IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| MICHAEL G. NEW,<br><br>Plaintiff,<br><br>v.<br><br>DONALD RUMSFELD, et al,<br><br>Defendant | Docket No. CA-96-33(PLF)<br><br>Washington, D.C.<br>October 19, 2004<br>2:00 p.m. |

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE PAUL L. FRIEDMAN
UNITED STATES DISTRICT JUDGE

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**P R O C E E D I N G S**

THE CLERK: Civil action 96-33, Michael New versus Donald Rumsfeld, et al. Mr. Miles, Mr. Hamilton and Mr. Titus for the plaintiff. Mr. Corn and Major Birdsong for the defendant.

THE COURT: Good afternoon, everybody. We're here for the defendant's Motion to Dismiss. It seems just like yesterday that we were here the last time, but looking back through the file it was quite a long time ago. So, I guess you're up first.

MR. CORN: Thank you, Your Honor. May it please the Court. Gary Corn from the District of Columbia U.S. Attorney's Office representing the government.

Your Honor, this case places at issue the proper relationship between the federal courts and the military criminal justice system, as well as the proper relationship between the coordinate branches of the federal government.

The petitioner in this case would have the Court, request the Court to essentially sit in review of the decision of the Court of Appeals for the Armed Forces, notwithstanding the fact that the Supreme Court of the United States declined to do so, and also asks this Court to pass judgment on issues committed to the political branches of government, and that is, matters dealing with the deployment of U.S. troops and foreign affairs.

The government's position in this case is that under the very circumscribed standard of review of collateral attacks on court-martials and as impacted by the doctrines of justiciability that govern different challenges in federal courts, they do not allege facts sufficient to state a claim upon which relief can be granted in this case.

The underlying issue in this case, as I've stated, Your Honor, is what is the proper scope of review in this case. The defendants don't challenge, as a jurisdictional matter, the petitioner's right to seek collateral review of the court-martial. However, the proper scope of that review dictates the result in this case.

Now, petitioners rely on Kauffman, and I would submit their reliance is, I won't say misstated, but overstated, that Kauffman does not stand for the sole proposition that there's an open-ended collateral review of court-martial proceedings, so long as there's an allegation of failure to comply with Supreme Court constitutional standards.

First and foremost, Kauffman, and it's very significant in this case, was self-limiting, self-limiting in that it said we hold that the test of fairness requires that military rulings on constitutional issues conform to Supreme Court standards unless it is shown that conditions peculiar to military life require a different rule.

And as one of the examples that the Court offered in a footnote to that proposition, I believe it was footnote 6 in the opinion, Your Honor, was in an area of sort of tried and true criminal procedure, Fourth Amendment search and seizure, that searches operate differently in the military context, and therefore the scope of review may be different in those contexts.

Well, we would submit that nothing strikes more clearly at the heart of unique military matters than obedience to orders. This is not something that has an analog in civilian life. And so it is entirely proper for this Court to look to the more circumscribed standard of review that we articulate in our brief because that is what the deference that even Kauffman and its progeny in this circuit recognize is required, especially in a case such as this, calling into question the obedience to orders issues in the military.

We believe that the standard of review is more accurately reflected in Cothran, a much more recent case.

THE COURT: What's the name of it?

MR. CORN: Cothran, Your Honor.

THE COURT: As opposed to Kauffman?

MR. CORN: As opposed to Kauffman, yes, Your Honor.

THE COURT: Could you spell it, please.

MR. TITUS: Yes, sir. It's C-o-t-h-r-a-n. In fact, I could tell you --

THE COURT: I may have it here.

MR. CORN: That's 83 F. Supp. 2d 58, it's a 1999 District Court case from this District Court, Your Honor.

Cothran recognizes that as subsequently articulated in Priest, after Kauffman, that essentially the review focuses on two factors: The nature of the alleged defect in the proceedings, and the gravity of the harm from which the relief is sought. But as recognized in Cothran, collateral relief is available where plaintiff alleges either a constitutional error or lack of jurisdiction or error, but one that is so fundamental as to have resulted in a miscarriage of justice.

THE COURT: So it's got to be more than a constitutional error. It's got to be a constitutional error that resulted in a miscarriage of justice?

MR. CORN: Your Honor, that's certainly what Cothran says and is, I would submit, reflective of the body of law that has developed over the last 40 or so years as the military justice system has matured after the passage of the current Uniform Code of Military Justice, with a development of a very competent and sophisticated appellate court system both at the military level, in this case the Army Court of Criminal Appeals, and a Court of Appeals for the Armed Forces which is composed of civilian judges.

And I think it's reflective, and as some of the cases we have cited in our brief reflect, the development of this body of law in areas where collateral attacks on courts-martial are far more frequent than in this jurisdiction, such as in the Court of Federal Claims and the Federal Circuit because of the back pay issues that are usually involved, or in the Tenth Circuit because the United States disciplinary barracks is located in Fort Leavenworth, Kansas.

Therefore, we would submit that body of law is not inconsistent with and is certainly instructive on the proper scope of review of these cases.

Now, looking at the plaintiff's claims in this case, I sort of will take them in reverse chronological order, if I could. And leaving the issues of justiciability aside for this point, because the government would submit that if you don't allege claims that are sufficient to warrant collateral review, we don't even get to the question of the justiciability issues in the case.

