

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

REPLY BRIEF ON BEHALF OF APPELLANT

Docket No. ARMY 9600263

v.

Specialist **Michael G. New**,
United States Army,
Appellant

Tried at Leighton Barracks, Wuerzburg, Germany on 24 October, 17 November, 8 and 13 December, 1995 and 18, 19, 23, and 24 January, 1996 before a Special Court-Martial Empowered to Adjudge a Bad Conduct Discharge appointed by the Commander, 3d Infantry Division, LTC W. Gary Jewell, military judge, presiding.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Statement of the Case

The appellant filed assignments of error with this Court on 3 July 1997. On 5 February 1998 the government answered appellant's assignments of error. On 11 February 1998 appellant moved to extend the deadline for filing the present reply to the government's answer. On 19 February 1998 this Court granted appellant's motion for an extension of time to reply to the government's answer.

Statement of Facts

Those facts necessary to a disposition of the assigned errors are set forth in the Brief on Behalf of Appellant and in the arguments,

infra.

Reply to the Government's Answer

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I

THE MILITARY JUDGE ABUSED HIS DISCRETION BY DENYING SPC NEW'S CAUSAL CHALLENGE AGAINST A MEMBER WHO ORDERED A SUBORDINATE TO WEAR THE UN UNIFORM AND DEPLOY TO MACEDONIA.

The government's brief correctly notes that challenges for cause should be liberally granted. (Resp. Br. at 3). However, the government's brief misinterprets several issues with respect to actual and implied bias.

With respect to actual bias, the government contends that the defense theory for excluding COL Kwist was insufficient (

Id.

) because the defense did not establish whether COL Kwist ever ordered his subordinate captain to deploy to Macedonia. (Resp. Br. at 4). However, focusing on whether COL Kwist personally ordered his captain to deploy to Macedonia misses the point. The defense clearly established that COL Kwist had been ordered by his superiors to identify and provide one of his captains for the Macedonia mission and that COL Kwist personally carried out that order or caused it to be carried out.

Thus, COL Kwist clearly had an interest in the seminal matter around which SPC New's court-martial revolved. Consequently, for COL Kwist to vote "not guilty" at SPC New's court-martial would require COL Kwist to impeach and affirmatively disavow the validity of the order COL Kwist received

after

COL Kwist had carried out that order or caused that order to be carried out. In light of COL Kwist's obvious interest in the outcome of the case, the military judge's denial of the defense challenge for cause against COL Kwist constituted an abuse of discretion.

The government also contends that COL Kwist was not confronted with precisely the identical situation presented by SPC New, i.e. the wearing of the UN Uniform (Resp. Br. at 4, note 2): "The assigned issue might have merit, had COL Kwist personally issued the same order to a subordinate, and then taken disciplinary action for that subordinate's refusal to wear the uniform." (

Id.

)

The government's contention in this regard is predicated on a hollow and immaterial distinction. COL Kwist's act of obeying his superiors' order to identify and provide a captain to deploy to Macedonia (R. at 533) clearly involved COL Kwist personally informing such captain that the captain was required to deploy to Macedonia or causing COL Kwist's subordinates to identify and inform such captain that the captain was required to deploy to Macedonia. In either event, COL Kwist was responsible for the order's execution. In addition, with the deployment instructions eventually came the collateral instruction for the captain to wear the UN Uniform. In other words, when COL Kwist received his superiors' order to identify and provide a captain to deploy to Macedonia, COL Kwist did not permit that order to languish in a state of limbo-like ambiguity without execution. Instead, he directly, or perhaps indirectly through his subordinates or staff, caused that order to be executed. Thus, he was personally involved with the identification and deployment of the captain which, in turn, involved the captain's donning the UN Uniform.

Furthermore, although COL Kwist denied any bias (R. at 532-533, Resp. Br. at 4), an appellate court need not accept as conclusive a challenged member's perfunctory disclaimer of personal interest or his

pro forma

assertion of impartiality.

United States v. Smart,

21 M.J. 15 at 19 (C.M.A. 1985);

United States V.

Harris

,

13 M.J. 288 (C.M.A. 1982). Such a legal fiction would strain the credulity of reasonable persons. With the defense having clearly made a case of actual bias, this Court should not rely on the bald assertions of COL Kwist that he could remain impartial notwithstanding his involvement in identifying and providing a captain for deployment to Macedonia in the UN Uniform.

With respect to implied bias, the government correctly notes that this Court views such matters from the perspective of a member of the public.

United States v.

Minyard

,

46 M.J. 229 (1997). In setting forth an objective test for implied bias,

Minyard

made several points which are relevant to this case.

First, while

United States v. Moyar,

24 M.J. 635 (A.C.M.R. 1987) refers to special deference provided to the military judge (

Id.

at 638, Resp. Br. At 6

3

),

Minyard

states that a reviewing court should give less deference to the trial judge when matters of implied bias are concerned. 46 M.J. at 231.

Minyard

goes on to hold that where matters of implied bias are raised, a court-martial member's credibility is not dispositive.

Id.

Secondly, the government contends that "within the context of COL Kwist's responses to the entire line of questioning, the record does not support that the military judge abused his discretion in declining to excuse COL Kwist" and again refers to "COL Kwist's forthright and matter of fact discussion on his views of the UN deployment," (Resp. Br. at 6). Due to the objective nature of implied bias, however, such factors are immaterial to an implied bias analysis.

Finally, with respect to implied bias, the government's brief asserts that

Appellant's case does not justify the application of implied bias, especially as the fact that the alleged bias goes to the issue of lawfulness of the order to wear the UN uniform, an issue that COL Kwist was not required to decide given the military judge's ruling that the issue was an interlocutory matter.

(Resp. Br. at 5.)

This observation again misses the point. Implied bias does not hinge on whether the order to wear the UN Uniform was lawful, or whether the military judge ruled on that issue. Implied bias hinges on whether, from the perspective of a reasonable member of the public, a senior commander who identified and sent his subordinate captain to Macedonia wearing a UN Uniform may properly sit in judgment of another soldier who is accused of refusing to do the same thing. Again, the issue involves the appearance of bias, and the standard is an objective one.

Minyard, *supra*.

For the same reasons that police officers and corrections officials have been historically excluded from sitting on criminal juries, COL Kwist "in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality"

should not have sat as a member at SPC New's court-martial.

II

THE EVIDENCE ADDUCED AT TRIAL WAS LEGALLY AND FACTUALLY INSUFFICIENT TO PROVE THAT SPC NEW

FAILED TO OBEY A LAWFUL ORDER.

