Supreme Court standards governing New's right to a complete defense.

The district court correctly ruled that the military courts wrongfully concluded that New's claims — that the Macedonian deployment violated the Commander-in-Chief and Appointments Clauses of Article II, Section 2 of, and the Thirteenth Amendment to, the Constitution — were nonjusticiable political questions, but the district court erred in resolving those claims on the merits against New. Detailing New to the Macedonian deployment would have placed New under the operational control of a foreign military commander whose duty under the U.N. Charter was to serve the U.N. Secretary General. By placing New under the operational control of a person not under the command of the President, the Macedonian deployment violated the Commander-in-Chief Clause which mandates that the President must retain operational control over members of the United States armed forces. By placing New under the command of a foreign field officer, the Macedonian deployment violated the Appointments Clause which mandates that such power be exercised only by persons appointed in accordance with the procedures set forth in Article II, Section 2 of the Constitution. Finally, placing New, without his consent, under U.N. command to maintain international peace and security is prohibited as involuntary servitude under the Thirteenth Amendment, the United States government having no authority to force any American soldier to serve under U.N. command.

With respect to Counts III and IV, the district court erroneously construed those counts of the Complaint as a request to review the military courts' purported finding that the order to wear the U.N. insignia on New's battle dress uniform did not violate the Foreign Emoluments and Office Clause of Article I, Section 9 of the Constitution. Particularly, if the district court had read the two counts liberally — as required by this Court's rules governing motions to dismiss for failure to state a claim upon which relief can be granted — it would have discovered that New claimed that the military courts had utterly failed to make any finding on the merits of New's Article I, Section 9 claim.

The district court further erred by its failure to review the allegations in Counts III and IV to ascertain whether the military courts had, nonetheless, "fully and fairly considered" his Article I, Section 9 claim. In support of these counts, New presented a prima facie case that the U.N. uniform was an unauthorized and unapproved foreign insignia, prescribed as mandatory wear for an American soldier detailed to a U.N. operation under a foreign field commander. New's evidence, in turn, stood unrebutted by any sworn affidavit or testimony — or even legal argument — that Congress had consented thereto. On their face, then, Counts III and IV state claims that the military courts failed to give full and fair consideration to New's Article I, Section 9 claim, as required by Burns v. Wilson, 346 U.S. 137 (1953).

ARGUMENT

As the district court recognized, a motion to dismiss a complaint for failure to state a claim upon which relief can be granted requires a court to "assume the truth of the facts alleged in the complaint." Rumsfeld, 350 F. Supp. 2d at 88, R. 56, J.A. ___. To that end, the district court was required to "construe [New's Complaint] liberally in [New's] favor[,] granting [him] the benefit of all inferences that can be derived from the facts alleged." *Id.*, R. 56, J.A. ___. Additionally, as the district court acknowledged, a Rule 12(b)(6) motion should not be granted unless "it appears beyond

doubt that [a] petitioner will be unable to prove any set of facts that would justify relief." *Id.*, R. 56, J.A. ___. To that end, the district court was required to confine its review only to those "facts contained within the four corners of the complaint," except for "factual findings of another court as part of the public record." *Id.* at 88-89, R. 56, J.A. ___.

As the district court also recognized, New's collateral attack on his court-martial conviction and sentence could encompass:

> (1) challenges to the jurisdiction of the court-martial tribunal; (2) constitutional challenges not fully and fairly considered by the military courts; (3) constitutional challenges resolved by the military courts in contravention of Supreme Court standards, unless conditions peculiar to military life require a different rule; and (4) non-constitutional legal challenges that implicate fundamental defects in the court-marital proceedings. [*Id*. at 92, R. 56, J.A. ___.]

Although the district court correctly stated the judicial standards governing its consideration of both collateral attacks on court-martial convictions and Rule 12(b)(6) motions to dismiss, it failed to apply those standards correctly to any of the four counts of New's Complaint.

I. THE DISTRICT COURT ERRONEOUSLY DISMISSED COUNT I OF THE COMPLAINT.

The very heart of New's defense to the court-martial charge that he had violated Article 92(2) of the UCMJ by his refusal "to wear the prescribed uniform for the deployment to Macedonia, *i.e*., U.N. patches and cap" was that the order to wear such uniform was **unlawful**. *See* Complaint ¶¶ 8-31, R. 48, J.A. ___. Initially, New pressed his claim of unlawfulness by filing with the military judge three motions to dismiss. Complaint ¶¶ 9-11, J.A., R. 48, ___. In aid of these motions, he introduced sworn testimony by a duly qualified expert on international law and policy supporting his claim that the deployment for which the U.N. uniform had been "prescribed" was unlawful and unconstitutional, as well as a "Stipulation of Fact" supporting his claim that the U.N. uniform was unlawful, because it had neither been authorized nor approved as part of an "A(rmy) [B(attle) D(ress) U(uniform)]." Complaint ¶¶ 12 and 14, R. 48, J.A. ___.

In response to the evidence that the Macedonian deployment was unlawful and unconstitutional, the prosecution offered neither sworn testimony nor any other admissible evidence. Instead, in opposition to New's claim, the prosecution submitted only: (i) letters from the President of the United States representing that such deployment was a noncombatant one, not requiring congressional approval; and (ii) argument of counsel that, in any event, the legality and unconstitutionality of the Macedonian deployment was a nonjusticiable political question outside the jurisdiction of the court-martial. Complaint ¶ 13, R. 48, J.A. ___. And the prosecution's only opposition to New's claim that the U.N. uniform was neither an "authorized" nor an "approved" addition to the Army BDU, as stipulated by both parties, was its capricious argument that the prescribed "U.N. patches and cap" were authorized by paragraphs 1-18 of Army Regulation 670-1 as necessary for "safety" in a "maneuver" area, maintaining that "the wearing of [U.N.] blue in a hostile environment [was] the best protection one can have from the boundless chaos of warfare," while simultaneously and inconsistently contending that "the Government does not concede Macedonia is a hostile environment." Complaint ¶ 15, R. 48, J.A. ___.

Nevertheless, the military judge embraced the prosecution's conflicting positions, denying New's motions to dismiss by ruling (i) **against** New's contention that the Macedonian deployment was a combatant one requiring express congressional agreement and (ii) **for** the prosecution's claim that the U.N. uniform was justified to "enhance the safety and/or tactical effectiveness of combat-equipped soldiers performing operations" in a "combat environment." *Contrast* Complaint ¶¶ 12 and 16 *with* Complaint ¶ 17, R. 48, J.A. ___. Further, the military judge ruled that any issue concerning the lawfulness of the order to wear the prescribed uniform for the Macedonian deployment was a question of law exclusively for the military judge, and would not be submitted to the jury. Complaint ¶ 18, R. 48, J.A. ___.