THE COURT: So where you're going now is starting with more traditional failure to state a claim analysis?

MR. CORN: Yes, Your Honor.

THE COURT: Sort of, this doesn't state a claim so we don't have to get to deference questions, and justiciability questions, and political questions?

MR. TITUS: Well, Your Honor, I believe that nonjusticiable questions are questions that fail to state a claim for which relief can be granted. They're appropriate as 12(b)(6).

THE COURT: I understand that point. But I thought you were saying -- what's the question I don't have to get to if I agree with you on the point you're about to make?

MR. CORN: That the Court doesn't necessarily need to engage in the questions of whether certain aspects of the claims are justiciable questions, because if there's not a scope of review available to these claims, that would end the inquiry.

And sort of in reverse order, Counts Three and Four are counts that are premised on claimed violations, the order to wear the U.N. beret and other accoutrements on the uniform violated the emoluments and appointments clauses of the Constitution.

I'd offer two points, Your Honor. One, even by petitioner's statement of the scope of review in this case, their reading of Kauffman, they've not presented a single case for what the standard, the Supreme Court standard, would be on deciding an issue like that. There is no Supreme Court standard for deciding issues like that, especially in the military context.

More importantly, I believe if you look at the body of law dealing with collateral review, the type of issues -- the type of errors that the courts are talking about are sort of your criminal procedure constitutional errors, your Fourth, Fifth, Sixth Amendment trial rights, and where those are deprived that might trigger review.

These are not -- the alleged constitutional errors in Counts Three and Four of the complaint doesn't raise those types of issues. They're not the types of constitutional issues sufficient to trigger collateral review of the court-martial. In fact, all they are is another attack, an attack which was presented at trial, to the lawfulness of the order itself.

THE COURT: Did any of the courts, either the court-martial itself or either of the appellate tribunals, specifically address these constitutional claims?

MR. TITUS: Yes, Your Honor. The trial court did, and as you'll see in the complaint, those claims are essentially tied into the allegation that the Army -- the order violated the Army's uniform regulation, AR 670-1. Those issues were all addressed, briefed, argued, and considered. And I think that is fairly encompassed in the published decisions from the Army Court of Criminal Appeals and the Court of Appeals for the Armed Forces.

And as a side note, in their brief petitioners take issue with I guess whether or not the defendants agree with their recitation of the facts. And we would point out that the standard, Your Honor, in 12(b)(6) is that the facts obviously must be construed as true, but that's material facts, not immaterial facts nor legal argument. The facts material to this case, whether the issue has been fully and fairly litigated, is what issues were presented, as the Court just properly questioned, what issues were presented to the military court-martial and on appeal.

And, yes, Your Honor, in a roundabout way that's my answer that, yes, those issues were raised and addressed in those opinions.

Now, you'll note in the APA and the CAAF opinions that they focus their review of that issue primarily on the question of whether the uniform regulation was violated, but those are intricately intertwined. And the fact that they may not have specifically mentioned the constitutional provisions doesn't mean they didn't give them full and fair consideration.

But again, Your Honor, we would submit that those are not the types of constitutional errors, not even acknowledging that there's error, but that warrant collateral review of the court-martial.

The other issue that bleeds over into the justiciability question is their Count Two, which does challenge directly the President's decision to deploy forces to the former Yugoslav Republic of Macedonia in the early '90s, 1990s. That issue itself, as the trial judge found and the APA agreed with and was an integral part of the appeal, was first not relevant to the charge because the order that was disobeyed was not an order to deploy. It was an order to put on the uniform items. And the simple fact that it stated it was in anticipation of the deployment doesn't somehow convert that into an order to deploy.

To say otherwise would invite, for example, any soldier who believes that an upcoming order to deploy to a current military operation, such as Iraq, absent a declaration of war is violative of the War Powers Resolution, and therefore that soldier will refuse to go to the rifle range and train in preparation for that deployment.

The order to put on these uniform items was in anticipation of, but it was not an order to deploy.

And so the lawfulness itself of the deployment, the judge was correct to find was irrelevant to the charge. But, again, as dealt with on appeal and as unanimously found by every one of the Justices, that issue was a nonjusticiable issue, and therefore it was a matter of nadmissibility of evidence to present to the military panel, or to be considered by a military judge ruling on it as a matter of law.

And so the only response to the question of justiciability presented in the petitioner's brief is that their challenge is based on the United Nations Participation Act. That is a distinction without a difference when it comes to the question of the justiciability of a challenge to the Presidential order to deploy troops. It is no different than the challenges that comes have been raised challenging military action such as in Kosovo and other places brought under the challenges under the War Powers Resolution.

It is a claim that there is Congressional circumscription on Presidential prerogative in this area. This is especially true in an area here where this isn't a war scenario, it is what I think would be best termed as forceable diplomacy.

And under long-standing Supreme Court precedent, the Curtis Wright case, this is the area of foreign relations that is committed almost entirely to the discretion of the Executive. But most importantly none of those issues in Count Two raise an issue of such constitutional import as to call into question the fundamental fairness of the trial process itself.

That leaves Count One which at its core, petitioner's argue, is untouched by the justiciability issues in the case, we submit it's hard to separate those so cleanly as they would say, but ultimately that question is one of whether or not the lawfulness of the order was an element of the offense under Article 92 of the Uniform Code, disobey a lawful order, such that it had to be submitted to the military panel as a trier of fact. The CAAF majority found that it was not.

