IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee v. Michael G. NEW XXX-XX-XXXX United States Army, Appellant	)	FINAL BRIEF ON BEHALF OF APPELLANT USCA Dkt. No. 99-0640/AR Crim. App. No. 9600263

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FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	FINAL BRIEF ON BEHALF OF APPELLANT
v.	)	USCA Dkt. No. 99-0640/AR
Michael G. NEW 450-73-3292 United States Army, Appellant	)	Crim. App. No. 9600263

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

ISSUES GRANTED

I

WHETHER THE MILITARY JUDGE ERRED BY DENYING APPELLANT'S CAUSAL CHALLENGE AGAINST A COURT-MARTIAL MEMBER WHO PREVIOUSLY ORDERED A SUBORDINATE TO DEPLOY TO MACEDONIA.

II

WHETHER APPELLANT'S CONSTITUTIONAL AND STATUTORY RIGHTS TO BE TRIED BY COURT-MARTIAL MEMBERS AND TO HAVE THE MEMBERS DETERMINE WHETHER THE GOVERNMENT HAS PROVED EVERY ESSENTIAL ELEMENT OF THE CHARGED OFFENSE BEYOND A REASONABLE DOUBT WERE VIOLATED BECAUSE THE MILITARY JUDGE RULED THAT THE ORDER GIVEN TO APPELLANT WAS LAWFUL WITHOUT SUBMITTING THE ISSUE TO THE MEMBERS, AND BECAUSE THE MILITARY JUDGE INSTRUCTED THE MEMBERS THAT THE ORDER WAS LAWFUL AS A MATTER OF LAW.

III

WHETHER THE MILITARY JUDGE ERRED BY FINDING THAT THE ORDER TO DEPLOY IN THE UNITED NATIONS UNIFORM WAS LAWFUL.

IV

WHETHER THE MILITARY JUDGE ERRED IN AVOIDING THE QUESTION OF THE LAWFULNESS OF THE ORDER AND HOLDING THAT LAWFULNESS WAS A NONJUSTICIABLE POLITICAL QUESTION.

STATEMENT OF THE CASE

On 24 October, 17 November, 8 and 13 December 1995, and 18, 19, 23 and 24 January 1996, Specialist Michael G. New, appellant, was tried by a Special Court Martial composed of officers and enlisted members at Leighton Barracks, Germany. Contrary to his plea, SPC New was convicted of violating a lawful order, in violation of Uniform Code of Military Justice (hereinafter "U.C.M.J.") art. 92, 10 U.S.C. § 892 (1988); in turn, he was sentenced to a bad conduct discharge. On 12 June 1996, the convening authority approved the sentence. On 28 April 1999, the United States Army Court of Criminal Appeals (hereinafter "the Army Court") affirmed the findings and sentence. (Appendix A.)

Pursuant to the order of this Court, on July 29, 1999, undersigned counsel filed a Supplement to Petition for Grant of Review under Rule 21. On October 13, 1999, this Court granted the Petition for Grant of Review on the four Issues Granted, *supra*.

STATEMENT OF FACTS

At the time of the offense for which he was convicted, SPC New was assigned to Headquarters Company, 1/15th Infantry, 3d Infantry Division. On 21 August 1995, SPC New was informed that his unit was to be deployed as Task Force Able Sentry as part of United Nations (hereinafter "UN") Protection Forces (hereinafter "UNPROFOR") to the former Yugoslav Republic of Macedonia (hereinafter "Macedonia"). The deployment, ostensibly under Chapter VI of the UN Charter, was ordered by the President, but was not ratified or approved by the United States Congress.

In preparation for the deployment, members of SPC New's unit were informed that they would be required to wear the shoulder patch and headgear of the UN (hereinafter "the UN Uniform") as their uniform throughout the deployment. (R. at 582; A.E. XXXII.) Lieutenant Colonel Stephen R. Layfield, SPC New's battalion commander, testified that this uniform was known as "the UN Uniform" and its individual components were "UN uniform parts." (R. at 595-596.)

It struck SPC New as odd that he was ordered to wear the UN Uniform when he was a soldier in the United States Army. (R. at 693.) Believing the order to wear the UN uniform unlawful, SPC New informed his squad leader and platoon leader that he would not wear the UN Uniform until he was provided with some rationale and controlling authority for the order to do so. In

turn, SPC New's concerns were brought to the attention of his chain of command, including his company, battalion and brigade commanders.

In response to his concerns, SPC New was ordered to examine the UN Charter, its history and objectives, and to re-think his position. On 31 August 1995 he was counselled about his concerns. (A.E. XXXI.) On 6 September 1995, he was counselled by three different non-commissioned officers in rapid fire succession, and was informed that he would be subject to discipline if he disobeyed an order to wear the UN Uniform. (A. E. XXXIII, XXXIV, XXXV.)

Having examined the UN Charter as directed, on 19 September 1995 SPC New submitted a statement to superiors in his chain of command indicating that he viewed the UN Charter to be inconsistent with the United States Constitution and his oath of enlistment. He wrote in pertinent part:

> 2... I interpret the wearing of a uniform, or the accouterments of a uniform, as a sign of allegiance and faithfulness to the authority or power so signified or which issues that uniform. I am an American who was recruited for and voluntarily joined the U.S. Army to serve as an American soldier. I am not a citizen of the United Nations. I am not a United Nations Fighting Person. I have never taken an oath to the United Nations, but I have taken the required oath to support and defend the Constitution of the United States of America.

> 3. I am not trying to avoid a difficult or dangerous assignment or to get out of the Army. I served in Kuwait last year and have offered to serve anywhere in the world, in my American uniform, in the capacity as a U.S. Army medic under American command and U.S. Constitutional protections. I have worked diligently to be a good soldier, and have received early promotion and recognition for my efforts ... In order to avoid controversy or to avoid placing the Army in a bad light, I have requested a transfer to a unit that is not required to wear the U.N. uniform. I was told that such was not possible and I was even reluctantly willing to accept an honorable discharge, and I was willing to sadly and reluctantly withdraw from the U.S. Army quietly. That request was also denied. However, I will not wear a UN uniform to serve under UN Command, and I will strongly contest any discharge that is less than honorable. (A.E. XXXVIL)

Principally in response to SPC New's questions, his unit was assembled to receive an "information briefing" on 2 October 1995 concerning the legal bases for the deployment of United States troops to Macedonia in the UN Uniform. (R. at 69-73.) SPC New attended this briefing. (R. at 690.) The briefing, conducted by a judge advocate,[1] answered SPC New's question concerning why he had to wear the UN Uniform to Macedonia with this response: "Because they look fabulous!" (R. at 82; App. Ex. XXVIII, pp.

[1] This same ubiquitous judge advocate served as lead trial counsel at SPC New's court-martial so he could personally prosecute SPC New for disobeying an order predicated upon this judge advocate's personal legal advice. This judge advocate also testified twice as a witness at the court-martial. (R. at 53-82, 652-669.) Eventually, this judge advocate was removed from further participation in the case by the military judge pursuant to a defense motion.

24-25.) At the conclusion of the briefing, LTC Layfield issued an order to the soldiers in the battalion to wear their UN Uniforms on 10 October 1995 for a battalion formation at 0900. SPC New's company commander, Captain Roger H. Palmateer, later ordered his troops, including SPC New, to attend a company formation at 0845, prior to the battalion formation. (R. at 625.)

To SPC New, the order to wear the UN Uniform appeared clearly unlawful. His conclusion that the order was unlawful was buttressed by the vapidity of the unprofessional, flippant and supercilious remark by the briefing judge advocate on 2 October that the reason United States soldiers wear UN Uniforms is "because they look fabulous!" SPC New's conclusion was largely based, however, on his research of Army regulations. (R. at 679-680.) In particular, SPC New researched Army Regulation 670-1, "Wear and Appearance of Army Uniforms and Insignia" (hereinafter "AR 670-1"). Finding no support in the regulation that the order to wear the UN Uniform was lawful (R. at 680, 685), SPC New chose to follow the regulation. Consequently, he appeared at the 10 October company formation in battle dress uniform (hereinafter "BDUs"), without the UN Uniform on; whereupon, he was pulled out of the formation for disciplinary processing.

Further facts necessary to a resolution of the issues presented are set forth in the arguments.

