

Unlawful Deployment

UNITED STATES OF AMERICA

-vs-

NEW, Michael G.

SPC, USA, xxx-xx-xxxx

Headquarters and Headquarters Company,

1st Brigade, 3d Infantry Division

APO Army Europe 09226

Motion to Dismiss:

Unlawful Deployment

COMES NOW Specialist Michael G. New, through undersigned counsel, and moves to dismiss the Charge and its Specifications on the grounds set forth below:

That the order issued on 2 October 1995 by LTC Stephen R. Layfield and again on 4 October 1995 by CPT Roger H. Palmateer "to wear the prescribed uniform for the deployment to Macedonia," i.e., U.N. patches and cap, was an unlawful order in that said order was issued

pursuant to the unlawful deployment of Specialist New to Task Force Able Sentry in violation of:

- (a) 22 U.S.C. Code Sec. 287d, or in the alternative, 22 U.S.C. Sec. 287d-1;
- (b) Article I, Section 8, Clauses 12, 13, 14, and 18 of the United States Constitution;
- (c) Article II, Section 2, Para. 1 of the United States Constitution; and
- (d) Article II, Section 2, Para. 2 of the United States Constitution.

This motion is supported by a Preliminary Memorandum of Authorities and the files and records herein.

Dated: December 6, 1995

By:

RONALD D. RAY

Counsellors at Law

3317 Hall's Hill Road

Crestwood, KY 40014-9523

(502) 241-5552

FAX (502) 241-1552

HANK HAMILTON, ESQ.

Ratchford & Associates

1531 Laurel St.

Columbia, SC 29201

(803) 779-0700

FAX (803) 252-6218

UNITED STATES OF AMERICA

-vs-

NEW, Michael G.

SPC, USA, xxx-xx-xxxx

Headquarters and Headquarters Company,

1st Brigade, 3d Infantry Division

APO Army Europe 09226

Preliminary Memorandum in Support of Motion to Dismiss: Unlawful Deployment

(footnote

1

)

Specialist Michael G. New has been charged with failure to obey a lawful order, to wit:

failure to wear the United Nations uniform prescribed for deployment as a member of Task Force Able Sentry of the United Nations Preventive Deployment Force (UNPREDEP) in the former Yugoslav Republic of Macedonia (FYROM). This motion to dismiss challenges the lawfulness of the order deploying Specialist New as a Task Force Able Sentry soldier under "the temporary operational control" of a United Nations commander.

This deployment order violates:

- (a) 22 U.S.C. 287d, or in the alternative, 22 U.S.C. Sec. 287d-1;
- (b) Article I, Section 8, Clauses 12, 13, 14, and 18 of the United States Constitution;
- (c) Article II, Section 2, Para. 1 of the United States Constitution; and
- (d) Article II, Section 2, Para. 2 of the United States Constitution.

I

THE LAWFULNESS OF THE ORDER TO WEAR UNITED NATIONS INSIGNIA DEPENDS UPON THE LAWFULNESS OF THE MACEDONIA DEPLOYMENT

Specialist New has been charged with disobedience of "a lawful order issued by LTC Stephen R. Layfield on 2 OCT 95 and CPT Roger H. Palmateer on 4 OCT 95, to wear the prescribed uniform for the deployment of Macedonia, i.e., U.N. patches and cap. ..." Attached

to, and in support of, this charge are the sworn statements of LTC Layfield, CPT Palmateer, and CPT Francisco Z. Marroquin. LTC Layfield has sworn that he "issued a lawful order to my Task Force Able Sentry for all TFAS soldiers to wear the U.N. accouterments on our U.S. uniform. ..." CPT Palmateer affirmed this statement by swearing that the order was "to wear the United Nation's patches, for all soldier[s] going to Macedonia." CPT Marroquin confirmed

both statements by swearing that the order to wear the U.N. accouterments was "prescribed by the chain of command for deployment to Macedonia" and, further, that CPT Palmateer "reported

to me, CPT Marroquin ... your refusal to wear the uniform as prescribed by the chain of command for our upcoming mission in Macedonia."

Without question, Specialist New would not have been ordered to wear the United Nations patches and cap had his unit not been deployed to Task Force Able Sentry in Macedonia.