Appellant adheres to the discussion of this assignment of error set forth in his Brief on Behalf of Appellant.

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III

BECAUSE THE EVIDENCE AFTER THE GOVERNMENT'S CASE IN CHIEF SHOWED THAT SPC NEW WAS PREVENTED FROM COMPLYING WITH THE ORDER, THE MILITARY JUDGE ABUSED HIS DISCRETION BY FAILING TO GRANT THE DEFENSE MOTION FOR A FINDING OF

NOT GUILTY.

Appellant adheres to the discussion of this assignment of error set forth in his Brief on Behalf of Appellant.

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IV

SPC NEW'S FIFTH AND SIXTH AMENDMENT RIGHTS TO DUE PROCESS AND A FAIR TRIAL WERE VIOLATED

BECAUSE THE MILITARY JUDGE FAILED TO INSTRUCT THE MEMBERS ON THE DEFENSE OF INABILITY.

V

SPC NEW'S FIFTH AND SIXTH AMENDMENT RIGHTS TO DUE PROCESS AND A FAIR TRIAL WERE VIOLATED

BECAUSE THE MILITARY JUDGE FAILED TO INSTRUCT THE MEMBERS ON THE DEFENSE OF OBEDIENCE TO

ORDERS.

Combined Reply Argument for Assignments of Error IV and V

The government brief focuses on a three-part test, enumerated by the then-named Court of Military Appeals in United States v.

Damatta-Olivera

,

37 M.J. 474 (C.M.A. 1993),

to determine whether failure to give an instruction constitutes error.

Damatta-Olivera,

however, is completely inapposite to the issues raised in Assignments of Error IV and V; Assignments of Error IV and V deal with instructions on special defenses;

Damatta-Olivera

deals with a mere evidentiary instruction concerning a "defense-requested instruction on prior inconsistent statements..." 37 M.J. at 478.

The cases cited under Assignments of Error IV and V in the Brief on Behalf of Appellant correctly set forth the methodology for determining whether the military judge must instruct on a special defense raised by the evidence. See also: R.C.M. 920(e)(3); R.C.M. 920,

Discussion;

R.C.M. 916(b); R.C.M. 916(d); R.C.M. 916(i); and Benchbook, para

5-10.

The government's focus on

DamattaOlivera

advocates a paradigm shift in evaluating whether special defense instructions must be given and suggests that existing law for special defense instructions has been superseded by the

Damatta-Olivera

test for evidentiary instructions. Assignments of Error IV and V do not address defense requests for evidentiary instructions pertaining to credibility of witnesses. Instead, Assignments of Error IV and V address instructions for special defenses which, once raised, require the government to prove beyond a reasonable doubt that such special defenses are not viable. Thus, special defenses raise matters of a "constitutional magnitude" and are entirely distinguishable from defense requests for evidentiary instructions about witness credibility.

United States v.

Brooks

,

25 M.J. 175(C.M.A. 1987). See also

United States v. Webster,

769 F.2d 487 (8th Cir. 1985) and

United States v. Hicks,

748 F. 2d 854 (4th Cir. 1984).

As the Brief on Behalf of Appellant establishes, instructions on the defenses of inability and obedience to orders were required as a matter of law. The evidence clearly raised the defenses, and the military judge had a duty to instruct the members,

sua sponte,

on those defenses. R.C.M. 920(e)(3). (App. Br. at 14-20.) In arguing against this point, the government contends that "any requested instruction on inability and obedience to orders would be incorrect as a matter of law" (Resp. Br. at 13) and invites reference to previous discussion on those issues

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. In any event, the government's

post hoc,

conclusory assertion that instructions on these special defenses would be incorrect is based on a flawed analysis of the issue. (Resp. Br. at 8,9.)

Instead of considering whether some evidence raised the defenses of inability and obedience to orders, the government, in order to advance its novel

Damatta-Olivera

test for special defenses, goes one step further and concludes that these special defenses would not have prevailed had the members been properly instructed. The issue, however, is whether the evidence raised these special defenses; if so, it was error for the military judge to fail to instruct on them. It is for the court-martial members to decide whether SPC New could prevail on the special defenses of inability and disobedience to orders.

In some general sense, the government contends that "the defense and issues in the case were adequately covered by the instructions given by the military judge to the members (R. 783-390)." (Resp. Br. at 11.) To the contrary, nowhere in the military judge's instructions does he even mention the special defense of inability. (R. at 782-784.

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With respect to the special defense of obedience to orders, the military judge's instruction is garbled and confusing. The military judge instructed that "[w]hile the unlawfulness of an order or regulation is a defense to the charge of disobedience, the inherent emphasis in the military upon obedience,

except in cases where the order is patently illegal,

encourages compliance with orders irrespective of legality." (R. at 784) (emphasis added). This instruction essentially informs the members that, somewhere, this defense may exist, but only where the order is patently unlawful. Having repeatedly instructed the members that the order to wear the UN Uniform was lawful (R.782, 784), the military judge's instruction was essentially a command to convict SPC New. Furthermore, the instruction completely ignores the issue of obedience to lawful orders with respect to AR 670-1 as a defense to disobeying LTC Layfield.

Further still, the military judge's instructions completely ignore the defense of obedience to orders as it pertains to SPC New being ordered out of formation before the time for the order's compliance. Thus, the government's assertion that "the defenses and issues in the case were adequately covered by the instructions given by the military judge to the members" (Resp. Br. at 11) is wildly overplayed and clearly incorrect.

Even if this Court were to break new ground by applying

Damatta-Olivera

to special defenses, it remains clear that the military judge erred in failing to give instructions on the special defenses of inability and obedience to orders even under

Damatta-Olivera's

three-prong conjunctive test.

With respect to the third prong of the

Damatta-Olivera

test, the government asserts that "[t]rial defense counsel's closing argument also demonstrates that that appellant's theory was placed before the members and appellant's defense was not hindered." (Resp. Br. at 13.) This misses the point; whether the defense counsel argues a particular theory is irrelevant under the third prong of the

Damatta-Olivera

test.

Darnatta-Olivera's

third prong looks to whether the requested instruction "is on

such a vital point

in the case

that the failure to give it deprived defendant of a defense

or seriously impaired its effective presentation." 37 M.J. at 478 (emphasis added). In light of the military judge's instruction to the members that the military judge is the only source of the law in the case (R. at 781), and his reminder that arguments of counsel are not evidence (IA.), any argument that counsel made does not adequately compensate for the military judge's lack of instruction on these two special defenses.