SUMMARY OF ARGUMENT

Issue I: The military judge erred by denying SPC New's causal challenge against a member who previously ordered a subordinate to deploy to Macedonia. The challenged member demonstrated actual and implied bias because he had a personal and professional interest in the result of SPC New's trial inasmuch as the challenged member gave precisely the same order as SPC New was accused of disobeying.

Issue II: SPC New's constitutional and statutory rights to be tried by members and to have the members determine whether the government proved every essential element beyond a reasonable doubt were violated because the military judge, not the members, ruled that the order given to SPC New was lawful without permitting the members to decide this element; further, the military judge then instructed the members that, as a matter of law, the order was lawful. In this manner, the military judge deprived the members of the opportunity to find an element of the offense and usurped the members' collective role in the court-martial. The government argument employing the discredited law-versus-fact distinction misses the point because a verdict, by its very nature, is a combination of law and fact, and the members cannot be relegated to deciding only questions

which the military judge deems factual as opposed to legal. Even under the law-versus-fact distinction paradigm, the members should have decided the lawfulness of the order because lawfulness depended on several key factual findings of which the defense highlighted approximately 15 at trial.

Issue III: The military judge erred by finding that the order to deploy in the UN uniform was lawful because the order violated Section 6 of the United Nations Participation Act, 22 U.S.C. § 7432 concerning decorations from foreign governments; and Army Regulation 670-1, para. 3-4k, prohibiting the wearing of foreign decorations on BDUs.

Issue IV: The military judge erred by avoiding certain arguments pertaining to the lawfulness of the deployment in holding that lawfulness was a nonjusticiable political question insulated from judicial review. The military judge then held that the order was presumed lawful and that defense arguments to the contrary could not be entertained because of the political question doctrine. In employing the political question doctrine to avoid dealing with defense arguments, the military judge ignored the fact that the political question doctrine, rooted in constitutional separation of powers, binds only Article III courts; that questions of statutory interpretation are not political questions; and that, even under political question

analysis employed by Article III courts, the issues in this case would be justiciable.

ARGUMENT

I

THE MILITARY JUDGE ERRED BY DENYING SPC NEW'S CAUSAL CHALLENGE AGAINST A COURT-MARTIAL MEMBER WHO PREVIOUSLY ORDERED A SUBORDINATE TO DEPLOY TO MACEDONIA.

The standard of review is abuse of discretion. United States v. Daulton, 45 M.J. 212, 217 (1996).

During *voir dire*, a court-martial member, Colonel Dana F. Kwist, admitted that he had ordered a subordinate to deploy to Macedonia. (R. at 508, 532). COL Kwist acknowledged that his order to deploy required his subordinate to wear the UN Uniform. (R. at 508). COL Kwist also stated that he had read several newspaper articles regarding SPC New's case. (R. at 530-31. COL Kwist stated that he read the newspaper everyday, and he estimated the number of articles he saw about SPC New's case to be about ten. (R. at 531). Although COL Kwist did not believe the amount of pretrial publicity in SPC New's case to be "extraordinary," he did comment that he had wondered whether SPC New's court-martial might be "a landmark case." (R. at 532).

After the individual *voir dire* of COL Kwist, but before calling the next panel member, the military judge voiced exception to the nature of the defense counsel's questions:

I don't know what the defense is

> accomplishing by *voir dire* on questions about commanders who have sent some of their soldiers on operations, and they're required to wear the blue beret - how that advances the case at all in view of my earlier ruling that the order, if there was such an order in this case, is lawful. Can you tell me what you hope to accomplish by that?

(R. at 534). The defense counsel replied that he was attempting to determine whether or not COL Kwist had "a personal interest" in SPC New's failure to obey his commander's order to wear the UN Uniform, when he had given the same order to one of his own subordinates. Id.

Following *voir dire*, the defense challenged COL Kwist for cause, citing two specific grounds which called his impartiality into question: (1) his prior knowledge of and familiarity with SPC New's case from having read several newspaper articles about it; and (2) his personal interest in the case stemming from his giving the same order to deploy to Macedonia to his own soldier. The government opposed the defense challenge for cause, arguing that although COL Kwist "keeps up on current events," he never indicated that he had any "significant, in-depth knowledge of this case." (R. at 567-68). With respect to his order to a subordinate to deploy, the government argued that COL Kwist was:

> merely doing what he's required to do, and that is receiving an order, executing it, and transmitting it. There is no indication that any of those soldiers raised the issues that the accused raised to him. He wasn't confronted with this issue in sending his soldiers on these deployments.

(R. at 568). The military judge denied the challenge for cause against COL Kwist, stating that he adopted "the argument of the trial counsel." Id.

An accused is entitled to be judged by court-martial members composed of individuals with fair and open minds. United States v. Smart, 21 M.J. 15, 18 (C.M.A. 1985). Indeed, it is well settled that "[c]ourt-martial members must be persons whose impartiality is not reasonably open to question." United States v. Glenn, 25 M.J. 278, 279 (C.M.A. 1987).

In addition to their constitutional right to an impartial jury, military accuseds also have a regulatory right to court-martial members who appear to be impartial. United States v. Ai, 49 M.J. 1, 4 (1998); Manual for Courts-Martial, United States, 1984 (hereinafter "Manual" or "M.C.M."), Rule for Courts-Martial (hereinafter "R.C.M.") 912 (f)(1)(N) (1998). R.C.M. 912 provides that a member shall be excused whenever it appears the member's presence would cast "substantial doubt" on the fairness and impartiality of the proceedings. According to the discussion section following R.C.M. 912, a personal interest in the result of trial may be grounds for a challenge for cause under the rule.

This Court has "enjoined military judges to be liberal in granting challenges for cause." United States v. Rome, 47 M.J. 467, 469 (1998); Smart, 21 M.J. at 21. Notwithstanding the

deference afforded military judges in ruling on challenges for cause, this Court has recognized its important responsibility to assure that military accuseds are tried by court-martial members unbiased as to both findings and sentencing. Smart, 21 M.J. at 19. Furthermore, this Court has acknowledged that military appellate courts bear a greater burden to ensure jury fairness than their civilian counterparts. Id. This heightened burden is due to the fact that the military severely limits peremptory challenges, and due to the unique manner of appointing court-martial members, which "presents perils that are not encountered elsewhere." Id. Therefore, this Court has held that it need not accept as conclusive a challenged panel member's "disclaimer of personal interest or his assertion of impartiality." Id.; United States v. Harris, 13 M.J. 288, 292 (C.M.A. 1982).

The focus of R.C.M. 912(f)(1)(N) is on the perception and appearance of fairness. United States v. Minyard, 46 M.J. 229, 231 (1997)(quoting United States v. Dale, 42 M.J. 384, 386 (1995)). The Rule includes both actual and implied bias. Minyard, 46 M.J. at 231; United States v. Rome, 47 M.J. 467, 469 (1998). Actual bias is essentially a question of credibility, while implied bias is reviewed under an objective standard, as if through the eyes of the public instead of the military judge. Daulton, 45 M.J. at 217. Although the standard of review is an abuse of discretion for challenges based on both actual and

implied bias, less deference is to be afforded the military judge when implied bias is involved. Minyard, 46 M.J. at 231.

A case factually similar to SPC New's is United States v. Harris. In Harris, the accused was tried for several on-post larcenies. A panel member divulged during *voir dire* that he served as the chairman of the base "resources protection committee." The committee's function was to survey areas of the base that had suffered personal or government property losses and to suggest ways to improve base security. Harris, 13 M.J. at 290-91. When asked about his duties as the committee chairman, the member assured the court that he did not feel any personal interest in the trial, and that he was "mentally free" to render a fair and impartial decision in the case. Id. At 290. The military judge denied a defense challenge for cause against the member.

On appeal, this Court refused to accept the member's disclaimer of personal interest in the case. Id. at 292. This Court reasoned that the member had an official interest in discouraging base larcenies in his role as committee chairman, such that the military judge erred in refusing to grant the challenge for cause on the basis of implied bias. Id.

Another factually similar case is United States v. Bergin, 7 C.M.R. 501 (A.F.B.R. 1952). In Bergin, the accused was charged with stealing from the post nonappropriated welfare fund. During

voir dire, three court-martial members revealed that they were the custodians of their respective unit welfare funds. When questioned, all three members acknowledged that any shortage in the post welfare fund could result in a corresponding shortage in their unit welfare funds. Id. at 504.