Further, without question, the authority to require Specialist New to wear the United Nations insignia was explicitly derived from the authority to detail him to that task force. If the order to deploy is unlawful,

a fortiori,

the order to wear the United Nations insignia is unlawful.

II

THE MACEDONIA DEPLOYMENT VIOLATES THE UNITED NATIONS PARTICIPATION ACT OF 1945 AS AMENDED IN 1949

22 U.S.C. Sections 287d and 287d-1 govern the deployment of American armed forces in the service of the United Nations. Section 287d governs such deployments pursuant to Chapter VII of the United Nations Charter; Section 287d-1 governs such deployments pursuant

to Chapter VI of the Charter.

According to Security Council Resolution 844 dated 18 June 1993, the UNPROFOR operating in the former Yugoslavia is "[a]cting under Chapter VII of the Charter of the United Nations." See also Security Council Resolutions 713, 724, 871 and 908. According to the

Report of the Secretary-General dated 22 March 1995, this UNPROFOR was structured initially into "three operational commands: UNPROFOR (Croatia) ... UNPROFOR (Bosnia and

Herzegovina) ... and UNPROFOR (former Yugoslav Republic of Macedonia)." According to this same report, the Secretary-General decided to restructure "the present UNPROFOR" by replacing it with "three separate but interlinked peace-keeping operations: ... UNPF-1 in Croatia ... UNPF-2 in Bosnia and Herzegovina and ... UNPF-3 in the former Yugoslav Republic of Macedonia." Para. 84.

Having proposed this restructuring, the Secretary-General recommended that UNPF-2 and UNPF-3 have "the same responsibilities and composition as UNPROFOR." And, most

significantly, the Secretary-General recommended to the Security Council the "transfer to the three United Nations Peace Forces (UNPF-1, UNPF-2, and UNPF-3) of the applicability of all relevant Security Council resolutions and authorities relating to the functioning of UNPROFOR in the territories of the Republic of Croatia, the Republic of Bosnia and Herzegovina, and the former Yugoslav Republic of Macedonia." Para. 85.

The Security Council, in turn, approved the Secretary-General's Report and passed Resolution 983 dated 31 March 1995 changing the name of UNPROFOR within the former Yugoslav Republic of Macedonia to "the United Nations Preventive Deployment Force

(UNPREDEP) with the mandate set out in paragraph 85 of the report of the Secretary-General of 22 March 1985." Thus, UNPREDEP in FYROM is a continuation of UNPROFOR in FYROM which was originally authorized under Chapter VII of the United Nations Charter. See Security Council resolutions 713, 724, 871, and 908.

Deployment of United States armed services is, therefore, governed exclusively by 22 U.S.C. Section 287d. That section authorizes the President "to negotiate a special agreement with the Security Council ... providing the numbers and types of armed forces, their degree of

readiness and general location ... to be made available to the Security Council." Such agreements, however, must be submitted to Congress for approval "by appropriate Act or Joint Resolution."

At no time has such an agreement deploying Task Force Able Sentry to UNPREDEP in FYROM been submitted for Congressional approval. As a matter of fact, according to testimony provided on March 3, 1994, to the House of Representatives Legislation and National Security

Subcommittee of the Government Operations Committee, "no action has ever been taken under Section 6 of the Act (22 U.S.C. Sec. 287d) because no agreements have ever been concluded under Article 42 (of the United Nations Charter). "

Statement of Conrad K. Harper, Legal

Advisor, Dept. of State, on Legal Authority for U.N. Peace Operations (March 3, 1994). See also Tuomala, "Just Cause: The Thread that Runs So True," 13 Dick. J. of Inter. Law 1, 38 (1994).

Because the UNPREDEP operating in FYROM has been authorized by the United Nations Security Council pursuant to Chapter VII of the United Nations Charter, the President's order detailing Task Force Able Sentry as part of UNPREDEP in FYROM violates 22 U.S.C.

Sec. 287d. Therefore, the order requiring Specialist New to wear the United Nations cap and patches in order to serve in Task Force Able Sentry is unlawful.