The special defenses of inability and obedience to orders were critical to SPC New's case. Without these special defenses, the only other defense available to SPC New would be to demonstrate that the order was not given, a proposition which could not be ethically or reasonably advanced. SPC New's special defenses were the very core, the absolute crux, of his defense. As such, the abject lack of instructions on such vital points deprived SPC New of his constitutional right to present his defense.

VI

SPC NEW'S FIFTH AND SIXTH AMENDMENT RIGHTS TO DUE PROCESS AND A FAIR TRIAL WERE VIOLATED

BECAUSE THE MILITARY JUDGE INSTRUCTED THE MEMBERS ERRONEOUSLY ON THE DEFENSE OF MISTAKE.

Abuse of discretion can be shown where the challenged action is "arbitrary, fanciful, clearly unreasonable," or "clearly erroneous."

United States v.

Mosely

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42 M.J. 300, 303

(1995); United States v. Travers, 25

M.J. 61, 62 (C.M.A. 1987). The government contends that "[a]ppellant has failed to demonstrate that the military judge [sic] instructions were arbitrary, fanciful, clearly unreasonable, or clearly erroneous

..."

(Resp. Br. at 14.) As set forth on pages 20-24 of the Brief on Behalf of Appellant, however, the military judge's mistake instruction was "so convoluted, confusing, contradictory and erroneous that it violated SPC New's due process and fair trial rights." (App. Br. at 21.) The military judge's mistake instruction reads more like a prosecutor's closing

argument or government appellate brief than a jury instruction. (R. at 784.)

First, the instruction was

arbitrary

because it unduly stressed the necessity to obey orders and had little, if anything, to do with the defense of mistake. (App. Br. at 21.)

Secondly, the instruction was

fanciful

because it introduced extraneous concepts like "patently illegal" and "immunity based on faithful obedience" without explaining or defining the terms and without disclosing the authority to which SPC New was required to be "faithfully obedien[t]." (App. Br. at 21-22.)

Thirdly, the instruction was

clearly unreasonable

because, after the military judge instructed the members that the possibility of a mistake defense existed, he then instructed them that, as a matter of law, it did not apply in SPC New's case. (App. Br. at 23.) As set forth in the Brief on Behalf of Appellant, the military judge's instruction was effectively a command to the members to convict SPC New.

Fourthly, the military judge's instruction was

clearly erroneous

in at least two respects: the military judge gave, within the context of a mistake instruction, a "reverse" obedience to orders instruction (App. Br. at 22); and the military judge's instruction improperly incorporated an inapplicable

mens rea

standard for the defense of mistake. (App. Br. at 23.)

Consequently, the government's assertion that "[a]ppellant has failed to demonstrate that the military judge [sic] instructions were arbitrary, fanciful, clearly unreasonable, or clearly erroneous . . .

"

(Resp. Br. at 14) is conclusory, unmeritorious, and without basis.

VII

SPC NEW'S FIFTH AND SIXTH AMENDMENT RIGHTS TO DUE PROCESS AND A FAIR TRIAL; HIS RIGHT TO A

TRIAL BY MEMBERS; AND HIS RIGHTS TO COMPULSORY PROCESS, CONFRONTATION OF WITNESSES, AND

EFFECTIVE ASSISTANCE OF COUNSEL; WERE VIOLATED BECAUSE THE MILITARY JUDGE FAILED TO PERMIT THE MEMBERS TO HEAR EVIDENCE CONCERNING THE UNLAWFULNESS OF THE ORDER.

The government correctly notes that "[i]n a trial by jury, the jurors determine questions of fact..." (Resp. Br. at 24.) In answering Assignment of Error VII,

however, the government bases its argument on two outcome determinative assumptions: that the lawfulness of the order was clear as a matter of law, and that the determination concerning the lawfulness of the order did not present any issues of fact.

As set forth in the Brief on Behalf of Appellant, the lawfulness of the order was certainly not "clear as a matter of law."

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(App. Br. at 24-28.)

Note 1.

When it is

clear as a matter of law

that the order was lawful, this should be resolved as an interlocutory question, and the members should be advised as follows:

Benchbook

, para. 3-29 (emphasis added).

As set forth in the reply argument to Assignment of Error VIIIA,

infra,

the government does not even attempt to contest the unlawfulness of the order. Instead, the government merely asserts that the order's lawfulness or unlawfulness is beyond the reach of the court-martial and this Court because it involves a nonjusticiable political question. Thus, by the government's own theory of the case, it is certainly not "clear as a matter of law" that the order was lawful. At best, under the government's theory of the case, the lawfulness or unlawfulness of the order was nonjusticiable. In any event, the government's first assumption that the lawfulness of the order was "clear as a matter of law" is unwarranted.

The government's second assumption that the determination concerning the lawfulness of the order did not present any issues of fact is similarly unwarranted. The Brief on Behalf of Appellant sets forth at least 16 factual issues surrounding the lawfulness of the order. (App. Br. at 26-27 citing R. at 442-444.)

When facts are an issue with respect to the lawfulness of an order, the facts must be resolved by the members:

Note 2.

If there is a

factual dispute as to whether or not the order was lawful,

that dispute must be resolved by the members in connection with their determination of guilt or innocence. The following instruction should be given in cases where the military judge concludes that the lawfulness of the order presents an issue of fact for determination by the members.

Benchbook, para. 3-29 (emphasis added).

The military judge's determination solely by himself that the order was lawful violated SPC New's right to be tried by members and other important constitutional rights. (App. Br. at 27-28.) The military judge's failure in this regard is of a constitutional magnitude. See

United States v.

Brooks

, supra,

at 180;

United States v. Webster, supra;

and

United States v. Hicks, supra.

VIII

THE MILITARY JUDGE ERRED BY FINDING THAT THE ORDER WAS LAWFUL.

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A.

The Government Does Not Seriously Contest the Unlawfulness of the Order to Deploy in the UN Uniform

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Instead of defending, or even discussing, the lawfulness of the order to deploy to Macedonia in the UN Uniform, the government brief adopts the remarkable position that the government may court-martial SPC New for disobeying a lawful order dealing with foreign policy, but SPC New may not defend against the lawfulness of the order, because to do so would involve a nonjusticiable political question. In other words, the government's position is this: If, in an Article 92 prosecution, litigation of the lawfulness of the order would involve foreign policy matters, the government need only prove a violation of an order, not a violation of a

lawful

order.