In an area of sort of unique jurisprudence, military law on a charge that is very unique in nature to the military, they applied their expertise in this area and concluded that this is not an element of the offense, it's an interlocutory matter to be decided by the judge as a matter of law.

THE COURT: If you were in a civilian court, the elements of the offense in civilian courts are set out in the statutes, and it's very clear -- I don't have my jury instructions here, but when we have a jury sitting in the box, we instruct the jury on what the elements of the offense are.

Possession of a quantity of heroin with the intent to distribute it, you tell the jury they have to decide did he knowingly possess the heroin. You have to find whether he knowingly possessed this item, you have to find whether it was heroin, you have to find whether he intended to distribute it. Those are all elements.

So by analogy it would seem to me that if there was a statute that said you violated a lawful order, isn't the question of whether the order was lawful a necessary element for somebody to be convicted? Because let's assume for the moment that in your scenario that the judge decided, well, it was an unlawful order. Then I suppose the answer is you can't be tried at all if the judge says it's an unlawful order, and the statute says it has to be a violation of a lawful order. But why isn't it a question for the jury as it would be in civilian courts?

MR. CORN: Well, Your Honor, that's exactly the issue for which the Supreme Court denied a Petition for Writ, but the reason is multifold. First, the scenario that you just described are questions of fact that go to the jury. And there's no dispute that questions of fact on elements of an offense go to a military panel like they would go to a civilian jury.

But in order to understand this issue, the Court has to understand the nature of the disobedience offense itself and the fact that there is long-standing precedent for the proposition that orders are presumptively lawful. A soldier disobeys an order at his or her own peril. And only if an order is patently illegal on its face, such as an order to commit murder, then there is -- the burden is on the accused to demonstrate that the order was otherwise unlawful.

And you're right, Your Honor, the petitioner in this case made a Motion to Dismiss the charges to the military judge, asking the judge to decide the question as a matter of law that they now complain he did decide as a matter of law, as to whether or not the order was lawful.

THE COURT: Did the judge make a decision?

MR. CORN: The judge did, Your Honor. The judge determined -- there were two separate motions.

THE COURT: So he wasn't made to go to trial with that question hanging out there undecided. The question as to whether it was a lawful order was decided, and the only question that you say Count One puts on the table is whether due process in the military requires that a military jury, as opposed to a military judge, decide that question.

MR. CORN: Correct, Your Honor. But I believe Judge Crawford in the CAAF had this one correct, that this is not a matter of constitutional law.

The petitioner cites to Gaudin, but Gaudin is a different case. Gaudin presented an issue that was uncontested that materiality was an element of the offense.

That is certainly contested here, and that was the issue presented and ruled against petitioner by the CAAF. And in large measure that's rested on, the opinion rested on several points. One was unlike a civilian context, the uniqueness of the military is that there is not a Sixth Amendment right to a jury trial. The entire process is a creature of statute. And just as the panel, which is not a jury, which is not required to find an accused guilty unanimously, it can be on a two-thirds vote, with narrow exceptions to that in capital cases.

It's a very different system, and Article 51 of the Uniform Code sets forth the rules for who within the court-martial itself which is composed of the military judge and the panel members will decide which issues. And based on precedent and logic, the Court of Appeals for the Armed Forces determined that this was properly considered an interlocutory matter to be decided by the judge as a matter of law.

Those issues were fully briefed to the judge. Two separate Motions to Dismiss. The first was made, I believe chronologically the first was made arguing that the entire deployment was unlawful. And that's where the judge found that that was irrelevant, and if it was relevant it was nonjusticiable.

Then separate Motions to Dismiss were made principally on the ground that this order violated the Uniform Regulation of the Army. And plaintiff's briefs seem to take great issue with the -- which I wouldn't concede as they would I think argue as a paucity of evidence on the government's part to respond to their motion, but it misses the point that they bore the burden to establish that the order was unlawful. That is well set down in military case law in the manual for courts-martial.

And in Article 92 itself, they bore the burden. They presented their case before the military judge, most of which were legal arguments, and the military judge made a ruling that they had not met their burden, and found the order to be lawful. And he then so instructed the panel when the case was submitted to the panel for them to resolve all the elements of the offense and the factual issues of the case.

None of that raises a constitutional question of the magnitude sufficient to warrant federal court intervention now that this case has run its course. We are sort of at the epilog to New, one that was taken up on the habeas petition and which the D.C. Circuit dismissed on comity grounds. But at the heart of that decision is a respect for and a confidence in the military judicial system.

And it's the rare case, the rare case, we would submit, where the military judicial system departs so radically from constitutional norms warranting subsequent intervention, and with the result of expunging a conviction in an entire process, as would be the case here. Such a position truly would invite in this case the same dangers identified by the Court of Appeals of the Armed Forces decision of inconsistent rulings, sort of in challenges to Presidential authority to execute national security missions under his powers as Commander-in-Chief.

And such a result, we submit, would be improper, and plaintiffs have not taken all the facts as true in this case with regard to how this case proceeded through the military court system, presented sufficient facts to warrant that type of review, and therefore their case should be dismissed for failure to state a claim.

THE COURT: Thank you.

MR. CORN: Thank you, Your Honor.