In response to this ruling, New registered his objection, contending 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 judge has 'effectively taken away ... the due process guaranteed to ... 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.'" Complaint ¶ 19, R. 48, J.A. ___. Additionally, New specifically identified for the court a number of factual issues that should be resolved by the military jury, including whether the Macedonian deployment was combatant or noncombatant in nature, and whether Macedonia was a "maneuver" area necessitating the wearing of the U.N. uniform as a "safety" measure. Complaint ¶ 21, R. 48, J.A. ___.

Rejecting both New's Due Process argument and his evidentiary proffer, the military judge ruled as a matter of law that the order to wear the U.N. uniform was lawful, and instructed the military jury accordingly. Complaint ¶¶ 22 and 24, R. 48, J.A. ___. Thus, at trial, the prosecution produced no evidence whatsoever concerning the nature of: (a) the deployment for which the U.N. uniform had been prescribed, whether it was combatant or noncombatant; (b) a "maneuver," whether it was the situs of the formation where the order was given or the deployment destination where the uniform was to be worn; or (c) the danger necessitating the order to wear an otherwise illegal uniform as a "safety" measure. Complaint ¶ 23, R. 48, J.A. ___.

On appeal, both ACCA and CAAF affirmed the military judge's ruling that lawfulness was not an element of the offense defined by 10 U.S.C. § 892(2). Complaint ¶¶ 26, 28, R. 48, J.A. ___. While the ACCA decision was unanimous on this point, CAAF divided three to two, the minority charging that the majority's decision constituted "a radical departure from our political, legal and military tradition." Complaint ¶¶ 29, 30, R. 48, J.A. ___. Nevertheless, the CAAF minority concurred with the majority in the result, ruling against New on the ground of "harmless error" — contending that

there was no "evidence" in the record that the order was unlawful — a contention that, in turn, prompted the CAAF majority to observe 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]." *See* Complaint ¶¶ 30, 31, R. 48, J.A. ___.

A. The District Court Erroneously Failed to Address New's Due Process Claim.

In Count I of the Complaint, New alleged that the military courts' rulings "that lawfulness is not an element of the offense defined by 10 U.S.C. § 892(2) ... 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)." Complaint ¶ 41, R. 48, J.A. ___. In support of this clearly stated Due Process claim, New alleged, as a matter of fact, that CAAF had so ruled "in order to avoid a conflict with ... Gaudin ..., having adopted a rule of construction governing the ascertainment of the elements of a federal offense out of conformity with the U.S. Supreme Court rule in Neder v. United States, 527 U.S. 1 (1999)." Complaint ¶ 40, R. 48, J.A. ___.

Failing to give the Complaint the "liberal" and "spacious" reading required of the court in addressing a motion to dismiss for failure to state a claim upon which relief may be granted (*see* Kowal v. MCI Communications Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994) and Schuler v. United States, 617 F.2d 605, 608 (D.C. Cir. 1979)), the district court actually transformed Count I from a Fifth Amendment Due Process claim into a Sixth Amendment claim, mischaracterizing it as a claim that the "military judge's failure to submit the question to the court-martial panel violated petitioner's *Sixth Amendment* right to a jury trial." Rumsfeld, 350 F. Supp. 2d at 92 (italics original), R. 56, J.A. ___. Having reworked New's Due Process claim into a Sixth Amendment jury trial claim, the district court made short shrift of Count I with a string of citations to Supreme Court decisions supporting the

uncontested proposition that "the *Sixth Amendment's* guarantee does not exist when one stands before a court-martial tribunal." *Id.* (italics original), R. 56, J.A. ___.

In a footnote, the district court brushed aside New's explicit reference in Count I to the "Due Process standards ... set forth in Gaudin ... and in Jackson," suggesting that New had contrived his claim as a Due Process one, in "recogni[tion] [of] the [obvious] inapplicability of the *Sixth Amendment*" and the Gaudin decision. *Id.* at 93, n8, R. 56, J.A. ___. The district court, however, mistakenly confined Gaudin to its Sixth Amendment holding, instead of applying the Gaudin Court's Due Process standards, as directed by this Court's instructions to apply Supreme Court standards to New's collateral attack on his court-martial conviction. *See* Kauffman, 415 F.2d at 997.

In Gaudin, the Supreme Court recognized that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of jury trial, while interrelated, are independently rooted. Gaudin, 515 U.S. at 509-10, citing Sullivan v. Louisiana, 508 U.S. 275, 278-79 (1993). Indeed, as Justice Scalia — the author of both the Gaudin and Sullivan opinions — recognized in Sullivan, the source of the Supreme Court's Due Process standard requiring the prosecution to prove beyond a reasonable doubt every element of an offense is In re Winship, 397 U.S. 358, 364 (1970) (*see* Sullivan, 508 U.S. at 277-78), a juvenile court proceeding which — like a court-martial — is not subject to the Sixth Amendment right to jury trial. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1971). Thus, the district court was simply mistaken when it stated that "[w]ithout the jury trial guarantees of the *Sixth Amendment*, ... due process alone is insufficient to give petitioner that which he seeks." *See* Rumsfeld, 350 F. Supp. 2d at 93, n.8 (italics original), R. 56, J.A. ___. Rather, as New has pled in Count I of the Complaint, the Due Process guarantee of proof of every element of an offense beyond a reasonable doubt is necessary to ensure "fundamental fairness" regardless of the factfinder — judge or jury. *See* Jackson v. Virginia, 443 U.S. 307, 316 (1979). Thus, the issue before the district court under Count I of New's Complaint was **not whether**

New had a Sixth Amendment constitutional right to a military jury, **but whether the Due Process Clause of the Fifth Amendment required proof beyond a reasonable doubt to the military jury** — the designated factfinder under 10 U.S.C. § 853(c) — of the lawfulness of an order upon a charge of violation of 10 U.S.C. § 892(2). Had the district court addressed this question, as required by the judicial precedents governing Rule 12(b)(6) motions, the court would have been required to rule in New's favor.

B. The Lawfulness of an Order Under 10 U.S.C. § 892(2) Is an Element of the Offense.

Having erroneously stripped the Due Process claim from Count I of the Complaint, the district court concluded that the claim in Count I of the Complaint was outside the scope of collateral review of a court-martial conviction, requiring the district court to defer to the military courts on a "specialized question[] of military law." Rumsfeld, 350 F. Supp. 2d at 93, R. 56, J.A. ___. Since the enactment of the UCMJ by Congress in 1950, however, the question whether a matter is an essential element of an offense under the UCMJ is **not** a matter of military discretion as it might have been under the "Articles of War, the Articles for the Government of the Navy, and the Disciplinary laws of the Coast Guard"; rather, because Congress has "codif[ied]" the "substantive and procedural law governing military justice and its administration in all of the armed forces of the United States," Congress has established the UCMJ as "the **sole statutory authority for ... pretrial and trial procedure** ... and the listing and **definition of offenses, redrafted and rephrased in modern legislative language**." *See Sen. Rep. 81-486* in U.S. Code Congress. Serv. 2222-23 (81st Cong., 2d Sess. 1950) (emphasis added). Each question, then — (a) whether lawfulness as a matter of **substantive law** is an element of the offense defined in 10 U.S.C. §892(2), and (b) whether, as a matter of **procedural law**, lawfulness must be proved beyond a reasonable doubt to the military jury under 10 U.S.C. § 851(c) — is decidedly a matter of judicial interpretation of congressional policy as

reflected in the text and legislative history of those statutes. Thus, interpretations of provisions of the UCMJ are subject to the same rules of interpretation of any criminal statute enacted by Congress.