In this manner, the government seeks to rewrite Article 92 by deleting the lawfulness requirement for the order and prohibiting SPC New from defending on the grounds that the order was not lawful; to contest the lawfulness of the order is off limits because it treads on the forbidden ground of a nonjusticiable political question. Thus, in the government's reasoning, when an order touches on foreign policy, an order's presumption of lawfulness becomes an irrebuttable presumption; the doctrine of the nonjusticiability of political questions supersedes SPC New's constitutional rights to defend himself and require the government to prove each element of an offense beyond a reasonable doubt. Under the government's reasoning, the Constitution yields to a superior notion: the nonjusticiability of political questions.

Why does the government rely on the nonjusticiability of political questions instead of simply demonstrating that the order was lawful? The answer is obvious: With the exception of the judge advocate who briefed SPC New and his battalion and then later prosecuted SPC New, no government attorney anywhere will defend the government's proposition at trial that the UNPROFOR Macedonian mission was undertaken pursuant to UN Charter Chapter VI, thereby rendering it legal under UNPA Section 7

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UNPA Section 6 prohibits United States participation in UN Charter Chapter VII actions except pursuant to a specific agreement which has been approved by Congress. Congress has never approved any such agreement concerning the Macedonian deployment. The UN has placed formal reliance on UN Charter Chapter VII for its operation in Macedonia; the UN Security Council invoked Chapter VII in passing several resolutions concerning the UNPROFOR Macedonian mission. At no time did the UN Security Council ever refer to UN Charter Chapter VI with respect to the UNPROFOR Macedonian mission. Given the UN's consistent references to the Macedonian operation as a UN Charter Chapter VII operation and the total absence of UN references to the Macedonian operation as a UN Charter Chapter VI operation, any

contention that the Macedonian operation was undertaken pursuant to UN Charter Chapter VI, and correspondingly UNPA Section 7, is disingenuous. (App. Br. at 32-41.)

As set forth in the Brief on Behalf of Appellant (App. Br. at 39-41), President Clinton lied to Congress in two letters to the Speaker of the House dated July 9, 1993 and January 8, 1994 by stating that the UNPROFOR mission in Macedonia was authorized by UN Charter Chapter VI and UNPA Section 7

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. The President lied in order to avoid the strict constraints of UNPA Section 6 which required him to obtain approval from Congress

prior

to deployment of any American soldiers in a UN Charter Chapter VII armed force operation. Because he wished to avoid obtaining prior approval from Congress, the President deceitfully mischaracterized the Macedonian operation as one authorized by UN Charter Chapter VI and UNPA Section 7 instead of truthfully denominating it as an operation under UN Charter Chapter VII and UNPA Section 6. (App. Br. at 39-41.)

The President's deceitful letters, drafted for political purposes to avoid the rigors of congressional scrutiny prior to the deployment of American soldiers in a UN operation, serve as the genesis of the chain of events which led to SPC New's court-martial. In turn, President Clinton's deception led the briefing judge advocate to inaccurately assert to SPC New and his battalion that their deployment to Macedonia was authorized by the UNPA and, hence, lawful. Other than the briefing judge advocate's inaccurate assertion to SPC New and his battalion, as well as the same judge advocate's later similar assertions at SPC New's court-martial, no government attorney has attempted to defend the lawfulness of the order by appealing to UN Charter Chapter VI and UNPA Section 7. Certainly, the government has declined to do so anywhere in its brief

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. (App. Br. at 32-41.)

Consequently, the government's brief does not persist in advocating the legality of the deployment of American soldiers to Macedonia as having been established under UN Charter Chapter VI and authorized by UNPA Section 7. Instead, the government attempts to dodge the entire matter by devising three points in its answer to Assignment of Error VIII:

a.

The lawfulness of the order to SPC New is off the judicial table and beyond discussion because the matter is a nonjusticiable political question. (Resp. Br. at 16-24.);

b.

The lawfulness of the deployment is immaterial because only the lawfulness of the order to wear the UN Uniform was an issue at SPC New's court-martial. (Resp. Br. at 21-23); and

c.

The order to SPC New must have been lawful because Congress failed to impeach President Clinton or take other corrective action concerning the Macedonian deployment. (Resp. Br. at 2 1-23.)

With respect to the government's first device to avoid litigating the legality of the deployment (nonjusticiability), see Section VIIIB,

infra.

With respect to the government's second device to avoid litigating the legality of the deployment (immateriality of the deployment), see the discussion in the Brief on Behalf of Appellant concerning the requirement for a nexus between a

military duty to obey an order and a legitimate military purpose. An order is not lawful if it does not relate to a valid military purpose. (App. Br. at 30-31.)

Without the legitimacy and legality of the deployment to Macedonia in UN Uniform, LTC Layfield possessed no more authority to order SPC New to don the UN Uniform than he would have had to, say, order SPC New to walk around in baby blue leotards, or to cross-dress as a transvestite, or to wear a swastika on his headgear, or to dress in a white hood and a white sheet. The deployment and the order to don the UN Uniform were inextricably linked; if the deployment is illegal, LTC Layfield's order to don the UN Uniform had no military purpose, was illegitimate, was unlawful, and SPC New had no duty to obey it.

(App. Br. at 31.)

With respect to the government's third device to avoid litigating the legality of the deployment (Congress did not impeach the President), the government suggests a new test for lawfulness: If Congress does not impeach the President, the President must be acting lawfully. According to this test, no court need directly examine the President's conduct concerning his official (or perhaps personal) conduct. All a court would have to do is to query whether Congress had impeached the President; if not, then the President's actions would be lawful. Of course, the government's brief cites no authority for this novel test for determining Executive Branch compliance with statutes or the Constitution.

B.

The Political Question Doctrine Did Not Constrain the Court-Martial and Does Not Constrain This Court from Deciding Any Issue in this Case

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The government's contention that the issue of the legality of the deployment of troops is a nonjusticiable political question is without merit for three reasons: (1) the political question doctrine has no application in Article I courts; the doctrine operates as a limitation only on Article III courts; (2) questions of statutory interpretation are not political questions; (3) this case presents no nonjusticiable political questions even under the traditional norms for Article III courts deciding constitutional issues.

1.

THE POLITICAL QUESTION DOCTRINE BINDS ONLY ARTICLE III COURTS.

Courts-martial are not Article III federal courts. "Pursuant to

Article I

of the Constitution, Congress has established three tiers of military courts."

Weiss v. United States,

510 U.S. 163, 166-167 (1994). See also,

Carter v. McClaghiy,

183 U.S. 365 (1901). Simply stated, military courts are part of the executive branch of government, not the judicial branch.

The political question doctrine has always been inextricably tied to Article III. The Supreme Court has labeled political questions among the "doctrines that cluster about Article III."