MR. MILES: Good afternoon, Your Honor. John Miles on behalf of the plaintiff, the petitioner Michael New. With me today are two of my co-counsel in the case, Henry Hamilton from the Bar of the State of South Carolina, and Herbert Titus from the Bar of the Commonwealth of Virginia. And Mr. Titus will present the plaintiff's argument.

THE COURT: Thank you.

MR. TITUS: Good afternoon, Your Honor.

THE COURT: Mr. Titus, how are you?

MR. TITUS: Fine. How are you?

In January, 1996, just three months short of nine years ago, Michael New stood before the bar of this Court seeking a writ of habeas corpus to halt court-martial proceedings against him, and to remove him from jurisdiction of the military justice system.

On March 28th, 1996, in its opinion explaining its ruling against Mr. New's habeas corpus petition, this Court stated that it had rejected New's petition on the grounds of comity, that the Court must stay its hand until court-martial proceedings and all military appeals have run their course.

Well, today we come back before you because the court-martial proceedings and the military appeals have run their course. Yet the government continues to contend that this Court should stay its hand, that this Court should not inquire into the constitutionality of Michael New's court-martial conviction because all of the legal claims raised in the four counts of Michael New's complaint are really political questions having to do with Michael New's personal political agenda of opposition to the American participation of the United Nations operation in Macedonia.

That was not the government's position when it appeared before this Court in January, 1996. If you recall, Your Honor, I was in the courtroom with Mr. Farris who argued the case at that time. To the contrary, as this Court noted in footnote 1 of its March, 1996, opinion, "The parties agree that the legality of the order under the United Nations Participation Act may turn on whether the deployment to Macedonia is under Chapter 6 noncombatant assistance, or Chapter 7, Armed Forces of the United Nations Charter."

Back then before this Court the government took the position that the military courts were perfectly capable of adjudicating the Macedonian deployment issue and any legal issues related to that deployment that Michael New might raise at this court-martial trial.

This Court expressed its confidence that the military courts would take seriously, as this Court had, the important issues that Michael New raises under the United Nations Participation Act which governs the relationships between Congress and the President, and the United States and the United Nations.

Now, we stand here today because the military courts did not seriously address the United Nations Participation Act or other issues that Michael New raised about the legality and constitutionality of the Macedonian deployment of American troops under U.N. command. They brushed aside those issues as political questions, and indeed dismissed them as Michael New's effort to inject his personal political agenda into a court-martial trial that had nothing to do with the Macedonian deployment.

But it was not Michael New who thrust the issue of the Macedonian deployment into the court-martial. If you look at paragraph 8 of our Second Amendment Complaint, you will see the charge set out in full. I believe it's worth restating, Your Honor, in light of what the government has argued here this afternoon, that specialist Michael New, U.S. Army, having knowledge of a lawful order issued by Lieutenant Commander Stephen R. Layfield on 2nd October, '95, and Captain Roger H. Palmateer on 4th October, '95, to wear the prescribed uniform for the deployment to Macedonia. That is, the U.N. patches and cap, an order of which

it was his duty to obey, did at or near Schweinfurt, Germany, on or about 10 October, '95, failed to obey the same.

Now, the reason why this charge specifies the prescribed uniform for the deployment of Macedonia is because the Army had stipulated, and this is set forth in the Exhibit P that is referred to in paragraph 14 of our Second Amendment Complaint, because the Army had stipulated to a -- that an order generally to wear U.N. patches was unlawful on its face, was unauthorized, and thus unlawful, unless within some exception. And, of course, the exception that they argued that it was for a safety purpose in a maneuver area was based upon the Macedonian deployment.

The government will have you believe that it can introduce its position on safety measurement in the maneuver area, citing the Macedonian deployment, but as soon as Mr. New claimed that that deployment was illegal, oh, Mr. New, you can't make that argument, it is a political question.

You see, the specification with regard to the Macedonia deployment was absolutely essential to this charge, because without it the government could not fit under the exception to AR 670-1, 1.1a and 2.6b, and therefore show what was otherwise an unauthorized order, was authorized.

So the legality of the Macedonian deployment is essential to the Army's case that the order to wear the U.N. patches and cap was a lawful one, one that Michael New had a duty to obey.

And as I indicated to you, Your Honor, when he raised the question of constitutionality and legality of the Macedonian deployment, he was stonewalled. At trial the government prosecutor insisted this the deployment question was a political question, and the military judge essentially agreed as he simply embraced the President's opinion that this was a Chapter 6 operation, without making any independent judicial judgment that it was, in fact, such an operation. And you can see this on page 22 of the Government's memorandum in support of their motion.

Now on appeal, the military judge's decision was affirmed that the whole issue of the Macedonian deployment was outside judicial cognizance, a political question. Now to be sure, if you look at the quoted passage of the military judge's ruling that appears on page 21 and 22 of the Government's response or their memo in support of their motion, the military judge wrestled with the issue on the merits, but he ran into difficulty, Your Honor. On the one hand if the Macedonian deployment was a Chapter 6 noncombatant operation, how could the government justify the wearing of the U.N. cap and patches as a safety measure in a maneuver area which would be a combat environment? There was a conflict between the two positions.

On appeal, they just simply dismissed the entire Macedonian deployment issue as a political issue, in order not to face the contradictory dilemma that the military judge faced.