As articulated in Neder v. United States, 527 U.S. 1 (1999) — cited in Count I of New's Complaint — Supreme Court standards of statutory interpretation require a "first look to the text of the statute[]" defining the offense, and second, to ascribe to that text its "settled meaning." *Id.* at 54. As the district court acknowledged, the CAAF three-judge majority did not even look at the text of 10 U.S.C. § 892(2) to ascertain whether "lawful" was an element of the defined offense; instead the CAAF majority "looked ... to the military courts' jurisprudence to answer the question, [i]nterpreting *Article 51(b) of the UCMJ,* Section 801(a)(4) of the Manual for Courts-Martial, and United States v. Carson, 15 USCMA [407] at 408 [(1965)] [to] determine [that] the lawfulness of both the uniform and the deployment orders [were] questions of law properly decided by the military judge as an interlocutory matter." Rumsfeld, 350 F. Supp. 2d at 93, R. 56, J.A. ___.

However, as CAAF Judge Sullivan pointed out in his dissenting and concurring opinion in New II: (a) "Article 51(b) [of the UCMJ] does not delineate what a 'question of law' is for final decision by a military judge," (*id.*, 55 M.J. at 123); and (b) Section 801(a)(4) of the Manual for Courts-Martial does not address that question either. *See id.*, 55 M.J. at 100-01. Indeed, neither the Article nor the Section cited by the CAAF majority refers either to the language or to the settled meaning of the text of 10 U.S.C. § 892(2). *See id.*, 55 M.J. at 100-101. To be sure, the Carson case, relied upon by the CAAF majority, did address the question whether the lawfulness of an order was for the military judge or for the military jury, but, as the CAAF majority acknowledged, it did so "in dicta" — not as a dispositive issue in the case. *See id.*, 55 M.J. at 101. And, as CAAF Judge Sullivan pointed out, the Carson dicta were directly contradicted in a later case by a unanimous CAAF in Unger v. Ziemniak, 27 M.J. 349, 358 (1989), a precedent conveniently explained away by the CAAF majority as dicta inconsistent with the Manual for Courts-Martial. *See id.*, 55 M.J. at 102.

Had the CAAF majority complied with Supreme Court's Neder standards of statutory interpretation, it would have concluded that lawful describes an element of the offense defined in 10 U.S.C. § 892(2) because, the CAAF majority found that "inherent in the term[] 'order' ... under [10 U.S.C. § 892]" is "lawful order." New II, 55 M.J. at 105. Thus, had CAAF adhered to the rule of construction in Neder, it would have come to the same conclusion as the Supreme Court did in Neder: As "materiality" of a representation is implicit in the meaning of "fraud," so "lawfulness" is implicit in the meaning of a military "order." *See* Neder, 527 U.S. at 22-25. Instead, the CAAF majority ruled otherwise, refusing even to consider the possibility that the express insertion of the word "lawful" before "order" supported New's contention that Congress had unmistakably intended that lawful described an essential element of the offense.

The CAAF majority attempted, however, to justify its refusal to apply the Neder rule, claiming that "lawful," unlike "materiality," was a pure question of law, not a "fact laden concept." *See* New II, 55 M.J. at 104 n6 and 105. The CAAF majority was mistaken. New challenged the ordinary presumption that a military order is lawful by a "**Stipulation of Fact**" — agreed to by the parties and entered into evidence at the court-marital — that the uniform was neither approved nor authorized as part of the battle dress uniform. The prosecution argued that the uniform was permitted under an exception permitting such a uniform as a "safety" measure in a "maneuver" area, and in making its argument made factual claims supporting its contentions that the U.N. uniform served a "safety" purpose in a "maneuver" area to overcome the stipulation that the U.N. uniform was otherwise, as a matter of fact, unapproved and unauthorized. Complaint ¶¶ 14 -15, R. 48, J.A. ___. The military judge, in turn, made "factual findings" that the U.N. uniform was permissible because it "had a function specifically to enhance the safety of United States armed forces in Macedonia." Complaint ¶

17, R. 48, J.A. ___. Clearly, the lawfulness of the uniform in this case turned on the "fact laden" concepts of "safety" and "maneuver."[4]

Instead of acknowledging the obvious fact-nature of the lawfulness issue before it, the CAAF majority refused to count "lawfulness" as an element of the defined offense because in its own judgment — independent of the judgment of Congress and the specific facts of the case — it claimed that, if lawfulness were an element that had to be proved beyond a reasonable doubt, then "orders of critical import to the national security would be subject to unreviewable and potentially inconsistent treatment by different court-martials." *See* New II, 55 M.J. at 105. But it was not for the CAAF majority to make this policy judgment in substitution for the one made by Congress at the time of the enactment of the UCMJ. As then-Secretary of Defense James Forrestal observed in a letter of endorsement of the new Code, "the proposed bill is well-designed to protect the rights of those subject to it, will increase the public confidence in military justice, and will not impair the performance of military functions." *Sen. Rep. 81-486* in U.S. Code Congressional Service at 2265.

In disregard of this congressional prerogative, the CAAF majority assessed the question whether lawfulness was an element of the offense defined in 10 U.S.C. § 892(2) without examining the statutory text. Instead, it erroneously preferred to base its decision upon: (1) a questionable reading of military practice — which prompted CAAF dissenting and concurring Judge Sullivan to accuse the majority of "radical departure from our political, legal and military tradition" in

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[4] Even New's claim that the uniform was not lawful because it was the prescribed uniform for an unlawful deployment was "fact laden," resting initially upon the question whether the Macedonian deployment was a "combatant" or a "noncombatant" one and, thus, whether the deployment was governed by Section 287d of the UNPA which required specific congressional agreement. *See* Complaint ¶¶ 12-13, R. 48, J.A. ___. Furthermore, even if the Macedonian deployment were a noncombatant one, there would have been a fact question whether the President had exceeded the statutory ceiling limiting the number of American Armed forces so detailed to 1,000. *See* 22 U.S.C. § 287d-1.

"disregard[] [of] long-existing military practice ...." (*id.*, 55 M.J. at 115)[5]; and (2) unsupported concerns for "national security" from "unreviewable and potentially inconsistent" military jury verdicts, when such verdicts, like those of civilian juries, are general ones, setting no legal precedent whatsoever.