Allen v. Wright,

468 U.S. 737, 750 (1984). See also.

United States v. Sisson,

399 U.S. 267, 276 (1970) (linking the political question doctrine to an Article III limitation in the context of a case challenging the constitutionality of the Vietnam War);

Mahoney v. Babbitt,

113 F.3d 219, 220 (D.C. Cir. 1997) (citing Article III as the source of the political question doctrine);

National Treasury Employees Union

V.

United States,

101 F.3d 1423, 1427 (1996) (D.C. Cir. 1996) ("In an attempt to give meaning to Article III's case-or-controversy requirement, the courts have developed a series of principles termed 'justiciability doctrines,' among which are standing, ripeness, mootness, and the political question doctrine.");

Graham v. Butterworth

, 5

F.3d 496, 498-499 (11th Cir. 1993) (linking Article III to the political question doctrine as a limitation on the federal courts' power to "encroach upon the powers of other branches of government.");

No Gwen Alliance of Lane City v. Aldridge,

855 F.2d 1380, 1382 (9th Cir. 1988) (the political question doctrine is a limitation on "federal courts, under Article III....").

Moreover, the reason for this limitation on Article III courts has been grounded in the principle of separation of powers. See,

Nixon

v. United States,

506 U.S. 224, 252 (1993) ("the political question doctrine is essentially a function of the separation of powers, existing to restrain courts from inappropriate interference in the business of the other branches of Government." (internal citations omitted)).

SPC New challenges the lawfulness of an order of the President concerning deployment. SPC New's court-martial and this Court are within the same branch of government as the President, not a different branch. There exists no separation of powers issue concerning the ability of the court-martial or this Court to declare an action of the President to have been unlawful. It may require courage for a military court to declare the Commander-in-Chief's order to be illegal, but no separation of powers issue arises from an Article I court holding that the executive branch has violated the statutes of the United States.

It is true, as the government points out in its brief, that the United States Court of Appeals for the Armed Forces relied on the political question doctrine as an alternate holding in

United States v.

Huet-Vaughn

,

43 M.J. 105, 114

(1995).

However, this reliance was essentially

dicta.

In the briefs filed by Huet-Vaughn's counsel, no issue was raised about the legality of the decision to employ military forces in the Persian Gulf. Therefore, the Court's observation in

Huet- Vaughn

that the employment of military forces in the Persian Gulf was a political question was simply immaterial to the issues which had actually been raised in the case. In

Huet-Vaughn,

the Court assumed, but did not decide, that the political question doctrine had pertinency in Article I courts. The matter was briefed only in the most perfunctory manner by the government,

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and not at all for Huet-Vaughn. To the extent that

HuetVaughn

held that Article I courts are bound by the political question constraints of Article III federal courts, that decision is not binding precedent since it conflicts with the clear holdings of the United States Supreme Court to the contrary.

The political question doctrine remains applicable to only Article III courts.

2.

QUESTIONS OF STATUTORY INTERPRETATION ARE NOT POLITICAL QUESTIONS.

SPC New argues that the order to wear the UN Uniform violates a law of Congress which prohibits the acceptance of an office (UN soldier) and decorations (insignia, etc.) from a foreign government. 5 U.S.C. § 7342. He also argues that this order violates the military's own regulations. AR 670-1. He further argues that the order to deploy him as a UN soldier in a UN Uniform under foreign command violates the UNPA.

The Supreme Court has forthrightly declared that questions of statutory interpretation—even those which touch on foreign affairs—are not barred by the political question doctrine.

We address first the Japanese petitioners' contention that the present actions are unsuitable for judicial review because they involve foreign relations and that a federal court, therefore, lacks the judicial power to command the Secretary of Commerce, an Executive Branch official, to dishonor and repudiate an international agreement. Relying on the political question doctrine, and quoting

Baker v. Carr

,

369 U.S. 186, 217 (1962), the Japanese petitioners argue that the danger of "embarrassment from multifarious pronouncements by various departments on one question" bars any judicial resolution of the instant controversy.

We disagree.

Baker

carefully pointed out that not every matter touching on politics is a political question, id.. at 209, and more specifically, that it is "error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." Id., at 211. The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch. The Judiciary is particularly ill suited to make such decisions, as "courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature."

United States ex rel. Joseph v. Cannon,

206 U. S. App. D. C. 405, 411, 642 F.2d 1373, 1379 (1981) (footnote omitted), cert. denied,

455

U.S. 999 (1982).

As

Baker

plainly held, however, the courts have the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts. It is also evident that the challenge to the Secretary's decision not to certify Japan for harvesting whales in excess of IWC quotas presents a purely legal question of statutory interpretation. The Court must first determine the nature and scope of the duty imposed upon the Secretary by the Amendments, a decision which calls for applying no more than the traditional rules of statutory construction, and then applying this analysis to the particular set of facts presented below. We are cognizant of the interplay between these Amendments and the conduct of this Nation's foreign relations, and we recognize the premier role which both Congress and the Executive play in this field. But under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones. We conclude, therefore, that the present cases present a justiciable controversy, and turn to the merits of petitioners' arguments.

Japanese

Whaling

Ass'n v. American Cetacean Society,

478 U.S. 221, 229-230 (1986).

See also,

Population Institute v. McPherson,

797 F.2d 1062, 1079 (D.C. Cir. 1986) ("Although the district court appeared to view this as a nonjusticiable political question [citation omitted], it is rather in our view purely an issue of statutory interpretation.");

Sioux Valley

Empire Elec. Assn v. Butz,

504 F.2d 168, 172 (8th Cir. 1974) ("The question involved is one of statutory interpretation and the issue [citation omitted] is justiciable.").

Questions of statutory interpretation and compliance have been held to be justiciable in the federal courts even against the military. See,

Harmon v. Brucker,

355 U.S. 579 (1958) (per curiam). "

Harmon

explicitly resolved the issue of whether the courts have power to review nonconstitutional claims." Note, JUDICIAL REVIEW OF CONSTITUTIONAL CLAIMS AGAINST THE MILITARY, 84 Colum. L.Rev. 387, 390, fn. 17 (1984). See,

Beard

v. Stahr,

370 U.S. 41, 44 (1962): "When the Army departs from the statutory standard which prescribes the basis on which discharges will be issued, the federal courts can intervene." See, also

Leedom v. Kyne,

358 U.S. 184, 190 (1958).

In

Dilley v. Alexander,

603 F.2d 914 (D.C. Cir. 1979), the Court specifically rejected a request for special deference to the military in a case brought by officers claiming they had been discharged illegally:

It is a basic tenet of our legal system that a government agency is not at liberty to ignore its own laws and that agency action in contravention of applicable statutes and regulations is unlawful. The military departments enjoy no immunity from this proscription. It is the duty of the federal courts to inquire whether an action of a military agency conforms to the law, or is instead arbitrary, capricious, or contrary to the statutes and regulations governing that agency. The logic of these cases derives from the self-evident proposition that the Government must obey its own laws.