Now, what this means as a matter of due process and fundamental fairness in the trial is that New is deprived of the very essence of his defense, and as Justice O'Connor in the Simmons case that we cite in our complaint, which is the hallmark of due process, the very opportunity to meet the government's case against him.

But, Your Honor, it was more serious than that. They created what we call the New exception to what theretofore had been a clear rule that lawfulness was an element of the offense.

And as Judge Sullivan, and, Your Honor, I would commend his entire opinion to you for your reading, as Judge Sullivan said this is unprecedented. Unprecedented. A radical departure from what had theretofore been the case that lawfulness was an element of the offense. And as an element of the offense, Your Honor, it was not on the burden of defendant

to prove that it was an unlawful order. No, it was the burden of the government to prove beyond a reasonable doubt that it was an unlawful order.

Yes, there was a presumption of lawfulness, but the stipulation of fact itself raised a question of whether the presumption would prevail. And, therefore, it raised the point that this order was at issue for the jury and that the government had the duty to prove beyond a reasonable doubt that it was lawful.

Now, going to each of the counts of the complaint, we take issue with the Government's characterization of this Court's constitutional and judicial responsibility with regard to this review. As you well know, Your Honor, a denial of certiorari --

THE COURT: It doesn't mean a thing.

MR. TITUS: -- by the U.S. Supreme Court doesn't mean a thing.

THE COURT: I said doesn't mean a thing.

MR. TITUS: One of the most famous opinions, as Justice Felix Frankfurter's opinion in the Baltimore Radio case, in which he said there are a variety of reasons why a certiorari petition would be denied. That's really irrelevant.

THE COURT: Justice Stewart said, although it's not directly relevant to your argument, and when we do grant cert, we really don't usually do it to tell the lower court they did a good job.

MR. TITUS: And, Your Honor, Congress has over the years concluded that the policy with regard to the administration of the Code of Military Justice should be conformed as much as possible to the civilian administration of criminal justice.

And the collateral review is as much a part of that plan and that program as the collateral review of state criminal proceedings. As a matter of fact, if you look at the Kauffman case, you will see that the Court indicated that the collateral review governing the military administration of the Code of Military Justice is comparable to that of the states.

Now, it's true that in Kauffman it indicated that unless you can -- the government can show a particular military need, a particular military need, but otherwise the standard is the same, conformity to constitutional standards, as set by the Supreme Court of the United States.

Now, the government has a very difficult time with the Gaudin case, and if you read Judge Sullivan's opinion, as in the military court you will see that he said there's no way that we can escape Gaudin. As a matter of due process, Gaudin stands for the proposition that if a particular element, a particular element is specified in a statute, then it doesn't matter that that element has both legal and factual ingredients. It's an element that must be submitted to the jury, and it's an element that the Government must prove beyond a reasonable doubt.

Now, Your Honor, I would like you to look specifically at page 512 when you have an opportunity after this hearing, and look at what Justice Scalia says in the Gaudin case about materiality, in a material false statement case, and note the parallel with lawfulness in a Congressionally defined offense. Remember, an Article 92 offense under the Uniform Code of Military Justice is a Congressionally enacted statute. It's not a military rule created by the President or by someone else. It's a Congressionally enacted statute, the same as the statute in Gaudin.

Now, there were two questions that were identified by Justice Scalia as historical fact questions, and then one as an ultimate fact question. He said there are two fact questions. What statement was made, and what decision was the agency trying to reach, or to make? And then the third question, which is the ultimate question, whether the statement made was material to the decision before the agency?

Now think, in an unlawful order case, what order was given? The same as what statement was made. What decision does this soldier who's received the order have to make? What decision is before the agency?

The ultimate question before the soldier is, is this lawful or unlawful? After all, Your Honor, if he obeys an unlawful order, he might be prosecuted for obeying an unlawful order. He has a duty to make that discernment and that choice.

So you see, the issues in Gaudin and the issue in the New case are exactly parallel. And the United States Supreme Court said that the Constitution, due process of law requires that that ultimate question, which is a mixed fact and law question, must be submitted to the jury the same as the two historical fact questions.

Now, Your Honor, counsel for the government was making the very argument this afternoon that was rejected in the Gaudin case. And we believe, as Judge Sullivan makes very clear in his opinion for the Court of Appeals of the Armed Forces, that this issue of lawfulness is a mixed law-fact issue, just as the materiality question is in Gaudin, and the due process clause requires that that issue be submitted to the military the same as it would be in a civilian criminal case.

Now, turning to Count 2 --

THE COURT: Okay, my question was whether or not that argument really covers both Count One and Count Two, because they seem to be -- the question of whether the deployment violated the Act, you're saying that's the defense, and he was deprived of the defense because it wasn't, in part because it wasn't submitted to the jury. That's your Count One argument. How does the Count One and Count Two arguments fit together?

MR. TITUS: Well, it fits together, but you have to make an additional inquiry with regard to Count Two. And that is the inquiry of whether or not the United Nations Participation Act claim or defense of Michael New is a political question.

THE COURT: But the question whether it's a political question, does that question come first? Does the judge have to decide, is it a political question?

MR. TITUS: Yes, Your Honor, because the reason for that would be that is it susceptible to a decision according to law, or is it just simply a decision according to politics?