The Bergin court held that the causal challenges against each of the three members should have been granted. Id. at 505. The court reasoned that, as the custodians of their respective unit funds, the three members were "so closely associated with and had so great an interest in the conservation" of the post fund, that their personal interest rendered them incompetent to sit as court-martial members. Id. at 504.

Similar to the members in Harris and Bergin, COL Kwist had a personal and professional interest in the result of SPC New's trial. He gave precisely the same order to deploy to Macedonia as SPC New's battalion commander had given. Consequently, COL Kwist was closely associated with, and had a significant interest in, the order by SPC New's commander to wear the UN Uniform in preparation for deployment to Macedonia. Therefore, applying the reasoning of the Harris and Bergin courts, SPC New's causal challenge against COL Kwist should have been granted.

The Army Court's reasoning that "Colonel Kwist merely filled a tasking from higher headquarters," and that he "did not

dictate his subordinate's uniform for the mission nor issue any orders concerning uniforms," misses the mark of SPC New's argument, because the order to wear the UN Uniform was part and parcel of the order to deploy. United States v. New, No. 9600263, at 27 (Army Ct. Crim. App. Apr. 28, 1999) (to appear in M.J. Reporter). To conclude that COL Kwist had no personal interest in appellant's case because his order to deploy was somehow different than the order given to SPC New is an attempt to skirt the underlying issue by a play on words. By virtue of COL Kwist's order to deploy, his subordinate was required to wear precisely the same UN Uniform to which SPC new objected. Any other interpretation of COL Kwist's order strains the boundaries of reasonableness.

The alternative justification offered by the Army Court in finding this issue to be without merit likewise misses the mark of SPC New's argument. The Army court reasoned that because COL Kwist "had no opinion on the lawfulness of the UN mission uniform" (R. at 533), his connections to the matters challenged by SPC New were professional rather than personal, such that there was no implied bias. New, at 27. The Army Court's reasoning, however, fails to recognize this Court's admonition that, "where circumstances are present which raise 'an appearance of evil' in the eye of disinterested observers, mere declarations of impartiality, no matter how sincere, are not

sufficient by themselves to insure legal propriety." Harris, 13 M.J. at 292 (quoting United States v. Deain, 5 U.S.C.M.A. 44, 17 C.M.R. 44, 53 (1953)). Therefore, COL Kwist's mere declaration that he had not really thought about his order to his subordinate was in no way dispositive of the issue of his implied bias.

COL Kwist's implied bias in this case did not hinge on whether the order to deploy and wear the UN Uniform was lawful, or whether the military judge or the panel was to rule on this issue. Rather, the existence of implied bias was to be determined by considering whether, from the perspective of a reasonable member of the public, a senior commander who has ordered a subordinate to deploy to Macedonia as part of a UN operation may properly sit in judgment of another soldier who has been accused of disobeying an identical order. Clearly, in the eyes of the public, the appearance of fairness in SPC New's case was compromised by having a panel member sit in judgment of him who had previously given the same order to one of his own subordinates.

Notwithstanding COL Kwist's perfunctory disclaimer of personal interest in this case, there existed the very real danger that he would have been improperly influenced by his own order for a subordinate to deploy while deliberating on the legality of SPC New's actions. Any finding by the members that

SPC New was not guilty would have implied that COL Kwist's previous order to deploy was also subject to attack. Consequently, allowing COL Kwist to remain on SPC New's court-martial asked "too much of him and the system." Rome, 47 M.J. at 470 (quoting Dale, 42 M.J. at 386)).

In addition to COL Kwist's personal interest in SPC New's case, his impartiality was also questionable due to his familiarity with the case. COL Kwist admitted that he read the newspaper daily, and that he had seen approximately ten articles about SPC New's case. Although he stated that he did not think he had read any of the articles in their entirety, he did admit that he knew enough about the case to recognize its potential to be a "landmark case." (R. at 532). Therefore, although COL Kwist's familiarity with the notoriety of SPC New's case may not have been, by itself, sufficient to sustain a challenge for cause, when considered in conjunction with his personal interest in having given an identical order to deploy to his own subordinate, sufficient bias was implied to warrant a challenge for cause.

In the present case, the military judge erroneously decided, prior to *voir dire*, the lawfulness of the order to wear the UN Uniform as an interlocutory matter. (R. at 448-49). Therefore, as reflected in his questioning of defense counsel after the individual *voir dire* of COL Kwist, the military judge

was disinclined to find any bias on the part of a court-martial member due to the giving of similar orders. Consequently, it was not surprising that the military judge denied the defense challenge for cause against COL Kwist.[2] By doing so, however, the military judge abused his discretion. Most soldiers in SPC New's position would have been prejudiced by having a senior commander who had given the same order which they were accused of disobeying sitting in judgment of them. Therefore, in the interest of having SPC New's court-martial free from substantial doubt as to fairness and impartiality, and in keeping with the liberal mandate of granting challenges for cause, the military judge should have granted the defense causal challenge against COL Kwist.

WHEREFORE, Specialist New requests that this Court set aside and dismiss his conviction for violating a lawful order.

II

SPC NEW'S CONSTITUTIONAL AND STATUTORY RIGHTS TO BE TRIED BY COURT-MARTIAL MEMBERS AND TO HAVE THE MEMBERS DETERMINE WHETHER THE GOVERNMENT HAS PROVED EVERY ESSENTIAL ELEMENT OF THE CHARGED OFFENSE BEYOND A REASONABLE DOUBT WERE VIOLATED BECAUSE THE MILITARY JUDGE RULED THAT THE ORDER GIVEN TO SPC NEW WAS LAWFUL WITHOUT SUBMITTING THE ISSUE TO THE MEMBERS, AND BECAUSE THE MILITARY JUDGE INSTRUCTED THE MEMBERS THAT THE ORDER WAS LAWFUL AS A MATTER OF LAW.

[2] The military judge provided no findings of fact or conclusions of law for his decision to deny the challenge for cause against COL Kwist, other than to state on the record that he adopted the argument of the trial counsel.

The standard of review is *de novo* as the issue presented is a question of law. United States v. Bubonics, 45 M.J. 93 (C.A.A.F. 1996). Because the error alleged was of constitutional magnitude, this Court should determine whether the error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24 (1967); United States v. Brooks, 25 M.J. 175, 180 (C.M.A. 1987); United States v. Hicks, 748 F.2d 854 (4th Cir. 1984).

At trial, the military judge ruled that he would determine, as an interlocutory matter, whether the order given to SPC New to don the UN Uniform was lawful. The military judge then ruled, as a matter of law, that the order was lawful. The military judge did not allow the members to determine whether the order was lawful; instead, he instructed the members that, as a matter of law, the order was lawful. (R. 433-449.)

The Sixth Amendment guarantees that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury..." The Sixth Amendment, along with the U.C.M.J., guarantees servicemembers a right to be tried by court-martial members. U.C.M.J. arts. 16, 25; United States v. Roland, 50 M.J. 66, 68 (1999).

According to U.C.M.J. art. 92, the order to SPC New to don the UN Uniform must be lawful for SPC New to be convicted.

Hence, lawfulness of the order is specifically enumerated as an essential element of the offense.

The Supreme Court, as well federal circuit courts of appeal, has held that a trial judge may not determine, as a matter of law, that an element of a criminal offense has been established. In United States v. Gaudin, 115 S. Ct. 2310 (1995), the defendant was convicted of making material false statements to a federal agency in violation of federal law. Id. at 2312. An element of the charged offense was that the false statements must have been "material." Id. at 2313. At trial, the judge determined, as a matter of law, that the statements at issue were "material" within the meaning of the federal statute. Id. The trial judge instructed the jury accordingly. Id.

On appeal, the Supreme Court reversed the conviction. In doing so, the Supreme Court held that the Fifth and Sixth Amendments require that every element of the crime charged must be found beyond a reasonable doubt by a jury. Id. The government argued to the Supreme Court that, although materiality was an element of the offense, the issue of materiality was a legal question and not a factual one. Id. at 2314. Therefore, according to the government, the element of materiality need not be submitted to the jury because only the factual components of the crime need be considered by a jury. Id. The Supreme Court rejected this argument, however, because

the question at issue was an element of the offense. Id. The Court held, in absolute terms, that "[t]he Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." Id.