603 F.2d at 920. (Internal citations omitted). See also,

Metzenbaum v. Federal Energy Regulatory Com'n,

675 F.2d 1282, 1287 (D.C. Cir. 1982).

SPC New's claim that the order of deployment violates the UNPA requires nothing more than statutory interpretation, and perhaps interpretation of the treaty called the United Nations Charter, but these are precisely the kinds of issues that were held justiciable in

Japanese Whaling Ass'n.

SPC New's case does not present the kind of constitutional question that arises when a soldier argues that a particular deployment was an act of war requiring a congressional declaration of war. With the UNPA, Congress has created a statute controlling the President's actions in assigning American soldier to fight for the United Nations. It is the duty of the courts to determine if the President has complied with this statute when a soldier is tried by court-martial for disobeying a

lawful

order.

3.

**THE ISSUES IN THIS CASE ARE JUSTICIABLE EVEN UNDER STANDARDS FOR
CONSTITUTIONAL CASES ARISING IN ARTICLE III COURTS.**

While the government purports to rely on

Baker v. Carr

,

369 U.S. 186 (1962) to support its nonjusticiability argument, such reliance is misplaced. In

Baker,

the Supreme Court warned against categorical

or per se

arguments based on broad proclamations by the judiciary. Instead, the Court ruled that political question analysis requires a careful case-by-case approach.

There are sweeping statements to the effect that all questions touching foreign relations are political questions

. . . .

Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.

369 U.S. at 211.

The cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloging.

369 U.S. at 217.

Yet, contrary to these teachings, the government employs almost nothing other than "sweeping statements" and "semantic cataloguing," replete with references to inapposite non-military cases which address war powers resolutions and similar matters having nothing to do with criminal prosecutions, much less the lawfulness of an order under Article 92, UCMJ. Foreign policy matters, the government repeatedly argues, is an area into which a court-martial and this Court may not intrude, as if this disposes of the appeal.

a.

Military Questions Can Be Justiciable.

There are six military cases concerning justiciability from the Supreme Court. In four, the Supreme Court did not dismiss on political question grounds, but reached the merits:

Rostker v. Goldberg,

453 U.S. 57 (1981)

Brown

v. Glines,

444 U.S. 348 (1980);

Burns v. Wilson,

346 U.S. 137

(1953);

Orloff v. Willoughby,

345 U.S. 83 (1953). Clearly military cases are not categorically off limits.

b.

Foreign Policy Questions Can Be Justiciable.

Any suggestion that foreign policy cases can be semantically catalogued as nonjusticiable was authoritatively rejected by the Supreme Court in

Baker v. Carr, *supra*

at 211. In

Crockett v. Reagan, 558

F. Supp. 893 (D.D.C. 1982);

aff'd,

720 F.2d 1355 (D.C. Cir.),

cert. denied,

467 U.S. 1251 (1984), the Court expressly rejected the blanket "hands-off of foreign policy" dogma urged by the Government.

The Court disagrees with defendants that this is the type of political question which involves potential judicial interference with executive discretion in the foreign affairs field. Plaintiffs do not seek relief that would dictate foreign policy but rather to enforce existing law concerning the procedures for decision-making. Moreover, the issue here is not a political question simply because it involves the apportionment of power between the executive and legislative branches.

The duty of courts to decide such questions has been repeatedly affirmed by the Supreme Court.

Id.

at 898 (emphasis added).

c.

SPC New's Claims Differ from Vietnam Cases.

The government relies heavily on Vietnam War cases for its contention that all cases touching military deployment are nonjusticiable.

A cursory review of the Vietnam War cases, however, demonstrates that the issues raised in SPC New's case are different. In the Vietnam cases, claims were not based upon a contention, as here, that the President had violated a specific military regulation or Congressional statute. Rather, those claims were based upon one fundamental allegation that the Constitution required Congress to formally declare war before the President had any authority to utilize military force in Vietnam. See

Mora v. McNamara,

389 U.S. 934, 934-35 (1967) (Stewart. J. dissenting). The issues raised by such a contention might very well be nonjusticiable. See

Id.,

389 U.S. at 935-38 (Douglas, J. dissenting), although the Court has in the past addressed the question on the merits.

Prize Cases,

67 U.S. (2 Black) 635 (1863).

In contrast to the broad, sweeping constitutional questions concerning the general allocation of war power between Congress and the President, the constitutional questions raised by SPC New are well-defined and narrow, and concern separation of powers questions that are controlled by explicit textual provisions.

d.

A Detailed Inquiry into the Baker Standards Demonstrates that the Issues in SPC New's Case are Justiciable.

Even though most of the questions raised by SPC New concern the interpretation of statutory or regulatory provisions which are clearly justiciable, the "discriminating inquiry" required in constitutional matters by the threefold

Baker v. Carr

standard, as summarized by Justice Powell in

Goldwater v. Carter,

444 U.S. 996, 998 (1979), demonstrates that all of the legal and constitutional issues raised in SPC New's case are justiciable.

(1)

"Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government?"

Goldwater v. Carter, *supra*,

at 998.

At the heart of SPC New's case, there exists a conflict between laws enacted by Congress and an order issued by the President. Resolution of a legal dispute between the President and the Congress is a duty that has been textually committed to the judiciary.

Marbury

v. Madison, 5

U.S. 1 (1803).

The first issue raised by SPC New is whether the President's order to deploy as a UN Soldier in a UN Uniform violates the UNPA. 22 U.S.C. § 287d. SPC New is clearly in the class of citizens to be protected by the UNPA which expressly prohibits the President from placing American soldiers into military service under the UN without the approval of Congress.

This statute is squarely based on Congress's Article I § 8 power to "make rules for the government and regulation of the land and naval forces." Congress's power to make such regulations is plenary and the courts are duty-bound to enforce the will of Congress even when the President takes opposing action on the subject. This is true regardless of whether the matter is characterized as a military issue or foreign policy.