In an Information Paper issued on 5 October 1995 by the Office of the Chief of Legislative Liaison, Department of the Army, the Pentagon, Washington, D.C., it is asserted that "UNPREDEP was established as a peacekeeping operation under Chapter VI of the U.N. Charter [and] therefore, the presence of U.S. troops serving in FYROM is authorized by law, i.e., by 22 U.S.C. Section 287d-1." (See Appendix)

The Information Paper cited no Security Council Resolution or Resolutions or other documentary evidence establishing UNPREDEP in FYROM under the authority of Chapter VI of the United Nations Charter. Nor has counsel been able to find such authorizing resolution or resolutions or other documentary authority. To the contrary, one of the two Security Council Resolutions furnished by the Government in this case is Resolution 795 authorizing "the Secretary-General to establish a presence of the United Nations Protective Force (UNPROFOR) in the former Yugoslav Republic of Macedonia." Moreover, MAJ Fred T. Pribble, Deputy Legal Advisor, Office of the Chairman, Joint Chiefs of Staff, identified the United States involvement in United Nations "Macedonia border operations as UNPROFOR." See Pribble, Support to Multilateral Peace Operations, Introduction, Paragraph 2, p. 1 (7 Feb. 1995). In addition, the

Government in this case provided counsel with a November 1994 United Nations document entitled, "Troop Contributing Nations Aide Memoir." On pages 6-8 of this document, it is stated that U.N. clothing, including the U.N. blue beret and U.N. cloth shoulder patch, would be provided to all "troops assigned to UNPROFOR to arrive in the Mission Area dressed as United Nations troops."

Designating the United Nations force in Macedonia as having been established as an UNPROFOR indicates that the Security Council authorized the UNPREDEP in FYROM as part of its overall UNPROFOR operations in the former Yugoslavia, which is clearly a Chapter VII operation. See Resolutions 713, 724, 844, 871, 908 and 983 and Secretary-General Report dated 22 March 1995. Under such circumstances, 22 U.S.C. Sec. 287d still governs a presidential decision to employ armed forces contemplated by Chapter VII of the United Nations Charter. By its text, 22 U.S.C. Sec. 287d-1(a) applies only to "support ... such activities of the United Nations as are

specifically directed

to the peaceful settlement of disputes and

not

involving the employment of armed forces contemplated by Chapter VII of the United Nations Charter." The burden of proof, then, is upon the Government to demonstrate that UNPREDEP is "specifically directed to the peaceful settlement of a dispute" (ie., a Chapter VI operation) unconnected with its Chapter VII operation in Bosnia and Herzegovina. It has not done so here. Therefore, 22 U.S.C. Sec. 287d applies to the deployment of Task Force Able Sentry and, as stated above, prohibits such deployment absent specific approval by Congress. That approval has never been secured; hence, the order deploying Specialist New to Task Force Able Sentry is unlawful.

In the event that UNPREDEP in FYROM could be a Chapter VI United Nations Operation, the deployment of Task Force Able Sentry would still be unlawful, having been ordered in violation of 22 U.S.C. Section 287d-1. That section provides that the President may

authorize "the detail to the United Nations ... of personnel of the armed forces of the United States to serve as observers, guards, or in any noncombatant capacity, but in no event shall more than a total of one thousand of such personnel be so detailed at any one time."

This Section has likely been violated by the deployment of Task Force Able Sentry and detailing it to United Nations command. The evidence produced by the Government in this case shows that, as of 7 February 1995, "the U.S. has over 70,000 military personnel either

participating directly or operating in support of eight U.N. peace operations world-wide. ..."Pribble, Support to Multilateral Peace Operations, Introduction Para. 2, p. 1 (7 Feb. 1995). Undoubtedly with this many United States personnel assigned to United Nations peace

operations, there would be more detailed pursuant to 22 U.S.C. Sec. 287d-1 than the 1,000 allowed by law.

For the reasons stated, the deployment of Specialist New to Task Force Able Sentry in Macedonia is unlawful under either 22 U.S.C. Section 287 or 287d. That deployment being unlawful, the order to Specialist New to wear the uniform prescribed by that deployment is unlawful. Therefore, Specialist New has not failed to obey a lawful order.