In United States v. (William C.) Johnson, 71 F.3d 139 (4th Cir. 1995), the defendant was tried by a jury for robbery of a credit union. Id. at 141. An essential element of the offense was that the robbery must have been perpetrated against a "credit union" as defined by federal law. Id. A trial, the government presented evidence that the money was stolen from a credit union. Id. The defendant did not contest that the robbery was perpetrated against a credit union. Id. The trial judge determined, as a matter of law, that the victimized organization fell within the definition of a credit union as defined by federal law. Id. He instructed the jury in accordance with this ruling. Id.

On appeal, the Fourth Circuit reversed the conviction and held that the trial judge erred by ruling, as a matter of law, that the crime was perpetrated against a credit union. Id. at 142. The Fourth Circuit specifically held that the trial judge's ruling, and his subsequent instruction, violated the defendant's Sixth Amendment right to have a jury decide every fact essential to his conviction. Id. Citing the Supreme

Court's holding in Gaudin, the Court stated that the Constitution gives a criminal defendant the right to have a jury determine his guilt, beyond a reasonable doubt, of every element of the charged offense. Id. The Court further stated that a trial judge commits an error of constitutional magnitude when he instructs the jury that, as a matter of law, a fact essential to conviction has been established, thus depriving the jury of the opportunity to render a finding. Id.

An instructional case concerning this issue is United States v. (William J.) Johnson, 718 F.2d 1317 (5th Cir. 1983). The defendant was convicted of securities fraud. Id. at 1319. One of the elements of the offense was that the document in question must have been a "security," as that term is utilized in the statute. Id. The trial judge determined, as a matter of law, that the document at issue was a "security," and he instructed the jury to that effect. Id.

On appeal, the Fifth Circuit reversed the conviction. The Fifth Circuit held that the trial judge violated the defendant's Fifth and Sixth Amendment rights to due process and a jury trial by ruling that one element of the charged offense was established as a matter of law. Id. at 1320. Citing the Supreme Court in Moore v. United States, 429 U.S. 20, 22 (1976) and Patterson v. New York, 432 U.S. 197, 210 (1977), the Fifth Circuit also reinforced the proposition that every element of a

charged offense must be proved beyond a reasonable doubt, and that all the elements of the offense must be submitted to the jury for its consideration. Id.

The government argued on appeal that the trial judge properly decided the matter because it was a questions of law, and not a question of fact. Id. at 1321. The Court rejected this argument, stating that the law versus fact distinction completely misses the point. Id. A jury's verdict, by its very nature, is a combination of law and fact. Id. at 1322. A jury may not be relegated to deciding only questions which the trial judge deems "factual." Id.

As an example, the Court explained that "the definition of a security is matter of law... Whether a particular piece of paper meets that definition, however, is for the jury to decide." Id. at 1321. This principle holds true even when the element is not in dispute. For instance, it is a jury question whether a pistol is a firearm or whether an automobile is a motor vehicle, even though the matter may be beyond intense debate. Id. at 1324. Hence, it is "fundamental" and "elementary" that, in a criminal prosecution, the government must prove each and every element of the crime beyond a reasonable doubt, and that all the elements must be submitted to the jury. Id. at 1323.

Another instructional case in which a federal appellate court reached the same conclusion is United States v. White Horse, 807 F.2d 1426 (8th Cir. 1986). The defendant was convicted of knowingly converting the funds of an Indian Tribal organization. Id. at 1427. One of the elements of that offense is that the funds must be the property of an "Indian Tribal organization." Id. at 1428. At trial, the trial judge ruled, as a matter of law, that the entity from which the funds were converted was an Indian Tribal organization. Id. The trial judge made his ruling "beyond a reasonable doubt," and instructed the jury to that effect. Id.

On appeal, the Eighth Circuit reversed the conviction. The Eighth Circuit held that, because the judge's ruling concerned an essential element of the charged offense, the issue should have been submitted to the jury. Id. at 1429. Once again, the government argued that the trial judge's ruling concerned a question of law, and not a question of fact. Id. Therefore, according to the government, the question was properly a matter for the judge to decide. Id.

The Eighth Circuit, however, again rejected this argument. Id. at 1430. The Court specifically stated that a jury may not be relegated to deciding only questions which the trial judge deems factual. Id. Citing the Fifth Circuit's Johnson decision, the White Horse Court reasoned that this issue does

not turn on whether a question is one of law or one of fact. Id. Rather, the issue is whether the province of the jury has been invaded by the trial judge. Id. The Court held that, regarding the elements of a criminal offense, the judge may do no more than instruct the jury as to the applicable law. Id. If the trial judge does any more, the trial judge usurps the role of the jury. Id. Hence, the trial judge invades the jury's domain by deciding, as a matter of law, that an element of the charged offense was established. Id.

The Supreme Court, as well as federal appellate courts, has held in absolute terms that, in a jury trial, it is strictly the jury's rule to determine whether every element of the charged crime has been established beyond a reasonable doubt. The right to have a jury, and only a jury, determine a criminal accused's fate is guaranteed by the Fifth and Sixth Amendments to the Constitution. Those amendments, as well as U.C.M.J. arts. 16 and 25, guarantee SPC New the right to be tried by court-martial members.

In this case, however, SPC New's right to be tried by court-martial members was usurped by the military judge. The military judge, and only the military judge, heard evidence pertaining to the lawfulness of the order. And the military judge, and only the military judge, determined that the order

given to SPC New was lawful. Hence, the plain dictates of the Supreme Court and the federal appellate courts were violated.

The government asserts, in this case, that the issue of lawfulness of the order was properly resolved by the military judge as question of law. As has been demonstrated, this argument has been solidly rejected by federal courts. Any attempt to distinguish questions of fact from questions of law completely misses the point. As the federal courts have repeatedly stated, ever jury verdict is inherently a mixed question of law and fact. Instead, the key consideration here is that the military judge's ruling pertained to an essential element of the charged offense. Regardless of whether the issue is labeled one of law or one of fact, the military judge has no authority to rule, of his own volition, that an element of the offense has been established. The government's argument that the military judge's ruling was proper because the question was legal and not factual is, therefore, inapposite.

Even under prevailing military law, the military judge erred by ruling, as a matter of law, that the lawfulness element of the charged offense was established. In some cases, the legality of the order is not in dispute. In those cases, when it is clear or uncontested that an order was lawful, military law allows the military judge to find that the order was lawful as an interlocutory matter. Unger v. Ziemniak, 27 M.J. 349, 359

(C.M.A. 1989). An order, however, may be lawful on its face, but be unlawful under the particular facts of the case. United States v. Kapla, 22 C.M.R. 825, 830 (A.B.R. 1956).

When an issue exists as to whether an order was lawful, the issue should be submitted to the members for their consideration. Id.; see also United States v. Tiggs, 40 C.M.R. 352, 353-354 (A.B.R. 1968). In that event, the members must be convinced beyond a reasonable doubt that the order was lawful; if not, the accused must be acquitted. Id. Even if the military judge has ruled that an order was lawful as an interlocutory matter, the issue of lawfulness must be submitted to the members for their consideration if evidence arises at trial that the order may not have been lawful. Unger, *supra*. Hence, an interlocutory determination that an order is lawful as a matter of law does not preclude the possibility that the order may be unlawful as a matter of fact. Kapla, *supra*, at 830 (citing United States v. Trani, 1 U.S.C.M.A. 293, 3 C.M.R. 27). In a trial by military judge alone, the military judge must determine beyond a reasonable doubt that the questioned order was lawful. Id.

Both the Manual and the Department of the Army Pamphlet 27-9, Military Judge's Benchbook (hereinafter "Military Judge's Benchbook") reflect this doctrine. According to the Discussion following R.C.M. 801(3)(5), questions regarding the

applicability of a rule of law to an undisputed set of facts are normally interlocutory questions of law. For example, the legality of an order in a disobedience case is normally a question of law. Id. However, these issues sometimes turn on some factual dispute, in which case they would become questions of fact. Id.

The R.C.M. 801(3)(5) Discussion also states that a question is interlocutory unless the ruling on it would finally decide the accused's guilt. Questions which may determine the ultimate issue of guilt are not interlocutory. An issue may arise as both an interlocutory question and a question which may determine the ultimate issue of guilt. A question is not purely interlocutory if the accused raises an objection and the disputed facts involve the ultimate question of guilt.

For example, in a trial for desertion, the accused may seek dismissal of the charges prior to trial and present evidence that he was not a member of the armed forces at the time of the alleged offense. The military judge may deny the motion to dismiss and conclude that the accused has not carried his burden of proving he was not a member of the armed forces at the time of the charged offense. But, the military judge's ruling cannot finally dispose of the issue as a matter of law because military status is an element of the crime of desertion. Therefore, even though the military judge may rule on the accused's motion to

dismiss, the disputed issue must still be submitted to the members for their deliberation on findings. R.C.M. 801(e)(5) Discussion.