Rostker v. Goldberg, *supra*; Youngstown Sheet & Tube Co. v. Sawyer,

343 U.S. 579 (1952). The President cannot claim any exclusive commitment from the text of the Constitution here.

The second issue raised by SPC New is whether he can be ordered to serve under foreign commanders in light of the Appointments Clause (Article II § 2). SPC New does not challenge a discretionary management decision concerning the military's appointed officers as in

Arnheiter v. Chafee,

435 F.2d 691 (9th Cir. 1970), a matter which is textually committed to the President. Rather, SPC New's case asks this Court to decide whether the President can unilaterally avoid the Appointments Clause and relevant statutes by commanding American soldiers to serve under a military officer commissioned by a foreign government not in accordance with the constitutional and statutory procedures for commissioning American military officers. See

Weiss v. United States,

510 U.S. 163, 127 L.Ed.2d 1, 11(1994). Whatever the power of the President may be in a situation like World War II when he acts under a declaration of war by Congress, one of the principal reasons why Congress enacted the UNPA was to avoid the possibility that American soldiers would be placed under UN command without congressional consent. When Congress provides for the appointment of officers to exercise executive power and the claim is that an appointment has departed from the constitutional process, the case is appropriate for judicial review.

Buckley

v. Valeo,

424 U.S. 1, 118-143 (1976). The case for justiciability can be no different for a claim that the President has ignored the Appointments Clause. Again, the President cannot claim any exclusive commitment from the text of the Constitution here.

The third issue raised by SPC New involves the specific command to become a UN soldier who wears the UN Uniform. The relevant textual commitment, Article I § 9, is to Congress, not to the President. Congress has employed its power to specifically ban the acceptance of the office (UN soldier) and decorations (insignia) by federal employees.

5

U.S.C. § 7342. The question of whether the UN is a foreign power for these purposes has been resolved because Congress has expressly decided the question.

5

U.S.C. § 7342(a)(2). The relevant military regulations which ban acceptance and use of foreign insignia on the battle dress uniform are clearly justiciable under the previously-cited precedents requiring the military to obey its own rules. Again, no exclusive constitutional textual commitment lies in favor of the President here.

The final issue

raised by SPC New

17

, whether he can be denied a crucial attribute of his citizenship—overriding his right and duty to be singularly loyal to the United States—raises no issues committed by the Constitution’s text to the President or the military. Indeed, the Supreme Court has expressly held that the military may not make final determinations about a soldier’s citizenship.

Trop

v.

Duties,

356 U.S. 86

(1958),

see especially, Black, concurring,

Id.

356 U.S. at 104. Regulation of citizenship is textually committed to Congress, not the President. See Article I § 8 and Fourteenth Amendment §§ 1 and

5.

In none of the salient issues raised by SPC New is there any exclusive constitutional textual commitment to the President.

(2)"Would resolution of the question demand that a court move beyond areas of judicial expertise?"

Goldwater v. Carter, *supra*.

at 998.

In a demonstration of duplicity which should not be condoned by any court, the government has adopted directly contrary advocacy positions in this Court and in the federal courts addressing SPC New’s

habeas

case: In the federal courts, the government argues that the Article III courts should defer to the special expertise of the military courts; in this Court, the government argues that the Article III political question doctrine should be employed to prevent this Court from exercising that special expertise. Thus, all the courthouse doors are barred to SPC New.

In

Gilligan

v. Morgan,

413 U.S. 1 (1975) the Court held that it would transcend the expertise of the federal judiciary to assume responsibility for the day-to-day operation of the Ohio National Guard. This broad request led to dismissal on grounds of judicial unmanageability. The Court warned, however, that its decision should not be read to announce a

per se

rule.

In concluding that no justiciable controversy is presented, it should be clear that we neither hold nor imply that the conduct of the National Guard is always beyond judicial review or that there may not be accountability in a judicial forum for violations of law or for specific unlawful conduct by military personnel. . . .

Id.

11-12.

By deciding the issues in SPC New's case, this Court does not assume daily operation of any military unit. All that must be done is to read and interpret a federal statute, examine the UN documents to determine which article was used to authorize this military force, and determine whether or not Congress has passed a formal approval of this use of American soldiers. Every one of these decisions can be made from reading documents and statutes. No trips to Macedonia are required. No unmanageable standards are suggested by the government. This

Baker

standard, even if applicable, clearly falls in favor of justiciability.

(3)"Do prudential considerations counsel against judicial intervention?"

Goldwater v. Carter, *supra*,

at 998.

The government broadly asserts, without explanation, that a decision on the lawfulness of the order to deploy would foster "multifarious pronouncements by various departments" of government (Resp. Br. at 17, 23 quoting

Baker v. Carr

, *supra*).

The government contends: "That is, based upon the constitutional principal of separation of powers in the three branches of government, judicial review of 'political questions' is precluded..." (Resp. Br. at 17, emphasis added.) Again, this Court is not another branch of government; this is an Article I court.

Moreover, the respect due the President, under the circumstances of this case, must take into account that he has acted in direct violation of the Acts of Congress and has lied to Congress concerning his actions. As Justice Jackson stated in his concurring opinion in

Youngstown Sheet & Tube,

343 U.S. at 637:

When the President takes measures incompatible with the expressed

...

will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.

See also

Dames

& Moore v. Regan,

453 U.S. 654, 669 (1981);

American International Group v. Islamic Republic of Iran, 657

F.2d 430, 439 (D.C. Cir. 1981).

In

Powell v. McCormack,

395 U.S. 486, 539 (1969) the Court rejected the suggestion that it should refrain from deciding the merits of that case because of "a potentially embarrassing confrontation between coordinate branches of the Federal Government." The Court said, "Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility." 395 U.S. at 549.

Although the political question doctrine does not constrain this Court, even if it did, the duty to require obedience to the law and Constitution is a higher value as has been clear from the earliest days of the Republic.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice completely obligatory.... It is prescribing limits, and declaring that those limits may be passed at pleasure.

Marbury v. Madison, *supra*, 5

U.S. at 178.

As demonstrated by the threefold

Baker

V.

Carr

standard as summarized by Justice Powell in

Goldwater

v. Carter

(444 U.S. at 998), all of the legal and constitutional issues raised in SPC New's case are clearly justiciable.

IX

AN APPROVED SENTENCE THAT INCLUDES A BAD CONDUCT DISCHARGE FOR SPC NEW'S OFFENSE IS

INAPPROPRIATELY SEVERE.

The government contends that "[SPC New] received only a punitive discharge." (Resp. Br. at 30) (emphasis added). The use of the modifier "only" to suggest that a punitive discharge is not inappropriately severe under the facts of this case badly distorts and unfairly ignores the severity of a punitive discharge as a punishment.