C. New Was Denied His Liberty and Property Without Due Process of Law.

By substituting its judgment for that of Congress in disregard of Supreme Court standards governing statutory interpretation, CAAF denied New his right to a "fair trial,"[6] as provided for in 10 U.S.C. § 851(c), which requires the military judge to 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 a reasonable doubt;**
> (2) that in the case being considered, if there is **a reasonable doubt** as to the guilt of the accused, the **doubt should** be resolved in **favor** of the accused and he shall be acquitted;
> (3) that if there is **reasonable doubt** as to the degree of guilt, the finding must be in a lower degree as to which there is **no reasonable doubt;** and
> (4) that the **burden of proof** to establish the guilt of the accused **beyond a reasonable doubt is upon the Government.**
> [10 U.S.C. § 851(c) (emphasis added)].

Having erroneously determined that lawfulness was not an element of the offense defined in 10 U.S.C. § 892(2), the burden concerning the lawfulness of the order requiring New to wear the prescribed U.N. uniform was improperly shifted from the prosecution to the defense. As the CAAF majority explained, orders that require the performance of a military duty or act are "clothed with an inference of lawfulness" and any soldier who disobeys such an order does so at his "peril," having "the burden to establish that the order is not lawful." New II, 55 M.J. at 106. Having placed the

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[5] *See also* New II, 55 M.J. at 121-22 (Sullivan, J., dissenting and concurring).

[6] *See Sen. Rep. 81-486* in U.S. Code Congressional Service at 2264.

burden of proof on New to show that the order was unlawful, the CAAF majority had no difficulty affirming the military judge's ruling that New had "not overcome the presumption of lawfulness given to military orders and that the order related to military duty." *Id.*, 55 M.J. at 107.

Had the CAAF majority found lawfulness of an order to be an element of the offense defined in 10 U.S.C. § 892(2), then — as 10 U.S.C § 851(c) expressly prescribes — the prosecution would have had the burden of proving lawfulness beyond a reasonable doubt. *See also* New II, 55 M.J. at 118, 120-22 (Sullivan, J., concurring). To be sure, the prosecution would have the benefit of a presumption of lawfulness, but that presumption does not shift the burden of proof; it only requires the defense to produce some evidence rebutting the presumption. *See* New II, 55 M.J. at 117-18 (Sullivan, J., concurring). At his court-marital, New carried that burden.

Indeed, the CAAF majority acknowledged that New "clearly produced at trial a large volume of material contesting the lawfulness of the order," which would have been "more than sufficient to go before [the military jury], if [lawfulness] were an element for [its] resolution." *See* New II, 55 M.J. at 106. With respect to the legality of the Macedonian deployment for which the U.N. uniform had been "prescribed," New adduced evidence, through the sworn testimony of an expert in international law, that the Macedonian deployment violated 22 U.S.C. §287d, in that it was a U.N. combatant operation under Chapter VII of the United Nations Charter which had not been approved by Congress. Complaint ¶ 12, R. 48, J.A. ___. With respect to the legality of the uniform itself, New introduced a Stipulation of Fact establishing that the prescribed "U.N. patches and cap" for the Macedonian deployment were not approved or authorized as an "augmentati[on] [to] his U.S. Army ... BDU." Complaint ¶ 16, R. 48, J.A. ___.

The CAAF majority completely ignored this Stipulation of Fact which, as CAAF dissenting and concurring Judge Sullivan observed, supported a claim that the order requiring New to wear the U.N. patches and cap "'directed the commission of a crime'" and, therefore, was patently illegal. *See*

New II, 55 M.J. at 127 (Sullivan, J., dissenting and concurring). Had the CAAF majority paid attention to the Stipulation, it would have been required to review the record to ascertain whether it supported the prosecution's contention that the U.N. uniform, otherwise illegal, was permissible **only if it were** a "safety" measure in a "maneuver" area. *See* New II, 55 M.J. at 119 (Sullivan, J., dissenting and concurring). By ignoring the Stipulation, the CAAF majority dispensed with that obligation, ruling by judicial fiat that it could not "think of a requirement more necessary to promoting the basic [U.N.] military mission or to safeguarding discipline and morale of deployed troops than uniform requirements." *See* New II, 55 M.J. at 108.

Even CAAF Judge Sullivan — claiming to have reviewed the record to ascertain the basis for the prosecution's claim that the U.N. uniform was justified as a "safety" measure in a "maneuver" area — did **not** state that the prosecution had, in fact, introduced any **evidence** in support of its contention that the U.N. patches and cap **actually** met this standard. Instead, Judge Sullivan merely expressed satisfaction that "the prosecution **could easily meet its burden** by proving as fact ... that the wearing of the UN badges and cap was otherwise authorized by an authority superior to that issuing the U.S. Army Uniform Regulation (Department of the Army)" governing the augmentation of the battle dress uniform. *Id.*, 55 M.J. at 127 (Sullivan, J., dissenting and concurring).

As alleged in paragraphs 15 and 23 of the Complaint, neither the CAAF majority nor the dissenting and concurring judges ascertained that the prosecution had introduced **any** "legal and competent evidence" supporting the contention that the uniform was lawful because it was a "safety" item in a "maneuver" area. Indeed, as the trial record clearly shows, the prosecution presented to the military judge only the naked argument — without supporting affidavits, sworn testimony or any other competent evidence — that the U.N. uniform was needed to protect the safety of American troops in Macedonia. Even then, the prosecution contradicted itself, on the one hand asserting that the

U.N. uniform was needed in a "hostile environment," and, on the other, maintaining that it was not conceding that "Macedonia is a hostile environment." Further, the prosecution inconsistently asserted, on the one hand, that the U.N. blue uniform was "recognized internationally as off limits to ... combatants," and, on the other, maintained that "in Macedonia, we don't have that situation." *See* Complaint ¶ 15, R. 48, J.A. ___.

According to Supreme Court standards, the Due Process Clause requires this Court to ask the question "whether any rational trier of fact could have found the essential element[] of [lawfulness of the order] beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979). Additionally, according to 10 U.S.C. § 851(c)(1), in order to prove any element of a court-martial charge beyond a reasonable doubt, the prosecution must do so "by legal and competent evidence." On this record, the only "legal and competent evidence" on the issue of the lawfulness of the U.N. uniform was the Stipulation of Fact that the augmentation of New's battle dress uniform by the U.N. patches and cap required for the Macedonian deployment was neither approved nor authorized, but rather was criminally prohibited. *See* New II, 55 M.J. at 127 (Sullivan, J., dissenting and concurring). Further, the very representations of the prosecution on whether the order met the regulatory exception that the U.N. patches and cap were permissible as a "safety" measure in a "maneuver" area were self-contradictory. On this record, then, there was no legal and competent evidence supporting any finding of lawfulness of the order to wear the prescribed U.N. uniform, much less any proof of such lawfulness beyond a reasonable doubt.

By erroneously omitting "lawful" from the essential elements of the offense defined in Article 2(2) of the UCMJ (10 U.S.C. § 892(2)),the CAAF majority deprived New of fundamental fairness, not only by shifting the burden of proof of unlawfulness to New, but also by dispensing with the requirement that the lawfulness of the order be based upon "legal and competent evidence" in

violation of Article 51(c) of the UCMJ (10 U.S.C. § 51(c)) and the Supreme Court's Due Process standards set forth in Jackson v. Virginia.