Now, see what's interesting about the way the government approaches the political question doctrines, they approach it wholesale. They don't sit down and retail the question. But if you notice in the motion that was before the military judge, it was retailed. There were several parts. United Nations Participation Act, the War Powers of Article I, and the Commander-in-Chief provision of Article II, the Appointments Provision of Article II, and the Thirteenth Amendment.

Now, the government would have you believe that it doesn't make any difference, you know. It's just a potpourri. But, as a matter of fact, it makes all the difference in the world. Take the United Nations Participation Act. The Government will have you believe that even under the United Nations Participation Act the court and the military jury would be required to make policy decisions that are rightfully belonging to Congress and the President, when as a matter of fact, if you read the United Nations Participation Act Statute and the legislative history, you will see that Congress and the President made the policy decision and set down a rule and said to the President of the United States, if it's a Chapter 7 combatant operation, then you've got to go to Congress and get a specific agreement as to the terms and conditions that the American soldier would serve in such an operation.

And if it's a Chapter 6 operation, a noncombatant operation, Congress has laid down a rule that limits the authority of the President to designate a soldier or sailor to that, and limits it that at no one time can it be more than a thousand.

THE COURT: More than a thousand what?

MR. CORN: More than a thousand so designated to that kind of an operation. Now, Your Honor, those are traditional issues that are considered justiciable, and they are certainly issues that even a jury could understand. Even a jury could determine on the basis of evidence properly before it whether or not a thousand limit has been exceeded, and certainly a jury

can make a decision based upon whether there's a specific agreement to this. So you see, this whole notion of a political question has got to be carefully assessed one by one.

Take for example the Commander-in-Chief claim. That doesn't have anything to do with the constitutional allocation of power between Congress and the President, but it has to do with whether or not the President, as Commander-in-Chief, can delegate any of the duties that he has as Commander-in-Chief to somebody else, especially to somebody else who was not appointed to an office in accordance with the Appointments Clause of Article II.

These are the kinds of questions that Michael New attempted to litigate, but he was deprived of the opportunity to present a complete defense, contrary to the constitutional standard laid down in Crane versus Kentucky because he was not allowed to litigate this particular matter.

THE COURT: Tell me again what the Appointments Clause argument is.

MR. TITUS: Well, the Appointments Clause argument is when you're placed under the operational control of a foreign officer, such as a Finish officer, the Finish officer was not appointed according to the process set forth in Article II.

THE COURT: Sure. But you just finished telling me about the United Nations Participation Act, and there are different procedures and different guidance with respect to Chapter 6 and Chapter 7.

MR. TITUS: Yes.

THE COURT: And under the United Nations Participation Act, assuming that the President jumps through all the right hoops under one or the other of those provisions, and the United States therefore is participating in a U.N. operation either because the President went back to Congress or there was a limited number of people under Chapter 6, doesn't it sometimes happen, assuming that Chapter 6 or Chapter 7 is complied with chapter and verse, all T's crossed and I's dotted, doesn't it sometimes happen that a U.S. soldier is then under the command of somebody from another country?

MR. TITUS: That may be so, but then there would be a constitutional question as to whether Congress and the President can do that.

THE COURT: So even if the Chapter 6 or Chapter 7 had been fully complied with, there still would be in your mind an Appointments Clause question about whether the statute or those agreements are constitutional. I'm just trying to get conceptually, are these two separate arguments? Are they related? Is the question, was the statute complied with? And if not, it's not a lawful order; end of discussion. But if so, then we have this Appointments Clause question.

MR. TITUS: That may be so, Your Honor. And, again, what I'm trying to indicate to you is that the question of justiciability, the question of whether something is a political question or not, has to be done issue by issue. It can't just be lumped together as a foreign relations issue.

As a matter of fact, if you look at Baker and Carr, they say courts are sometimes mistaken to think that just because it's a matter that deals with foreign affairs, then it must be a political question. Now, it all depends.

In the United Nations Participation Act, it requires construing a statute and a treaty and applying that statute and the treaty to the facts, which is clearly a justiciable question.

Now, whether the issue of the Commander-in-Chief and whether that's a nondelible duty, whether that's a political question or not requires a question of whether the Constitution has set down certain principles with regard to the authority of the Commander-in-Chief.

And in this particular situation, the President claimed that he retained veto power over the operational control of an American soldier. Well, is that consistent with the designation that he's the Commander-in-Chief? Is it enough that he has veto power? Or doesn't it require that he has not only veto power, but he can direct what those troops would do?

I'm not trying to answer the substantive question so much as to indicate to you that, Your Honor, to say that this is a justiciable question because under other circumstances such as the War Powers Act where there's a continuing dialogue between Congress and the President, that that's a political question, then these must be political questions. They're quite different.

Turning to Counts Three and Four, the mistake the government makes here is assuming that just because they might be able to justify the U.N. uniform as a safety measure in a maneuver area, that answers the question of whether Congress consented to the wearing of a U.N. uniform, which we argue is an emolument and an office of a foreign government, that Article I, Section 9 of the Constitution specifically states that Congress has to make the decision.

Now, notice they're relying upon an Army regulation. We're relying upon the constitutional statement that no person holding an office in the United States of America can have an emolument or an office of a foreign government without Congress' consent.

Now interestingly, Your Honor, under the United Nations Participation Act, the terms and conditions under which a soldier might be assigned to a combatant operation might include permission or consent to holding an office or emolument.