The guidance set forth in the Military Judge's Benchbook conforms with the Manual's summary of law. Paragraph 3-29, in use at the time of SPC New's court-martial, states that the legality of an order should be resolved as an interlocutory question when it is clear as a matter of law that the order was lawful. But, paragraph 3-29 also provides that a factual dispute as to whether an order was lawful is part of the members' ultimate determination of guilt or innocence.

Thus, even under the prevailing state of military law, the military judge erred by ruling on the issue of lawfulness of the order. First, the issue of lawfulness was contested at trial.

Second, the ruling on lawfulness of the order turned on several key factual findings. The defense provided the military judge several specific factual issues surrounding the lawfulness of the order issue, which included: whether a UN resolution exists which authorizes deployment under Chapter VI of the UN Charter; whether a UN resolution exists which authorizes deployment under Chapter VII of the UN Charter; whether President Clinton erred in misrepresenting the deployment to Macedonia as a Chapter VI deployment; whether, of the 13 UN resolutions cited by the government, seven of them refer to the

deployment as a Chapter VII deployment; whether any UN resolution anywhere ever refers to the deployment as a Chapter VI deployment; whether, of the 97 UN resolutions presented by the defense, any of them in any place refer at any time to a Chapter VI deployment; whether Congress approved the deployment; whether a regulation exists which prohibits wearing the UN Uniform; whether LTC Layfield's order was consistent with AR 670-1; whether SPC New's uniform was in conformity with AR 670-1; whether the UN Uniform had a military function; whether Macedonia was a maneuver area within the meaning of AR 670-1; whether the UN Uniform consisted of safety items within the meaning of AR 670-1; whether the UN is a foreign government; whether the UN Uniform is a foreign uniform; and whether there is a military purpose to the order to wear the UN Uniform (R. at 442-444.) Factual issues as to whether Macedonia was a maneuver area within the meaning of AR 670-1, whether the UN Uniform was a safety item within the meaning of AR 670-1, and whether the UN Uniform included foreign insignia were particularly important.

Third, there is nothing to indicate the military judge found the element of the offense proved beyond a reasonable doubt. Fourth, because the military judge ruled on an essential element of the offense, his ruling touched on the ultimate determination of guilt.

The military judge's ruling in this case is strikingly similar to the trial judge's ruling in Gaudin and the other federal cases cited previously. The questions of whether Macedonia was a maneuver area within the meaning of AR 670-1 and whether the UN Uniform was a safety item within the meaning of AR 670-1 are nearly identical to the issues in those cases -- whether a financial institution was a credit union within the meaning of the federal statue, or whether a particular financial document was a security within the meaning of a particular federal law.

In sum, the military judge should not have determined by himself that the order was lawful. The lawfulness of the order was an element of the charged offense, and only the court-martial members should have been able to determine whether that element had been established, based on the particular facts of this case. Because the military judge refused to allow the members to consider or deliberate on that element of the offense, SPC New was denied his constitutional and statutory right to have court-martial members determine whether the government had proved each and every element of the charged offense beyond a reasonable doubt.

WHEREFORE, Specialist New requests that this Court set aside and dismiss his conviction for violating a lawful order.

III

THE MILITARY JUDGE ERRED BY FINDING THAT THE ORDER TO DEPLOY IN THE UN UNIFORM WAS LAWFUL.[3]

The standard of review is *de novo* as the issue presented is a question of law. United States v. Bubonics, *supra*. Because the error alleged was of constitutional magnitude, this Court

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[3] With few exceptions, this Supplement does not cite appellate exhibits. SPC New's R.C.M. 1105 submissions refer to considerable problems with the record of trial, especially the appellate exhibits. As noted in paras. 13-14 of SPC New's R.C.M. 1105 submission dated 16 April 1996:

> 13.[..R]equest that you order a revision proceeding to correct the record of trial. The record of trial is seriously flawed. It has hampered our review of the case, and will present an even greater obstacle to the military appellate courts... Although the record of trial appears to contain all appellate exhibits that the trial court considered, a large number (approximately 38) are not referred to anywhere in the transcript. For that reason it is difficult to review the record and it is more likely that other courts will be confused or overlook important exhibits.
>
> 14. This confusion is heightened by the fact that so many of the appellate exhibits are mentioned in the transcript out of order from the sequence in which they are numbered...If the military judge has not already made these corrections, as we previously requested in writing, then we ask that you order a proceeding to do so.

SPC New's "final" R.C.M. 1105 submission dated 8 May 1996 again requested a proceeding in revision to correct the record of trial. The government failed to respond to these requests for a proceeding in revision and took no action to straighten out the confusion with the appellate exhibits.

should determine whether the error was harmless beyond a reasonable doubt. Chapman v. California, *supra*; United States v. Brooks, *supra*; and United States v. Hicks, *supra*.

At trial, the defense raised four motions to dismiss, including two principal motions based on the order's unlawfulness:

a. Motion to Dismiss: Unlawful Deployment (A. E. XLVIII), and

b. Motion to Dismiss: Unauthorized Alteration of Uniform (A.E. XLIX).

The defense supported each of its motions to dismiss with lengthy memoranda including attachments, as well as additional appellate exhibits and expert testimony. (R. at 323-375.)

The defense arguments that the order was unlawful are integrated and summarized in this Issue in two sub-sections: A. Deployment of SPC New to Serve in a UN Armed Force Operation in Macedonia is Illegal and Unconstitutional; and B. The Order to Wear the UN Uniform Violated the Constitution, Federal Law, and Military Regulations.

A. Deployment Of SPC New To Serve In A UN Armed Force Operation In Macedonia Is Illegal And Unconstitutional.

1. Introduction.

Article II, Section 3 of the Constitution states that the President "shall take Care that the Laws be faithfully executed." In Youngstown Sheet & Tube, Inc. v. Sawyer, 343 U.S. 579, 646 (1952), Justice Jackson wrote that this Clause, coupled with the Fifth Amendment's guarantee of due process, subjects the President to the rule of law:

> One gives a governmental authority that reaches so far as there is law, the other gives a private right that authority shall go no farther. These signify about all there is of the principle that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules.

The President has no power to make the rules; only Congress does. Therefore, the President's power "to execute the laws starts and ends with the laws Congress has enacted." Id. at 633.

Congress has enacted the United Nations Participation Act (hereinafter "UNPA") to govern the President's power to employ United States soldiers in a UN armed force operation. See, Section 6 (22 U.S.C. § 287d) (hereinafter "UNPA Section 6") and Section 7 (22 U.S.C. § 287d-1) (hereinafter "UNPA Section 7") of

the UNPA.[4] Neither section authorizes the President to deploy SPC New as part of the UN armed force operation in Macedonia.

The UN itself claims Chapter VII of the UN Charter (hereinafter "Chapter VII") as its authority for military action in Macedonia. UNPA Section 6 prohibits United States participation in Chapter VII actions except pursuant to a specific agreement which has been approved by Congress. Congress has never approved any such agreement. Glennon, *The Constitution and Chapter VII of the United Nations Charter,* 85 AM. J. OF INT'L. L. 74, 80 *(1991).*

The President claims that his authority to order United States soldiers to become UN soldiers is based on UNPA Section 7 which, in turn, is predicated on noncombatant operations authorized by Chapter VI of the UN Charter (hereinafter "Chapter VI"). However, this claim is manifestly inconsistent with the UN's formal reliance on Chapter VII, and with the actual nature of the UN operation in Macedonia.

Having failed to comply with the UNPA, the President cannot require any member of the United States armed forces to participate in the UN armed force operation in Macedonia. Neither the UN Charter, nor the President's general executive

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

power or his power as Commander in Chief under the Constitution, authorizes the President to do so. Stromseth, *Collective Force and Constitutional Responsibility,* 50 U. OF MIAMI L. REV. 145, 150-160 (1995) (hereinafter "Stromseth, *Collective Force");* Testimony of Assistant Secretary of State Ernest A. Gross in Hearings to Amend the United Nations Participation Act of 1945 at pp. 17, 20, 24, 27-28. To the contrary, Article II, Section 2 of the Constitution prohibits the President from delegating any of his power as Chief Executive or as Commander in Chief to any foreign officer, government, or organization, including the UN.