II. THE DISTRICT COURT ERRONEOUSLY DISMISSED COUNT II OF THE COMPLAINT.

At his court-martial, New was not just charged with having failed to obey an order requiring him to wear the U.N. patches and cap; rather, he was charged with having failed to obey an order to wear the patches and cap as "the **prescribed uniform for the deployment to Macedonia.**" Complaint, ¶ 8 (emphasis added), R. 48, J.A. ___. Yet, when New challenged the lawfulness of the order on the ground that the Macedonian deployment for which it had been **prescribed** was unlawful, the prosecution urged the military judge to dismiss New's challenge **not** on the merits, but as a nonjusticiable political question. Complaint ¶ 13, R. 48, J.A. ___. Although the military judge purported to rule against New on the merits, he agreed with the prosecution that insofar as the legality of the order depended upon the legality of the Macedonian deployment, the matter lay outside his jurisdiction as a nonjusticiable political question. Complaint ¶ 16, R. 48, J.A. ___.

On appeal, both ACCA and CAAF affirmed the military judge's ruling, **not on the merits**, but on the ground that the lawfulness of the deployment was a nonjusticiable political question entirely outside the jurisdiction of the court-martial. *See* New I, 50 M.J. at 739-40; 55 M.J. at 108-09. Thus, the military courts **refused to address on the merits** New's fourfold attack on the lawfulness of the Macedonian deployment, namely, that the deployment violated: (a) the United Nations Participation Act; (b) the Commander-in-Chief Clause of Article II, Section 2 of the Constitution; (c) the Appointments Clause of Article II, Section 2 of the Constitution; and (d) the Thirteenth Amendment to the Constitution. *See* Complaint ¶¶ 9, 10, 16, 26, and 27, R. 48, J.A. ___.

By ruling nonjusticiable his claim that the Macedonian deployment was unlawful, the military courts not only erroneously applied the political question doctrine, but unconstitutionally deprived

New of the full defense guaranteed him by the Fifth Amendment Due Process Clause. *See* Complaint ¶¶ 43 and 45, R. 48, J.A. ___. Although the district court agreed that the military courts had "improperly aggregated" New's four distinct and independent claims, it mistakenly denied that New had stated a claim upon which relief can be granted. *See* Rumsfeld, 350 F. Supp. 2d at 95-101, R. 56, J.A. ___.

A. The District Court Erroneously Failed to Address New's Due Process Claim.

In Count II of the Complaint, New plainly alleged that the military courts' wrongful invocation of the political question doctrine denied him his "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 by the Supreme Court in Crane v. Kentucky, 476 U.S. 683 (1986) and Simmons v. South Carolina, 521 U.S. 154 (1994)." Complaint ¶ 44, R. 48, J.A. ___. According to Crane, the Due Process Clause guarantees "the fundamental constitutional right to a **fair opportunity** to present a defense." Crane, 476 U.S. at 687 (emphasis added). Indeed, the Court stated that the Due Process Clause "guarantees criminal defendants 'a meaningful opportunity to present a **complete defense**.'" *Id.* at 690 (emphasis added). Such an opportunity is denied when the prosecution is "permitted to exclude competent, reliable evidence ... when such evidence is central to the defendant's claim of innocence" (*see id.*), such as that presented through New's expert in international law supporting New's contention that the deployment violated the UNPA. *See* Complaint ¶ 12, R. 48, J.A. ___.

The district court, however, dismissed New's Due Process claim, asserting that it was "based on an erroneous understanding of the policy behind the political question doctrine":

> The doctrine does not exist to protect or advantage government litigants; it exists "to assure that the federal courts will not intrude into areas committed to the other branches of government." [Rumsfeld, 350 F. Supp. 2d at 94; R. 56, J.A. ___.]

But, as the district court conceded, the military courts' use of the political question "work[ed] to the government's benefit in this case ... because the doctrine prevents the normal presumption of a military order's lawfulness from being rebutted." Rumsfeld, 350 F. Supp. 2d at 95, R. 56, J.A. ___. Indeed, by retreating behind the political question doctrine, the ACCA and CAAF permitted the military judge to conclude that, because the order to wear the prescribed uniform for the Macedonian deployment was a "military order," the order was "lawful," regardless of the merits of New's claim that his deployment violated the UNPA, the Commander-in-Chief and Appointments Clauses of Article II, Section 2 of, or the Thirteenth Amendment to the Constitution.

Notwithstanding the Supreme Court's standard that "one of the hallmarks of due process ... is the defendant's ability to meet [the prosecution's] case" (Simmons v. South Carolina, 512 U.S. 154, 175 (1994) (O'Connor, J., concurring)), the district court voiced no concern that the military's use of the political question doctrine substantially diminished New's opportunity to rebut the prosecution's case against him. Instead, the district court appeared to fault New for having brought "into question the order's legality by his deliberate and informed decision to disobey the uniform order in violation of Article 92 of the UCMJ" (Rumsfeld, 350 F. Supp. 2d at 95, R. 56, J.A. ___), as if it were New who had initiated the court-martial, rather than the Army. Further, the district court failed to acknowledge, as it had seven years before, that New had attempted to avoid a court-martial confrontation by requesting a unit transfer or discharge. *See* Perry, 919 F. Supp. at 493.

This time around, however, the district court was apparently convinced that New "had numerous avenues, besides direct disobedience, by which to challenge that order" on the ground that it was based upon an unlawful and unconstitutional deployment. *See* Rumsfeld, 350 F. Supp. 2d at 96-97, R. 56, J.A. ___. Quoting from CAAF Judge Effron's concurring opinion in New II (55 M.J. at 110), the district court stated that New could have: (1) "challenge[d] [the deployment] policy through a complaint under Article 138, UCMJ, 10 U.S.C. § 938"; (2) "raise[d] his concerns to the Inspector

General of the Department of Defense ("DoD"), 5 U.S.C. Appendix"; and (3) "communicate[d] directly with Members of Congress ... without interference from his military superiors and with protections against reprisal, 10 U.S.C. § 1034." Rumsfeld, 350 F. Supp. 2d at 96, n10, R. 56, J.A. ___. Surely, however, even if such options existed, they would not support the district court's apparent suggestion that they — not the court-martial — were the only "processes" by which New should have pressed his claim that the Macedonian deployment was unlawful. Moreover, the options set forth by the district court, and endorsed by CAAF Judge Effron, were really not options at all:

(1) New could not have obtained any relief through an Article 138 complaint, which is limited to complaints for "wrong[s]" suffered by a "**discretionary** action by a commander." *See* Turner v. Galloway, 371 F. Supp. 188, 190 (D.D.C. 1974). The order to wear the U.N. patches and cap as the "prescribed" uniform for the Macedonian deployment did not originate from New's commanding officer, but from someone else high in the national command authority, possibly even the President of the United States. According to the implementing regulation for initiating Article 138 complaints, "[t]he procedures prescribed ... are intended to ensure that an adequate official channel for redress is available to every soldier who believes the **soldier's commanding officer wronged the soldier**." AR 27-10, ¶ 20-5(a) (June 13, 2005) (emphasis added).