But that's a very different question than what was asked and answered by the Court. Your Honor, this question was raised very specifically as set forth in paragraph 11 of our Second Amended Complaint, and as the government conceded, you cannot find any reference to Article I, Section 9, in any of the opinions in the military proceeding in this case, which indicates that they refuse to address this question.

And once again we say, Your Honor, that this is a denial of fundamental due process because Michael New raised it as a defense, it was never addressed by the Courts.

And it's for these reasons, Your Honor, that we believe that the government's Motion to Dismiss should be denied, and that we should go to the merits of our claims on each of the four counts.

Thank you very much.

THE COURT: Thank you very much, Mr. Titus. Mr. Corn.

MR. CORN: Thank you, Your Honor. I promise I will endeavor to be brief.

But what you've got, I think what you see here is that infused throughout is a challenge to and a question of the President's prerogatives in the area of foreign affairs in the area of his Commander-in-Chief powers, in the area of how he will deploy U.S. forces and in what capacity. Those questions are absolutely the types of questions that strike at the heart of the political question doctrine.

And while plaintiff's counsel argues that it's the defendants that want to lump all of these into one issue, that is a lumping that is unsupported by Baker versus Carr and all the subsequent case law dealing with this area of law. They would approach this in sort of an APA view solely, that if there are standards to apply, then it is emphatically the duty of the Court to do so.

The political question doctrine assumes there are constitutional issues in many respects, but it recognizes that there are times when the courts must stay their hands. There are areas into which the judiciary should not tread.

These are the very types of core issues. What uniform will I deploy my troops in? The President's decisions on those matters. Into what areas? Under what conditions? As recently as 2000, the D.C. Circuit took these issues up in Campbell versus Clinton.

THE COURT: That was also my case.

MR. CORN: Yes, Your Honor.

THE COURT: And I was affirmed, and the court found it necessary, the three judges on the panel found it necessary to write four separate opinions to explain the reasons why they were affirming. First, Judge Silberman wrote an opinion for himself and Judge Tatel. Then Judge Silberman wrote an opinion for himself, which is the one you're about to tell me about.

Then Judge Randolph wrote an opinion disagreeing. And then Judge Tatel wrote an opinion saying courts can decide whether war has been declared, or something to that effect. So, I'm delighted that you're going to clear it all up.

MR. CORN: I will tread very lightly into that area, Your Honor.

THE COURT: I assume you're going to talk about Judge Silberman's concurring opinion in which he concurred with himself.

MR. CORN: He concurred with himself. Your Honor, I think underlying that entire opinion, however, though is the essential proposition that even in a situation where there is a statute on the books, a statute that was -- that's binding as law of the land, it doesn't necessarily bind the President's hands in certain discrete areas. And those are difficult decisions, but those are the types of decisions that, I mean, let's not shirk it.

Under their analysis those decisions, rather than a Federal District Court Judge addressing, subject to appeal and review by the Supreme Court, in instances where even those courts are staying their hands, will submit it to a panel of nine military members, and such that if they come back and determine for whatever their reasons behind the closed doors in the panel room they disagree with this deployment order, that's nonreviewable.

There's another significant problem with that view and the view of whether or not this is an element that should be submitted to the panel. And we would point out that the petitioner's entire argument as to the constitutional import of this issue rests on the disagreement found in a concurring opinion in the CAAF decision. Not a dissent. A concurring opinion, which I'll come back to in a moment, Your Honor.

But the problem is, as they alluded to, you then shift the burden. By their view, the burden would then be on the government. And there goes -- it would eviscerate the presumption applicable to every soldier out there that orders are lawful, presumptively lawful.

And as the CAAF discussed and cases in this Circuit and the Supreme Court have discussed time and again, obedience -- immediate obedience to orders is a critical component of military life. You don't sign a contract when you come into the military. It's a status change. You must be prepared, you must obey orders, unless they're patently illegal on their face.

Well, you wouldn't -- soldiers could disobey orders and it would be up to the government to then prove them later on to be lawful before the soldier would have to comply with that order. It turns that system on its head, Your Honor.

THE COURT: That's not exactly right. First of all, there are rebuttable presumptions and irrebuttable presumptions. Not all presumptions are the same.

Secondly, one could make this argument, now I'm putting aside for the moment what the proper role of this Court is vis-a-vis the military.

MR. CORN: Yes, Your Honor.

THE COURT: But one could make the following argument: All orders are presumptively lawful, and therefore all soldiers have to obey them. And most soldiers would. They wouldn't disobey them on the theory that some day I'll have my court-martial which I'm really looking forward to, and they will have to prove that it's lawful. That's not going to happen.

And, again, my analogies to criminal trials in this Court I understand are not perfect. There is a requirement of the gun statute that says that in order to be convicted, the gun at some point in its history has to have traveled interstate from one jurisdiction to another.

Well, in almost every gun case there's a stipulation, because everybody knows that no guns are manufactured in the District of Columbia. And it might take some effort for the Government to pull together all the paperwork and bring in some custodian of records or some expert to prove it, but they could prove it in 100 percent of the cases.

And, therefore, every criminal defense lawyer, even the best of them, stipulates rather than make me and the prosecutors waste their time.