2. The UN Has Placed Formal Reliance On Chapter VII For the UN Armed Force Operation In Macedonia.

From the beginning of the UN's actions in former Yugoslavia, and throughout their duration, the UN Security Council has explicitly acted under Chapter VII. Not once has the Security Council referred to Chapter VI, and for good reason. Chapter VII authorizes the UN to take "such action by air, sea or land forces as may be necessary to maintain or restore international peace and security." (Article 41.) It is clear that Chapter VII authorizes actions when "the Security Council has decided to use force." (Article 44.)

On the other hand, Chapter VI action calls for "pacific settlement of disputes" and contains no colorable authority for the use of force. The UN operation in former Yugoslavia, including Macedonia, has never been a consensual noncombatant

operation mediating the peaceful settlement of a dispute as contemplated by Chapter VI. Rather, it has always been an operation calling for coercive measures, as provided for in Chapter VII, backed up by an armed peacekeeping force. UN Resolutions 713, *et seq.*

According to the UN Secretary-General's Report (S/24852), the mission in Macedonia would include "an infantry battalion, with appropriate logistic support," deployed to "monitor Macedonia's borders with Albania and the Federal Republic of Yugoslavia (Serbia and Montenegro)" with authority, if necessary, to "stand between forces that otherwise might clash." Overall, the purpose of UNPROFOR in Macedonia was to prevent the fighting in former Yugoslavia from spilling over into Macedonia and setting off a "wider Balkan war."

The Secretary-General established UNPROFOR in Macedonia to include a military component of "three rifle companies" headed by a brigadier general and supported by a helicopter unit. This military unit became an integral part of the larger UNPROFOR in former Yugoslavia. Over the next several months, the Security Council, invoking Chapter VII, passed several resolutions "to ensure the security of UNPROFOR and its freedom of movement for all its missions." See UN Resolutions 815, 819, 820, 824, 836, and 847. The mission in Macedonia is clearly one of the missions

covered by these resolutions containing numerous references to Chapter VII and no references to Chapter VI.

The UN operation in Macedonia was formally justified by the Security Council under Chapter VII of the UN Charter. Because the President has not even attempted to comply with UNPA Section 6 which controls United States participation in Chapter VII actions, he has clearly acted illegally in bypassing Congress by sending United States soldiers to serve in a UN armed force operation.

3. The Nature Of The UN Operation In Macedonia Precludes Reliance On Chapter VI.

UNPROFOR has always been an armed Chapter VII peacekeeping force, not an unarmed Chapter VI peace observation operation. The distinction is a crucial one. Fink, *From Peacekeeping to Peace Enforcement: The Blurring of the Mandate for the Use of Force in Maintaining International Peace and Security,* 19 MD. J. INT'L. & TRADE 1, 13 (1995) (hereinafter "Fink, *Peace Enforcement").*

Chapter VI peacekeeping missions are confined to unarmed peace observations. Such missions are limited by three guiding principles: "(1) complete neutrality; (2) consent by all disputing parties to the presence of the peacekeepers; and (3) the absolute prohibition on the use of force, both offensively and defensively." Ramlogan, *Towards a New Vision of World Security: The United Nations Security Council and the Lessons of*

Somalia, 16 HOUS. J. INT'L. 213, 246-47 (1993). According to former Secretary-General Boutros Boutros-Ghali (who oversaw UNPROFOR in Macedonia), however, the traditional limits of consent, neutrality and self-defense have proved inadequate to meet "[n]ew military facts":

> UN operations today may require disarming or seizing weapons from factional fighters, with or without agreement. The arms must be kept in custody and possibly destroyed. Before, during, and after the conflict, the serious problem of land mines must be dealt with. Additionally, humanitarian aid now may require military protection.

Boutros-Ghali, *Maintaining International Peace and Security: The United Nations as Forum and Focal Point,* 16 LOY. L.A. INT'L. & COMP. L. J. 1, 4 (1993).

The UN faced all of these "new military facts" in former Yugoslavia. Hence, it departed from the consensual, neutrality, and limited force principles characteristic of Chapter VI peace observation operations and opted instead for a Chapter VII armed peacekeeping operation.

Before the UN launched UNPROFOR, it did not obtain the consent of all parties to the dispute. Fink, *Peace Enforcement, supra,* at 34. The UN favored the Croatians and Bosnian Muslims with a number of nonneutral resolutions "condemning" the Serbs and the Bosnian Serbs and "demanding" their compliance with UN actions. Id. at 35-36. The UN authorized not only self-defense and defense of position, but the use of force in securing

UNPROFOR's "freedom of movement" and the introduction of "outside troops." Id. at 37-38.

Likewise, the Security Council established UNPROFOR in Macedonia without the consent of Macedonia's neighbors: Albania, Serbia, Montenegro, and Greece. UN Resolution 795. At the time, there were ongoing disputes with each country over borders, the treatment of Albanian ethnics within Macedonia, and international recognition of Macedonia. See UN Secretary-General Report S/24852 (Nov. 25, 1992); Lowe and Warbrick, *Recognition of States,* 41 INT'L. AND COMP. L. Q. 473-75, 478-80 (1992); Poulakidas, *Macedonia: Far More Than A Name to Greece,* 18 HASTINGS INT'L. & COMP. L. REV. 397-99, 429-431 (1995).

Finally, the Security Council specifically authorized UNPROFOR to use force beyond that required for self-defense or defense of position. The Secretary-General anticipated that UNPROFOR in Macedonia, deployed to monitor Macedonia's borders with Serbia, Montenegro and Albania, would not only "report" any threats to border security, but "deter such threats," and if necessary, "stand between forces that might otherwise clash." Secretary-General Report S/24852 (Nov. 25, 1992).

Unquestionably, the UN operation in Macedonia is both formally and functionally an armed peacekeeping operation under Chapter VII. Indeed, if it were not, then UN intervention into the clash in this region would be in violation of Article 2(7)

of the UN Charter which prohibits intervention "in matters which are essentially within the jurisdiction of any state," except as authorized by Chapter VII Rubin, *An International Criminal Tribunal* for *Former Yugoslavia?, 6* PACE INT'L. L. REV. 7, 9-10 (1994); Fink, *Peace Enforcement, supra,* at 8-9, 40-41.

Having drawn upon its coercive authority under Chapter VII to justify its military operation, the Secretary-General has described the conditions in this divided nation as "near-war." UN Secretary-General Report, "Supplement to An Agenda for Peace," para. 39, S/1995/1 (Jan. 3, 1995).

The UN is authorized to enter "near-wars" only under Chapter VII, and never under Chapter VI.

4. The President Violated The UNPA.

Because UNPROFOR in Macedonia was a Chapter VII armed force operation, UNPA Section 6 governs the President's authority. Before deployment of any United States troops in a UN armed force operation, UNPA Section VI clearly requires the President to obtain Congress' prior approval "by Appropriate Act or joint resolution." Congress must approve any proposed arrangement between the President and the UN Security Council "providing the numbers and types of armed forces, their degree of readiness and general location, and the nature of facilities and assistance, including rights of passage, to be made available to the Security Council...."

The one exception specified in the text of UNPA Section 6 provides that the President may assign United States armed forces in accordance with UNPA Section 7 for Chapter VI operations. This exception, however, does not apply to the Macedonian operation because it provides only for the "detail" of United States armed forces "to serve as observers, guards, or in any noncombatant capacity" as contemplated by Chapter VI.[5] Moreover, the exception requires formal assurance from the President that any armed force detailed under UNPA Section 7 would not involve "the employment of forces contemplated by Chapter VII of the United Nations Charter." Stromseth, *Rethinking War Powers: Congress, the President and the United Nations,* 81 GEORGETOWN L. J. 597, 619 (1995). As the legislative history to UNPA Section 7 makes clear, the limiting language of that section was designed specifically to ensure that United States troops would not participate in any UN military act of any kind outside the confines of an approved agreement under UNPA Section 6. No such agreement has been negotiated by the President or approved by Congress.