(2) While New might have "voiced" his legal and constitutional concerns to the DoD Inspector General, it does not appear that the Inspector General has statutory authority to address the legal and constitutional aspects of defense policy, but rather to focus on such concerns as "fraud, abuse, waste and mismanagement." *See Sen. Rep. 95-1071,* Inspector General Act of 1978 in 4 U.S. Code Congressional and Administrative News 2676 (95th Cong., 2d Sess. 1978); *see also* 5 U.S.C. App. 3, §§ 2, 6 and 8. Nor is there any indication that the DoD Inspector General serviced New's battalion stationed in Schweinfurt, Germany.

(3) Finally, 10 U.S.C. § 1034 does not, as the district court and CAAF Judge Effron apparently assumed, afford a soldier access to a member of Congress, much less mandate a response. Indeed, all that that section is designed to do is to dispense with the normal rule that a soldier may not communicate to his or her elected representatives in Congress without going through his chain of command. *See* Brown v. Glines, 444 U.S. 348, 359 (1980).

In short, none of the "avenues" referred to by the district court and CAAF Judge Effron were effective as means by which New could have raised his constitutional and legal objections to the Macedonian deployment. To the contrary, New's only meaningful choice was either to obey the order, foregoing his deeply-held conviction that the Macedonian deployment was violative of his oath of office as a American soldier, or to disobey that order, trusting that, if court-martialed, he would have the full right to contest the order's legality and constitutionality.

According to the district court, however, by disobeying the order to wear the U.N. uniform prescribed for the Macedonian deployment, New "put his liberty on the line to make an arguably political statement," thereby forfeiting his right to present a defense at his court-martial by contesting the legality and constitutionality of the Macedonian deployment. Rumsfeld, 350 F. Supp. 2d at 92, R. 56, J.A. ___. But there is nothing "political" about New's legal and constitutional defenses; rather, they are grounded in statutory and constitutional text and, according to due process of law, must be addressed on their merits, lest New be deprived of his liberty and property without a full and fair opportunity to be heard.

B. The District Court Failed to Correct the Military Courts' Erroneous Disposition of New's UNPA Statutory Claims.

The district court agreed with New that, "in characterizing the legality of the deployment order as a nonjusticiable political question," the military courts had "improperly aggregated all of [New's] claims of illegality under the rubric of a 'challenge to the President's use of the Armed Forces.'"

Rumsfeld, 350 F. Supp. 2d at 96, R. 56, J.A. ___. Indeed, by recasting New's four distinct and separate claims that the deployment was illegal and unconstitutional into one generalized challenge to presidential authority over the armed forces, CAAF, on the one hand, affirmed on the merits the prosecution's contention that the U.N. uniform was "necessary to promoting the basic [United Nations] military mission," while, on the other hand, it declined even to review the merits of New's claim that the very mission being relied upon to justify an otherwise illegal uniform contravened the UNPA, which laid down a specific set of rules binding the President's use of the Armed Forces in service of the United Nations. *Contrast* New II, 55 M.J. at 108 *with* 55 M.J. at 109, J.A. ___. By so ruling, CAAF put its judicial imprimatur upon the prosecution's deplorable tactic of (a) denying New any right to contest the legality and constitutionality of the Macedonian deployment as a **combatant** operation governed by 22 U.S.C. § 287d, while (b) maintaining that the Army had the right to rely upon the Macedonian deployment to justify the required U.N. uniform as a "safety" measure in a "maneuver" area without fear of undermining its counter-position that the Macedonian deployment was nothing more than a **noncombatant** operation! *See* Complaint ¶¶ 13 and 15, R. 48, J.A. ___.

The district court failed to address this obvious miscarriage of justice because it, too, laid aside the UNPA as containing only politically-enforceable provisions concerning "the allocation of war-making power between" the President and Congress, not rules of law governing a court-martial charge of violating a lawful order. *See* Rumsfeld, 350 F. Supp. 2d at 96-97, R. 56, J.A. ___. Without examination of any statutory language, legislative history, or judicial precedent, the district court assumed that the UNPA: (a) "does not vest any personal rights in [New]"; (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 [some particular] matter" as it

may arise. Rumsfeld, 350 F. Supp. 2d at 96-97, R. 56, J.A. ___. **The district court erred on all four points.**

Section 287d of the UNPA — the statute which requires specific congressional agreement before the President may detail American armed forces to serve under U.N. command in a combatant operation under Chapter VII of the U.N. Charter — does **not** "implicate ... the allocation of war-making power" between Congress and the President. To the contrary, the House Committee Report on this section (Section 6 of the UNPA of 1945) stated exactly the opposite:

> 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 [U.N.] Charter do **not affect the exclusive power of the Congress to declare war."** [*H. Rep. 79-1383*, reprinted in U.S. Code Cong. Serv., 927, 934 (79th Cong., 1st Sess. 1945) (emphasis added).]

Instead of resting Section 287d of the UNPA on its war power, Congress expressly stated that "mak[ing] available to the Security Council the armed force necessary for the purpose of maintaining international peace and security is ... for legislative sanction by the Congress under its constitutional powers to **raise and support armies, to provide and maintain a navy and to make rules for the government and regulation of the land and naval forces."** *See H. Rep. 79-1383* at U.S. Code Cong. Serv., pp. 933-34 (emphasis added). The constitutional authority for Section 287d, therefore, is the same as that upon which the Uniform Code of Military Justice rests — making rules for the government and regulation of the land and naval forces. *See generally* Loving v. United States, 517 U.S. 748 (1996). Thus, there is absolutely no basis for the district court's statement that the UNPA "does [not] implicate in any fashion the conduct of court-martial proceedings." Rumsfeld, 350 F. Supp. 2d at 96, R. 56, J.A. ___.

To the contrary, there is every reason to expect that one of the provisions of the requisite congressional agreement before the deployment of American troops to a U.N. combatant operation

would be a meeting of the minds on the rules governing the conduct of those troops. As the Supreme Court has recently observed, the constitutional provision vesting power in Congress to make the rules governing American armed forces "allocat[es] to Congress ... 'the primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military,'" and, "[u]nder [that provision] Congress ... **exercises a power of precedence** over ... Executive authority." Loving, 517 U.S. at 767 (emphasis added). Thus, unlike the war power where the President arguably has discretion to employ American armed forces without prior permission from Congress,[7] the President's power to discipline those armed forces is constrained by congressional rules limiting that discretion. *See id.* at 769-70. If the Macedonian deployment were found to be a combatant operation subject to 22 U.S.C. 287d, the detailing of New to that operation without prior congressional agreement deprived New of his right to be governed by rules agreed to by Congress, not by rules that may have been unilaterally agreed to by the President, including rules governing the "discipline" of an American service member under operational control of a U.N. commander. *See Record of Trial*, Vol. 4, App. Exh. IV, p. 2, ¶ d. J.A. ___.