III

THE MACEDONIA DEPLOYMENT, IF NOT AUTHORIZED BY THE UNITED NATIONS PARTICIPATION ACT, VIOLATES THE UNITED STATES CONSTITUTION

In its Information Paper dated 5 October 1995, issued by the Office of the Chief of Legislative Liaison, the Department of Army claims that the President has the authority as commander-in-chief of the armed forces "to employ the armed forces in order to further U.S. national interests," including the "providing [of] assistance to the U.N. in order to maintain international peace and security." (See Appendix) In addition, Conrad K. Harper, Legal Advisor, Department of State, claimed in testimony before a House subcommittee that "the President has independent constitutional authority, as Commander-in-Chief of the Armed Forces and as Chief Executive with responsibility for the conduct of U.S. foreign affairs, to deploy U.S. forces to take part in or support U.N. peace operations. ..." Statement of Conrad K. Harper on Legal Authority for U.N. Peace Operations, p. 7 (Mar. 3, 1994).

Whatever might be the constitutional authority of the President to deploy United States armed forces generally, his constitutional authority to deploy those forces in service of the United Nations is governed exclusively by the United Nations Participation Act. That Act was passed specifically by Congress as "implementing legislation requisite to our effective participation in the fulfillment of the purposes of the United Nations Charter." House Rep. No. 1383 (Dec. 12, 1945). To that end, the Act "sets up the machinery whereby our national authorities can comply with certain of the major international commitments which the United States assumed upon ratification of the Charter." *Id.* Moreover, the legislation was "carefully prepared in cooperation between the Members of Congress and the executive branch." *Id.*

As for the deployment of the United States armed forces in support of the United Nations operations under Chapter VII, Congress decided that any agreement of this kind was of such "scope and importance [that] Congress should record its views in advance." *Id.* It was further

determined that such agreements were not "treaties within the meaning of the Constitution," but "agreements ... entered into for the purpose of giving effect to the obligation assumed by this country under Article 43 of the Charter" to make available to the Security Council the armed force necessary for the purpose of maintaining international peace and security:

Under this view, the precise details of the obligation--such as the exact amount of the forces to be contributed and the places where they are to be stationed—is not a matter for treaty consideration but for legislative sanction by Congress under its constitutional powers to raise and support armies, to provide and

maintain a navy and to make rules for the government and regulation of the land and naval forces." *Id.*

As for the detailing of the United States armed forces personnel authorized for the first time in 1949 by the addition of Section 7 to the United Nations Participation Act (22 U.S.C. Sec. 287d-1), then Assistant Secretary of State Ernest A. Gross testified before the House

Committee on Foreign Affairs:

Because of the fact that under the Constitution, America military personnel cannot be made available to foreign powers or foreign organizations, except by authority of law, it has been necessary, instead of detailing the personnel to the United Nations for service with these missions, to keep them within American control. ... So they were really not on service with the United Nations, but were working for a top American official, either military or diplomatic. Hearings before the Committee on Foreign Affairs, House of Representatives, 81st Congress, 1st Session, p. 17 (May 10, 11, 12, & 13, 1949).

Thus, the Senate Committee on Foreign Relations reported that the new Section 7 (22 U.S.C. Sec. 287d-1) was "designed ... to clarify the authority and terms under which services and supplies may be made available to the U.N. by the United States. ..." Sen. Rep. No. 510, p. 5 (81st Cong., 1st Sess., June 16, 1949).

Given this legislative history, Congress has addressed the issue of Presidential authority to detail United States armed forces personnel to the United Nations, and has provided specific criteria and procedure for such presidential initiative in 22 U.S.C. Secs. 287d and 287d-1.

Having so legislated, the President is bound to comply with those sections and may not exercise independent power either as commander-in-chief or as the chief executive officer of the United

States.

Youngstown Sheet & Tube Co.

v.

Sawyer

, 343 U.S. 579, 643 (1952). (Jackson, J. concurring: "The Constitution expressly places in Congress power 'to raise and support Armies'

and 'to provide and maintain a Navy'. ... This certainly lays upon Congress primary responsibility for supplying the armed forces. Congress alone controls the raising of revenues and their appropriation and may determine in what manner and by what means they shall be spent for military and naval procurement.")