So, if there is a rebuttable but very strong presumption that orders are lawful, and someone is court-martialed for disobeying a lawful order, my guess is that in 95 percent of the cases the issue would be, did he really disobey? What did he do? What was his conduct? Rather than, was the order lawful? And this may be the aberrational case where the question is, was the order lawful.

My only point in rambling on about this, and you can react if it doesn't make any sense to you or if it does make sense to you, at least from my normal way of thinking as a practicing lawyer and for 10 years as a judge, an element of an offense is something that is proved to the jury or to the fact finder, not decided by the judge.

And in some cases it's a slam dunk to prove it, or it's so clear that you'll get a stipulation. And, you know, possession of drugs with intent to distribute, there are defenses sometimes: I had those drugs, but I had no intent to distribute them. How do you know that? Because the quantity was too small. It was for my own use. So, they get convicted of a misdemeanor instead of a felony.

So the question is what element do you put at issue, and how hard is it to prove? And even if the lawfulness of an order is presumed in day-to-day life in the military, and even when you get to your court-martial trial, there may be a strong presumption, I'm not sure how you instruct the military tribunal, but why isn't it an element that has to be proved, proved beyond a reasonable doubt, rather than decided as a matter of law?

MR. CORN: Your Honor, for one, I don't think the analogy is a perfect analogy.

THE COURT: I'm sure.

MR. CORN: And the reason being, is because the potential problems, the true constitutional potential problems of putting the burden on anyone other than the government to prove each element of the offense beyond a reasonable doubt, it may be true that in many cases similar to the practice here you'll see stipulations, but not necessarily. And any defense counsel that wants to can put the government to its burden on each and every element.

THE COURT: I agree.

MR. CORN: So at the end of the day, it does turn the burdens around on this issue if it's something that's to go to the jury or to the panel in a military case, which creates the potential for difficulties.

And that sort of goes back to the sort of core of Judge Crawford's and the majority's view of this issue, and that is, and not to downplay it, but the inclusion of the word "lawful" in Article 92 is surplusage, in essence. It's a reflection of the obvious that orders are presumptively lawful, and an acknowledgment that as a matter of defense, the defense can come in and seek to overcome and rebut that presumption and prove the unlawfulness of the order, which takes it out of the realm of being an element.

What I think also, Your Honor, is significant in terms of the fundamental question here as to the scope of the Court's review, is the fact that Judge Sullivan concurred, as did Judge Everett, I believe. Both of them concurred on the very important point that if there was error, neither of them conceding, as I read the opinion, that the error was one of constitutional magnitude necessarily, but more in the framework, as counsel mentioned, that for the most part Congress wants court-martials to operate similar to civilian trails when appropriate. But that if there was error, it was harmless error.

And debating that or not, if you look at Cothran, that is another basis that the Court looked to in that case to say if this is a matter that is subject to harmless error analysis, it is, I won't say in all cases, but certainly in the majority of cases, not of the nature that rises to such a significant constitutional deprivation as warranting collateral review.

Very quickly, too, Your Honor, I think, and this is not something that's extensively briefed, but a lot of discussion about the United Nations Participation Act and Chapter 6 versus Chapter

7 of the U.N. Charter, I think there are some subjective views injected into the counsel's argument as to the nature, the different nature of those types of operations.

You'll see commentary in literature referring to them as peace enforcement versus peace keeping. But I think anyone would be hard pressed to find a deployment of troops under either Chapter 6 or Chapter 7 where they're not deploying with weapons, where they're not deploying into a condition, a situation essentially where there are hostile factions.

The question becomes whether they're invited in, which is essentially a trigger for a Chapter 6, or whether they're coming in uninvited based on a U.N. mandate in a more hostile environment. But to suggest that the deployment to Macedonia was akin to a vacation spot somewhere is not accurate, and at heart the military judge has very logical findings about that being a maneuver area, and there being safety issues, were absolutely triggered by the fact that this was a deployment of the nature that it was.

Unless you have any other questions, Your Honor, I think I've exhausted my time and my efforts.

THE COURT: I think I have lots of questions, but I'm not sure they're going to get resolved this afternoon until I go back and read a few more things.

Mr. Titus, is there anything you would like to add?

MR. TITUS: Yes, Your Honor. I would just like to add, Your Honor, with regard to the harmless error issue that in our pleading you will see that we cite the Neder case. And if you look at the Neder case, you will see that the whole question of harmless error is itself a matter of constitutional dimension because it has to do with whether there was error in the failure to submit an element of the offense to the jury for its decision and proof beyond a reasonable doubt.

Now, in that particular case, Chief Justice Renquist's opinion lays it down very carefully that if there's no evidence that goes to that ultimate question of lawfulness or the ultimate question of materiality, and there's no suggestion that there was any dispute about that, then you've made it out as harmless error.

Now, if you read Judge Sullivan and Judge Everett's opinions, they do not apply that Neder standard in their opinions. They ignore that Neder standard. So it's important for to you look at that when you have the opportunity to reflect and realize that we have plead that in our Count One, that they made a constitutional error in applying the Neder rule.

Thank you, Your Honor.

THE COURT: Thank you. Well, thank you all very much.

(Proceedings concluded.)

CERTIFICATE

I, LINDA L. RUSSO, Official Court Reporter, certify that the foregoing pages are a correct transcript from the record of proceedings in the above-entitled matter.

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Linda L. Russo, RPR
Virginia CCR No: 0313102