This reading of Section 287d is reinforced by the specific provisions of Section 287d-1 of the UNPA — the statute which limits, to 1,000 at any one time, the number of members of the American armed forces the President may detail to serve in a noncombatant operation under Chapter VI of the U.N. Charter. Like Section 287d, Section 287d-1 in no way "implicates the allocation of war-making power." Rather, as Congress specifically observed, this section "would relate to United States assistance to the political commissions of the United Nations engaged in the peaceful settlement of disputes between nations." *See H. Rep. 81-591* in U.S. Code Cong. Serv., p. 2070 (81st Cong., 1st Sess., 1949). Like Section 287d governing the detail of American service members to U.N.

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[7] *See, e.g.*, Note, "Congress, the President, and the Power to Commit Forces to Combat," 81 *Harv. L. Rev.* 1771 (1968).

combatant operations, Section 287d-1 is based upon Congress's power to make rules and regulations for the armed forces, in that it explicitly states that "while ... detailed ... [American armed forces] personnel shall be considered 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." 22 U.S.C. Section 287d-1 (emphasis added). *See, e.g.*, *Record of Trial*, Vol. 4, App. Exh. IV, p. 2, ¶ d., J.A. ___.

Thus, both the text of Section 287d-1 and the legislative history of Section 287d belie the district court's assumption that the UNPA "does not raise a claim of fundamental error or unfairness in his court-martial proceeding [because the UNPA] does not vest any personal rights in [New] nor ... implicate in any fashion the conduct of court-martial or other military disciplinary proceedings." *See* Rumsfeld, 350 F. Supp. 2d at 96, R. 56, J.A. ___. Because those rules directly "implicate" congressional power over the rules for the government of the armed forces, including the UCMJ, there is no justification for the district court's unsupported contention that neither Section 287d nor 287d-1 of the UNPA may be invoked by New as a defense in a court-martial.

And the availability of those provisions as such a defense should not, as the district court amazingly claimed, be dependent upon whether Congress has disputed the President's report that he has detailed American armed forces to a U.N. operation. *See id.* at 97, n. 11, R. 56, J.A. ___. Instead, such a defense should depend upon whether the President, pursuant to statute, obeyed the "judicially discoverable and manageable standards" by which each of two types of U.N. operations are governed: (1) if the Macedonian deployment were a Chapter VII **combatant** operation, then the President may not detail American armed forces to it apart from a specific agreement with Congress; and (2) if the Macedonian deployment were a Chapter VI noncombatant operation, then the President may not

detail American armed forces to it and other like **noncombatant** operations in excess of 1,000 personnel at any one time. *See* 22 U.S.C. §§ 287d and 287d-1.

C. The Court Below Erroneously Disposed of New's Constitutional Claims Concerning the Macedonian Deployment.

In contrast with its exclusive treatment of New's UNPA claims as a nonjusticiable political question, the district court addressed on the merits New's three claims that the Macedonian deployment was unconstitutional. To be sure, the district court did state that New's Commander-in-Chief claim was "nonjusticiable." Rumsfeld, 350 F. Supp. 2d at 99, R. 56, J.A. ___. It erroneously rested that statement almost exclusively upon an extensive quotation from Gilligan v. Morgan, 413 U.S. 1 (1973), in which the Supreme Court dismissed a lawsuit seeking (1) an injunction restraining the governor of Ohio from calling out the National Guard prematurely, and (2) an order instructing the governor how to train and equip the Guard so as to minimize the use of deadly force in suppressing a civil disorder. *Id.*, 413 U.S. at 10. However, unlike the claim in Gilligan, New does **not** challenge the President's discretionary powers as commander-in-chief. Rather, he contests the President's delegation of his discretionary powers as commander-in-chief to a foreign military officer serving under the U.N. Secretary-General and exercising operational control over American service members detailed to a U.N. operation. Thus, the question raised by New is governed by Fleming v. Page, 50 U.S. 603 (1850), **not** by Gilligan v. Morgan.

According to the Supreme Court in Fleming, "[a]s commander-in-chief, [the President] is authorized to **direct** the movements of the ... military forces ... **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). According to the government's own release concerning the Macedonian deployment, the President did not retain such control over New's unit so as "to direct the movements" of that unit, or "to employ [it] in the manner he deem[ed] most effectual." Instead, the

President turned New's unit over to the "operational control" of the United Nations under the command of a foreign officer. *See* App. Exh. IV, *Record of Trial*, Vol. 4, J.A. ___. By divesting himself of "operational control," retaining only veto power over the American armed forces deployed to the U.N. Macedonian operation, the President unconstitutionally delegated his **exclusive** authority as commander-in-chief. *See* 2 J. Story, Commentaries on the Constitution, § 1491, p. 327 (5th ed. 1891).

Not only was this delegation of power to a foreign military officer a violation of the commander-in-chief mandate, but it was also violative of the Appointments Clause of Article II, Section 2 of the Constitution. To escape the reach of this clause, the district court concluded that the foreign officer commanding the U.N. operation in Macedonia was not an "officer of the United States" and, therefore, was not subject to the constrictions of that clause. Rumsfeld, 350 F. Supp. 2d at 98, R. 56, J.A. ___. To reach that conclusion, the district court relied heavily upon United States v. Germaine, 99 U.S. 508 (1878), which held that a surgeon, under contract of service to an officer of the United States, was not an "officer of the United States," but an agent of such an officer. Rumsfeld, 350 F. Supp. 2d at 98, R. 56, J.A. ___. The facts in this case are markedly different from those in Germaine. The U.N. field officer commanding the U.N. operation in Macedonia, for example, was not under contract with the President, but rather was under the authority of the U.N. Secretary-General. Moreover, that U.N. field officer was carrying out the very government function that would otherwise have been executed by an American military officer, who clearly would have been subject to the Appointments Clause. *See* Weiss v. United States, 510 U.S. 163, 170 (1994).

Relying on Germaine, the district court also asserted that, because the subjection of New's unit to foreign command was "under a temporary arrangement limited in scope and duration," it was not subject to an Appointments Clause challenge. Rumsfeld, 350 F. Supp. 2d at 98, R. 56, J.A. ___. Under the district court's view of the Appointments Clause, the President apparently would be free to

"out-source" military functions by contract to mercenary forces free from the check and balance of a Congress. According to Printz v. United States, 521 U.S. 898 (1997), however, the Appointments Clause applies to delegations of federal executive power to state officials, even when that delegation is temporary and limited, because even such a constrained 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 [a federal] program without meaningful Presidential control." *Id.* at 922. If presidential authority to execute the laws faithfully may not be delegated even to a state official who is bound by oath to support the United States Constitution, certainly it would be beyond the constitutional pale to permit the President to delegate his authority as commander-in-chief to a foreign military officer who is not bound by oath to support the United States Constitution, but has instead sworn allegiance to a foreign government as well as to the United Nations Charter.