In his effort to justify deploying United States troops in the UN armed force operation in Macedonia, President Clinton

[5] See, Sen. R. No. 510, 81st Cong., 1st Sess. pp. 2, 3 and 5 (June 16, 1949); House R. No. 591, 81st Cong., lst Sess. (May 17, 1949). Hearings To Amend the United Nations Participation Act of 1945, House of Representatives, 81st Cong., lst Sess., p. 28 (May 11, 1949).

sent a letter dated July 9, 1993 to then-House of Representatives Speaker Thomas Foley. (A.E. LXVIII.) The President stated that "UN Security Council Resolution 795 established the UNPROFOR Macedonia mission under Chapter VI of the UN Charter" and that he had deployed 350 United States infantry troops to serve in the UN Macedonian operation "in accordance with Section 7 of the United Nations Participation Act..." In a second letter dated January 8, 1994 (A.E. LXVI), the President, relying again upon UNPA Section 7, advised the Speaker that he was deploying another "combat-equipped U.S. Army contingent ... fully prepared not only to fulfill their peacekeeping mission but to defend themselves if necessary."

Again, neither the UN Charter nor the Security Council resolutions support the President's patently false claim that the UNPROFOR Macedonia mission was undertaken pursuant to Chapter VI. Even a cursory reading of UNPA Section 7 demonstrates that it does not authorize the President to deploy "combat-equipped" troops as part of a UN operation into a "near-war" zone.

Because the troops were combat ready, the President felt compelled to report to Congress under the War Powers Resolution Section which provides:

> In the absence of a declaration of war, in any case in which United States Armed Forces are introduced into hostilities or into situations where imminent involvement of

> hostilities is clearly indicated by the circumstances or into territory.... of a foreign nation, while equipped for combat.... or in numbers which substantially enlarge United States Armed Forces equipped for combat.... the President shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report....

50 U.S.C. § 1543(a)(l)(2)(3). By reporting under this section, the President has switched positions and proved false his claim that the UNPROFOR operation in Macedonia was established under Chapter VI and UNPA Section 7.

UNPA Section 6 is the exclusive means by which the President may deploy United States armed forces in service to any UN military operation. Fisher, *The Korean War: On What Legal Basis Did Truman Act?,* 89 AM. J. INT'L. 29, 31-32 (1995).

Unquestionably, President Clinton lied to Congress in his letters to the Speaker dated July 9, 1993 and January 8, 1994 by stating that the UNPROFOR mission in Macedonia was authorized by Chapter VI and UNPA Section 7. No doubt, the President lied in order to avoid the strict constraints of UNPA Section 6 requiring him to obtain approval from Congress prior to deployment of any United States troops in a UN armed force operation. By his deception, the President violated SPC New's Fifth Amendment due process rights by ordering him to serve in a Chapter VII UN armed force operation when the law clearly prohibits the President's action. In turn, prosecution of SPC

New for violating orders by the President's subordinates for SPC New to deploy to Macedonia, and to wear the UN Uniform for such deployment, violated SPC New's Fifth Amendment due process rights.

The Congress has utilized its constitutional authority to provide for the regulation of the armed forces to ensure that the President cannot, without congressional approval, send United States soldiers into "near-war" in UN armed force operations. It is President Clinton, not SPC New, who has acted illegally.

5. The President Has No Authority Under Article II, Section 2 Of The Constitution To Deploy United States Soldiers Under UN Authority.

In addition to deceptively citing UNPA Section 7 as authority, President Clinton has claimed unilateral authority as Commander in Chief and Chief Executive to deploy combat-equipped United States troops under UN authority. Whatever power the President may have under the Constitution to deploy United States armed forces under United States command, it does not follow that he has comparable authority to deploy such forces under foreign authority. At least two reasons dictate against such authority.

First, the President cannot deploy any United States soldiers to serve the UN, either in a combatant or noncombatant role, without explicit authority from Congress. Stromseth,

Collective Force, supra, at 145, 150-160 (1995). That is why the Executive Branch sought such authority from Congress in 1945 and 1949 when it urged Congress to enact the UNPA. As then-Assistant Secretary of State, Ernest A. Gross, testified on May 11, 1949:

> ... [U]nder the Constitution, American military personnel cannot be made available to foreign powers or foreign organizations, except by authority of law.... The problem as it exists now is complicated by the fact that there is no explicit authority by law for the United States Government to detail personnel to the United Nations .... [U]nder Section 7 the main purpose is to give the President authority to detail persons to the United Nations.

Hearings, *supra,* at 17, 20, 24.

Having sought such authority, and having been granted it by Congress, the President cannot now maintain that he is free to violate the statute because he did not need such statutory authority in the first place. As the Court held in Youngstown, the President has no constitutional authority to act contrary to a congressionally determined policy, even under the claimed exercise of his power as Chief Executive or Commander in Chief. 343 U.S. at 601-609, 637-655.

The second objection to placing United States soldiers under UN authority is its unconstitutional delegation of the President’s power as Commander in Chief and as the Chief Executive Officer. Except when the United States has been in a constitutionally declared war and then, only under emergency war

conditions, United States soldiers have not been put into military operations unless they were put there "under the command of United States generals and admirals who took their orders from the President of the United States." Houck, *The Command and Control of United Nations Forces in the Era of "Peace Enforcement",* 4 DUKE J. COMP. & INT'L. L. 1 (1993) (hereinafter "Houck, *Command & Control").* Placing United States soldiers under UN authority in the manner of the UNPROFOR operation in Macedonia, then, is unprecedented in the history of the United States and should not be countenanced, unless clearly authorized by the Constitution.

According to Chief Justice Roger Taney, the President as Commander in Chief is "authorized to direct the movements of the naval and military forces placed in his command, and to employ them in the manner that he may deem most effectual." Fleming v. Page, 50 U.S. [9 How.] 603, 615 (1850). According to the terms of deployment of United States troops under UN authority, the UN commander obtains "temporary operational control" over United States soldiers, subject only to the authority of the President to countermand that control if he sees fit. Glennon and Hayward, *Collective Security and the Constitution: Can the Commander in Chief Power be Delegated to the United Nations?,* 82 GEO. L.J. 1573, n.65 (1994) (hereinafter "Glennon and Hayward, *Collective Security").* Such "veto" power is not the equivalent of the

constitutional authority of the President as Commander in Chief, which necessarily requires that the President retain authority to "direct" United States armed forces, not just to "disregard orders that were judged beyond the United Nations mandate for the operation." Glennon and Hayward, *Collective Security, supra.* See Houck, *Command and Control, supra,* at 47. See also Houck, *The Commander in Chief and the United Nations Charter Article 43: A Case of Irreconcilable Differences?,* 12 DICK. J. INT'L. LAW 1 (1993).

In addition to this unconstitutional delegation of the President's nondelegable authority as Commander in Chief, placing United States soldiers under UN authority in the manner of the UNPROFOR operation in Macedonia puts them under the executive power of foreign political and military officers who have not been appointed according to the procedure specified in Article II, Section 2 of the Constitution. Casey and Rivkin, "Presidents and War Power: Another View," 9 Common Sense, pp. 59-73 (Winter 1996).

SPC New has the right to be under an exclusively United States chain of command that ends with the President, not with the UN Secretary General.

B. The Order To Wear The UN Uniform Violated The Constitution, Federal Law, And Military Regulations.

Article I § 9 of the Constitution states:

> No title of nobility shall be granted by the United States: and no Person holding any Office of Profit or Trust under them, shall, without the Consent of Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign state.

This section was designed to preserve all officers of the United States to be "independent of external influence." Madison, *Journal of the Federal Convention,* Vol. 2, p. 593.

History confirms that the office of "United States soldier" is an "office of profit or trust under the United States." Accordingly, SPC New may not accept an office of any kind from a foreign state without the consent of Congress. SPC New's ordered service in the UN Uniform under UN authority would bestow on him the office of "UN soldier."

History also demonstrates that the United States does not permit United States citizens to accept the office of soldier in a foreign military even when joining the army of a United States ally. Before the United States entered World War I, thousands of United States citizens joined the military of one of the United States' eventual allies; this cost them their United States citizenship. Congress had to enact a special act to restore the citizenship of such persons. Glennon and Hayward, *Collective Security, supra,* at n. 65.

No Act of Congress authorizes the transfer to this new or additional office of "UN soldier." Therefore, the order under

which SPC New was convicted facially violates Article I § 9 of the Constitution if the UN is a foreign government within the meaning of this section. As set forth below, the executive and legislative branches have concluded that service to the UN is subject to this ban.

Under Article I § 9, it is equally illegal to accept the badges and insignia of a foreign office. Moreover, the statutes and regulations which have been enacted to enforce this constitutional ban remove any doubt that the UN is a foreign government for these purposes.