The severity of a punitive discharge as a sentence is well-established. The Court of Appeals for the Armed Forces has long recognized the ineradicable stigma of a punitive discharge.

The severity of these penalties, unknown to civil life as they are, cannot be denied.

..

[T]he ordering of a punitive discharge so characterizes an individual that his whole future is utterly destroyed. He is marked far beyond the civilian felon, hampered as he may be by the sneering term "ex-con," for, justifiedly or not, the punitive discharge so dishonors and disgraces an accused that he finds employment virtually impossible; is subjected to many legal deprivations; and is regarded with horror by his fellow citizens. Truly, it has come to be the modern equivalent of the ancient practice of branding felons, and the stain it leaves is as ineradicable. And, in the case of a soldier with extended service, the discharge can be even more severe, for, as the Chief Judge wisely noted [citation omitted] "an executed punitive discharge terminates military status as completely as an executed death penalty ends mortal

life."

United States v.

Wheeler

,

17 USCMA 274, 38 CMR 72 (1967).

When one considers the extent to which SPC New will suffer from his court-martial sentence for the rest of his life and the employment opportunities which he will be denied by virtue of his conviction alone, to argue that his sentence is appropriate because he received "only" a bad-conduct discharge strains credulity.

In addition, the government's characterization of SPC New's charged misconduct as "flagrant disobedience" contradicts the facts of this case. The word "flagrant" is defined as "extremely, flauntingly, or purposefully conspicuous, usu.

because of uncommon evil, unworthiness, unpleasantness, or truculence ..."

Webster's Third New International Dictionary (1981) (emphasis added).

As the record demonstrates, SPC New's actions were not "flagrant" in any sense. He did not refuse to deploy with his unit. He did not refuse to pick up a weapon and defend his country. He did not commit, and was not charged with, willful disrespect. He did not foment disorder or notoriously challenge the legitimacy of his command to order him to deploy. He merely wore the uniform of the United States Army, not the UN Uniform. Although his motive may not constitute a defense to the charge, the circumstances surrounding his offense certainly bear scrutiny as mitigating circumstances.

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WHEREFORE, the appellant respectfully requests that this Court set aside the findings and the sentence

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CERTIFICATE OF SERVICE AND FILING

I certify that a copy of the foregoing was personally delivered to this Honorable Court and Government Appellate Division on this 6th day of March 1998.

PAUL FIORI

Captain, JA

Defense Appellate Division

Notes:

1.

The appellant reasserts and invites the Court's examination of Grostefon Issue I. (App. Br. at A-1-1 through A-1-8.)

2.

The government does not contend that COL Kwist disobeyed his superiors' order.

3.

It is unclear whether the government's brief at page 6 is addressing actual or implied bias. Of course, any reference to COL Kwist's courtroom demeanor is irrelevant when addressing implied bias due to the objective nature of implied.

Minyard, supra.

4.

R.C.M. 912(O)(1)(N)

5.

With respect to any argument made in the government's answer to which the appellant does not reply in this pleading, the appellant reasserts his assignment of error and argument set forth in his Brief on Behalf of Appellant. Any inference that the appellant concedes that assignments of error or arguments set forth in the Brief on Behalf of Appellant lack merit is unwarranted.

6

. Cf

United States v.

Kimble

, ACCA 9502221 (A.C.C.A. 23 Dec. 1997) (unpub.) at footnote.

See previous footnote.

7.

"The test to determine if the denial of a requested instruction constitutes error is whether (1) the charge is correct; (2) 'it is not substantially covered in the main charge'; and (3) 'it is on such a vital point in the case that the failure to give it deprived defendant of a defense or seriously impaired its effective presentation.'"

Damatta-Olivera,

supra, 37 M.J. at 478 quoting

United States v. Winbom,

14 USCMA 277. 282, 34 CMR 57, 62 (1963).

8.

The government could be referring to the discussion on pages 7-10 of its brief in which Assignments of Error II (factual insufficiency) and III (failure to grant a motion for a finding of not guilty) are addressed.

9.

The government asserts that the special defenses of inability and obedience to orders were adequately covered in the instructions to the members which appear on pages 783-790 of the record of trial. (Resp. Br. at 11.) However, pages 784-790 of the record encompass instructions on burden of proof, circumstantial evidence, stipulations of fact and testimony, credibility of witnesses, character evidence, presumption of innocence, quanta of proof, and evaluation of evidence.

10.

Strangely, the government presents a combined argument in answer to Assignments of Error VII and VIII; then the government segregates its "combined" argument such that subsection A of the combined argument addresses Assignment of Error VIII (lawfulness of the order) while subsection B of the combined argument addresses Assignment of Error VII (military judge failing to permit members to hear evidence on unlawfulness of order).

11.

Contrast Assignment of Error VIII in the Brief on Behalf of Appellant with the absence of any discussion on the lawfulness of the substance of the order in the government's brief. If the order is clear as a matter of law, why does the government brief fail to so demonstrate?

12.

The Appellant reasserts and invites the Court's examination of Grostefon Issue I. (App. Br. at A-1-1 through A-1-8.)

13.

UNPA Section 6 governs the use of military power that proceeds from UN Charter Chapter VII, while UNPA Section 7 relates to UN Charter Chapter VI concerning noncombatant assistance, i.e. UNPA Section 6 relates to Chapter VII, while UNPA Section 7 relates to Chapter VI.

14.

See Brief on Behalf of Appellant, Appendix IV, for President Clinton's letters to the Speaker of the House.

15.

Of course, this Court can utilize its fact-finding power and hold that the UNPROFOR operation in Macedonia was undertaken pursuant to UN Charter Chapter VI and UNPA Section 7 or, alternatively, hold as a matter of law that the operation was a UN Charter Chapter VI and UNPA Section 7 operation. The appellant doubts that the government can persuade this Court to do so inasmuch as there is no basis for such a factual or legal conclusion. Certainly, the government has not attempted to advance any such basis in its brief.

16.

See, government brief in Huet-Vaughn at 11-12.

17.

See Brief on Behalf of Appellant, Appendix I - Grostefon Issue I. (App. Br. at A-1-1 through A-1-8.) SPC New again requests that this Court direct the government to brief this important Grostefon issue.

18.

The government urges this Court to disregard matters presented pursuant to R.C.M. 1105 in assessing the severity of SPC New's sentence. (Resp. Br. at 30-31.) However, as the appellant made his request pursuant to

United States v. Grostefon

, 12 M.J. 431 (C.M.A. 1982) (App. Br. at 48, note 21), those matters are properly before this Court for consideration and cannot be disregarded.