According to the district court's view of the virtually unlimited power of the American presidency in foreign affairs, the President may deploy any member of the United States armed forces to serve in whatever capacity the President, in his judicially-unreviewable discretion, believes to be in the "national interest." Rumsfeld, 350 F. Supp. 2d at 98, R. 56, J.A. ___. Hence, the district court found without merit New's Thirteenth Amendment objection to being deployed to Macedonia as a "United Nations fighting person," rather than a "United States soldier." *Id.* at 100, R. 56, J.A. ___.

Apparently believing that it was relying upon the Selective Service Cases, 245 U.S. 366 (1918), the district court asserted that New's Thirteenth Amendment claim was refuted by the Supreme Court's declaration that, notwithstanding the Thirteenth Amendment, "the Government [has the power] to compel a citizen to render public service." *Id.* The language upon which the district court relied, however, **does not appear in the opinion** of the Court, but in a summary of the "brief of the United States." *See id.* at 366, 374. Had the district court relied upon the Supreme Court's actual opinion, it would have discovered that the Government's expansive view of its power to conscript was

rejected in favor of the much more limited one — namely, that the Thirteenth Amendment does not prohibit "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.

Similarly, the district court's view that "compulsory military service is generally outside the scope of the Thirteenth Amendment" (*see* Rumsfeld, 350 F. Supp. 2d at 100, R. 56, J.A. ___) is not supported by its lengthy quotation from Butler v. Perry, 240 U.S. 328 (1916), which compares compulsory military service to jury service, "existing since the foundation of our government." *Id.* at 333. *See also* Selective Service Cases, 245 U.S. at 378-82. The historic obligation of compulsory military service has always been directly tied, and limited to, the reciprocal duty of every American citizen to "yield his personal service [to his nation] when necessary" to defend his country which was, after all, created to "protect the enjoyment of [his unalienable rights] of life, liberty and property," and never linked to the enforcement of peace and security in the world. *See, e.g.*, Article VIII of the *Constitution of Pennsylvania* (Aug. 16, 1776), reprinted in Sources of Our Liberties ("Sources") 330 (Perry, ed., Amer. Bar. Found.: 1978).[8]

III. THE DISTRICT COURT ERRONEOUSLY DISMISSED COUNTS III AND IV OF THE COMPLAINT.

According to the district court, "Counts III and IV of [the Complaint] challenge the military judge's **finding** that the uniform order did not violate the Foreign Emoluments and Office Clause of the United States Constitution." Rumsfeld, 350 F. Supp. 2d at 101 (emphasis added), R. 56, J.A. ___. To the contrary, in both counts New has alleged that **no military court made any finding** that the order to don the U.N. uniform did not violate Article I, § 9 of the Constitution which prohibits,

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[8] *See also Delaware Declaration of Rights*, Section 10 (Sept. 11, 1776), Sources at 339; *Constitution of Vermont*, C. I, Article IX (July 8, 1777), Sources at 365; *Constitution of New Hampshire*, Article I, Section XII (June 2, 1784), Sources at 383.

"without the Consent of Congress," the "accept[ance] of any Emolument [or] Office ... of any kind whatever from any ... foreign state." *See* Complaint ¶¶ 46-49, 51-56, R. 48, J.A. ___. Having "failed fully to adjudicate ... the merits" of New's defense that the order to wear the U.N. patches and cap violated the prohibition against foreign emoluments or office without the consent of Congress, New clearly has stated a claim upon which relief can be granted under the classic rule of Burns v. Wilson, 346 U.S. 137 (1953). *See* Complaint ¶¶ 48-49, 56, R. 48, J.A. ___.

The district court claimed, however, that the ACCA opinion established that New's Article I, § 9 "argument was extensively litigated at trial." *See* Rumsfeld, 350 F. Supp. 2d at 101-02, R. 56, J.A. ___. That assertion is simply wrong, wholly unsupported by a reading of the cited portion of the ACCA opinion, which omits entirely any reference to the Foreign Emoluments and Office issue. *See* New I, 50 M.J. at 737. Indeed, the ACCA opinion supports New's claim that the issue was not litigated at all, in that ACCA observed that the government had "called no witnesses" to testify on the issue of the lawfulness of the uniform. *Id.* Despite the lack of any sworn affidavit or testimony, ACCA inexplicably upheld — as "findings of fact" — the military judge's conclusion that the U.N. uniform had been justified by the prosecution's naked argument that the uniform was a "safety" measure in a "maneuver" area. *See id.* at 737-40.

CAAF's treatment of the Foreign Emoluments and Office claim was no different. Indeed, the CAAF majority did not even bother to review the court-martial record before it determined, *sua sponte*, that "it is difficult to think of a requirement more necessary to promoting the basic [Macedonian] military mission or to safeguarding discipline and morale of deployed troops than uniform requirements." *See* New II, 55 M.J. at 108, J.A. ___. Indeed, one will search in vain any of CAAF's four opinions for any reference whatsoever to the New's claim regarding the Foreign Emoluments and Office Clause. And for good reason. There is nothing in the record to support any contention that the U.N. patches and cap had been authorized by Congress. Rather, the only purported

justification for the U.N. uniform was AR 670-1, ¶¶ 1-18 and 2-6d, an Army regulation. *See* New I, 50 M.J. at 740; New II, 55 M.J. at 119-20 (Sullivan, J., dissenting and concurring).

Thus, on the face of the Complaint, as reinforced by the court-martial record and the two military appellate court decisions, there is absolutely no basis for the district court's conclusion that New seeks in this proceeding to "revisit the military courts' evidentiary rulings or findings of fact." *See* Rumsfeld, 350 F. Supp. 2d at 101, R. 56, J.A. ___. To the contrary, there is ample evidence — in the court-martial record, confirmed by two military appellate decisions — to support the allegation in Count III of the Complaint that New's foreign emoluments and office claim was never "fully and fairly adjudicated," and alternatively, in Count IV of the Complaint, that the military courts' adjudication of the "safety" and "maneuver" issues was not based upon "any competent evidence."

According to the rule of Burns v. Wilson, 346 U.S. 137 (1953), then, New's claim that the military courts did not "fully and fairly" address his Article I, § 9 defense required the district court to address that defense on its merits, not to dismiss it on the false and erroneous ground that it has already been fully litigated.

CONCLUSION

For the reasons stated, the district court's decision dismissing each of the four counts of the Complaint should be reversed and remanded to the district court with instructions: (a) to vacate its December 22, 2004 judgment dismissing the Complaint; (b) to deny Defendants' motion to dismiss each of the four counts of the Complaint on the grounds that they fail to state a claim upon which relief can be granted; (c) to order Defendants to file and serve an Answer to the Complaint within 30 days after the docketing of a certified copy of this Court's judgment; and (d) to grant such further relief consistent with the opinion and judgment of this Court.

Respectfully submitted,

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