Federal law bans any federal employee from accepting “gifts or decorations” from foreign governments. 5 U.S.C. § 7342. All military personnel are subject to this ban. § 7342(a)(1)(D). The UN is clearly defined as a “foreign government.” § 7342(a)(2).

DoD Directive 1005.13, “Gifts from Foreign Governments” defines “foreign government” to include “any international or multinational organization whose membership is composed of any unit of foreign government....” Thus, there is no question that both Congress and the Department of Defense consider the UN a foreign government under Article I § 9, and its enforcing statutes and regulations. If it were otherwise, any federal employee could accept contemporaneous employment from the UN.

SPC New contends that the UN insignia that he was ordered to wear on his uniform and on his headgear are “decorations”

from a foreign government,[6] the receipt of which is banned by 5 U.S.C. § 7342 (b)(2) and § 7342(a)(1)(D).

Neither do the statutory definitions permit UN insignia to be characterized as "gifts of minimal value." A "decoration" is: "an order, device, medal, badge, insignia, emblem, or award." 5 U.S.C. § 7342 (a)(4). A "gift" is: "a tangible item or intangible present (other than a decoration) tendered by, or received from a foreign government." § 7342(a)(3). "Gifts of minimal value" are gifts which are "tendered and received as a souvenir or mark of courtesy." § 7342(c)(1)(A). DoD Dir. 1005.13(F)(1) also defines a "gift of minimal value" as "table favors, mementos, remembrances, or other tokens bestowed at official functions" as well as "souvenirs" and "marks of courtesy."

The UN insignia is the distinguishing component of each of the items SPC New was ordered to wear as his UN Uniform. The word "insignia" appears in the definition of "decoration" and cannot be considered a "gift" of any kind, much less a gift of minimal value. Hopefully, the government is not contending that

[6] There is no question that the UN, not the Army, provides the contested UN insignia items. It is the UN's responsibility to provide UN berets, caps, shoulder patches, armlets and scarves to all ranks of soldiers deployed under UN command. "Troop Memoire" (A.E. XLIX, Attachment.) Indeed, the UN beret (D.E. C.) states that it is UN property on a tag sewn to the inside lining. (As a further deficiency in the record of trial, Defense Exhibits C, D, E and F, all of which are UN Uniform items, are

SPC New refused to wear a souvenir or table favor on his uniform.

Congress grants its consent to certain gifts and decorations in 5 U.S.C. § 7342(c) and (d). Subsection (c) consents to gifts of minimal value, which is clearly not relevant because the UN insignia is a "decoration," not a "gift." Moreover, it is clear on the face of subsection (d) that the UN insignia is not an approved foreign decoration.

Finally, Army regulations make it clear that even those foreign decorations approved by Congress under § 7342(d) can *never* be worn on BDUs. AR 670-1, para. 3-4 k, governs insignia to be worn on BDUs: "Foreign badges, distinctive unit insignia, and regiment distinctive insignia will not be worn on these uniforms." Even approved foreign decorations can only be worn on the more formal dress uniforms.

SPC New was court-martialed for refusing to wear "foreign decorations" on his BDUs. Both law and regulation make it clear: When United States soldiers deploy, they are to possess undiluted identity and allegiance free from the influence of an insignia, a bit of ribbon, or a piece of brass from any foreign power.

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neither described nor photographed in the record of trial. (See also fn. 14, *supra*.)

WHEREFORE, Specialist New requests that this Court set aside and dismiss his conviction for violating a lawful order.

IV

THE MILITARY JUDGE ERRED BY AVOIDING THE QUESTION OF THE LAWFULNESS OF THE ORDER AND HOLDING THAT LAWFULNESS WAS A NONJUSTICIABLE POLITICAL QUESTION.

The standard of review is *de novo* as the issue presented is a question of law. United States v. Bubonics, *supra*. Because the error alleged is of a constitutional magnitude involving the doctrine of nonjusticiable political question, a doctrine derived from the constitutional separation of powers, this Court should determine whether the error was harmless beyond a reasonable doubt. Chapman v. California, *supra*; United States v. Brooks, *supra*; United States v. Hicks, *supra*.

The military judge declined to rule on the motion to dismiss with respect to unlawful deployment on the basis that the issue is a political question insulated from judicial review. (R. at 432.) Nevertheless, LTC Layfield's order to don the UN Uniform was clearly based on the order to deploy to Macedonia in the UN Uniform; it had no other purpose. If the deployment was illegal, SPC New had no duty to obey LTC Layfield's order because the order had no legitimate military purpose. No military duty exists to obey an order which lacks nexus to a legitimate military purpose. See Manual for Courts-Martial, Part IV, para. 14C(2)(a)(iii). An order is not lawful

if it is contrary to established law or regulation, or does not relate to a valid military purpose. United States v. Womack, 27 M.J. 630 (A.F.C.M.R. 1988); United States v. Wine, 28 M.J. 691 (A.F.C.M.R. 1989). Orders which are arbitrary and capricious are invalid and unenforceable. United States v. Sargeant, 39 M.J. 812 (A.C.M.R. 1989). If the defense raises the issue of lawfulness of an order, the prosecution must establish lawfulness. Unger v. Ziemniak, 27 M.J. 349 (C.M.A. 1989). Accordingly, although the military judge declined to find that the deployment to Macedonia in the UN Uniform was legal, holding instead that the matter was a nonjusticiable political question, in reality the military judge assumed *a priori* that the deployment in the UN Uniform was legal in order to infer that SPC New had a duty to obey the order.

Contrary to the military judge's holding that LTC Layfield's order to don the UN Uniform on 10 October "did not effectively call into issue the underlying legality of the deployment" (R. at 429), the opposite is true. Without the legitimacy and legality of the deployment to Macedonia in the 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. By failing to examine the lawfulness of the deployment and, through sophistry, holding that LTC Layfield's order to don the UN Uniform was legally unrelated to the deployment, the military judge simply dodged the issue.

The political question doctrine did not constrain the court-martial, or the Army Court, and does not constrain this Court, from deciding any issue in this case. The 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.

A. 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.

McClaughry, 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 Article III 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, the Army Court, 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, the Army Court, or this Court to declare an action of the President to have been unlawful.

It is true that this Court 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, without discussion, 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, this Court's observation in Huet-Vaughn that the employment of military forces in the Persian Gulf was a political question was immaterial to the issues which had

actually been raised in the case. In Huet-Vaughn, this 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,[7] and not at all for Huet-Vaughn. In SPC New's case, the Army Court simply affirmed the military judge's determination that lawfulness was a political question and stated with vapidity, "This court will respect both the President's powers as well as the powers of the nation's elected representatives in Congress." New, at 13.

To the extent that Huet-Vaughn 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.

B. 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

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

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....
>
> 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 an nonjusticiable political question [citation omitted], it is rather in our view purely an issue of statutory interpretation."); Sioux Valley Empire Elec. Ass'n 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 soldiers 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.

C. The Issues In This Case Are Justiciable Even Under Standards For Constitutional Cases Arising In Article III Courts.

While the military judge and the Army Court purports to rely on Baker v. Carr, 369 U.S. 186 (1962) to support nonjusticiability, 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 military judge and the Army Court employ 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, U.C.M.J.

1. 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.

2. 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).

3. SPC New's Claims Differ From Vietnam Cases.

A cursory review of the Vietnam War cases concerning nonjusticiability 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.

4. 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.

a. "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. 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 as 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, 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. Dulles, 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 commitment to the President.

b. "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 the Army Court and in the federal courts addressing SPC New's *habeas* case: In the federal courts, the government argued that the Article III courts should defer

to the special expertise of the military appellate courts; in the Army Court, the government argued that the Article III political question doctrine should be employed to prevent military appellate courts from exercising that special expertise. Thus, according to the government, 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, military appellate courts would 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.

> c. Do prudential considerations counsel against judicial intervention?" Goldwater v. Carter, *supra*, at 998.

The government broadly asserted before the Army Court, 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 contended: "That is, based upon the constitutional principle of **separation of powers in the three branches of government**, judicial review of 'political questions' is precluded..." (Resp. Br. at 17, emphasis added.) Again, the Army Court and this Court are not in a different branch of government than the President; they are Article I courts.

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. 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.

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.

WHEREFORE, Specialist New requests that this Court set aside and dismiss his conviction for violating a lawful order.

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APPENDIX A

OPINION BY ARMY COURT OF CRIMINAL APPEALS