There is no question that the deployment of United States armed forces to United Nations operations, whether under Chapter VI or Chapter VII, costs the United States taxpayer. MAJ Fred T. Pribble of the Office of the Chairman, Joint Chiefs of Staff, reported in February

1995 that "[t]he U.S. is responsible for paying 30.4% of the total U.N. peacekeeping budget [and that] in 1994, the U.S. contributed over \$1.2 billion for U.N. peacekeeping assessments." Pribble, Support to Multilateral Peace Operations, Introduction, Para. 4, p. 1 (7 Feb. 1995).

Furthermore, MAJ Pribble has acknowledged that one of the main problems has been to "obtain ... adequate funding from Congress to meet our U.N. assessments responsibility." Id. at 4.

These facts reinforce the constitutional barrier to presidential initiatives to detail United States armed forces personnel outside the specific statutory authority given him by Congress. Having deployed Task Force Able Sentry without compliance with such authority, the order detailing Specialist New to UNPREDEP in FYROM is unlawful, being in violation of Congress's powers under Article I, Section 8, Clauses 12, 13, 14, and 18. Therefore, the order requiring Specialist New to wear the U.N. insignia prescribed for that unlawful mission is also unlawful.

IV

THE MACEDONIA DEPLOYMENT PLACING UNITED STATES ARMED FORCES UNDER UNITED NATIONS COMMAND VIOLATES THE PRESIDENT'S CONSTITUTIONAL DUTY AS COMMANDER-IN-CHIEF

Article II, Section 2, Clause 1, states that "[t]he President shall be commander-in-chief of the army and navy of the United States. ..." No other person can assume this role; it is a nondelegable duty. As Alexander Hamilton wrote in Federalist No. 74:

The propriety of this provision is so evident in itself ... that little need to be said to explain or enforce it. Even those of them which have, in other respects, coupled the chief magistrate with a council, have for the most part concentrated military authority in him alone. Of all the cares and concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand.

According to Chief Justice Roger Taney, "As commander-in-chief, he [the President] is authorized to direct

the movements of the naval and military forces placed in his command, and to

employ

them in the manner he may deem most effectual to harass and conquer and subdue the enemy."

Fleming

v.

Page

, 50 U.S. [9 How.] 603, 615 (1850). According to the rules governing the deployment of Task Force Able Sentry to UNPREDEP in FYROM, the President no longer has the authority to "direct the movements of the armed force thus deployed" or "employ them in the manner he may deem most effectual." To the contrary, the President has relinquished those powers to the United Nations Security Council and its field commander who has "temporary operational control." Under the terms of such control, the U.N. field commander may deploy U.S. armed personnel inside a U.N.-defined mission area to achieve the purposes

and objectives defined by the United Nations. The President may veto those decisions by withdrawing American troops, but he cannot redirect those decisions in a manner that he deems more effectual. See Appendix and Pribble, Support to Multilateral Peace Operations, II. 4., p. 3 (7 Feb. 1995).

The President, as Commander-in-Chief, has no authority to place the United States armed forces "under the temporary or tactical control of a ... U.N. commander for specific operations authorized by the [U.N.] Security Council." Nor may Congress authorize him to do so. Such a delegation of the President's authority and duty to exercise the duties of Commander-in-Chief under Article II, Section 2, Clause 1, is unconstitutional. Having so delegated that power in an unconstitutional manner in the deployment of Task Force Able Sentry, such deployment is unlawful and all orders pursuant to that deployment, including the one commanding Specialist New to wear U.N. insignia is unlawful.

V

THE MACEDONIA DEPLOYMENT VIOLATES THE
CONSTITUTIONAL REQUIREMENT THAT EXECUTIVE
POWER OF THE UNITED STATES BE EXERCISED
BY THE PRESIDENT OR BY AN OFFICER APPOINTED
PURSUANT TO ARTICLE II, SECTION 2, PARAGRAPH 2

According to the Information Paper issued on 5 October 1995 by the Army Department's Office of Legislative Liaison, "UNPREDEP" operations in FYROM "are conducted under U.N. auspices by a multinational military force currently commanded by a Norwegian general officer who exercises operational control over Task Force Able Sentry." (See Appendix) Other reports have stated that the operational control resides in a Finnish general. In either event, such control is an unconstitutional delegation of executive power of the United States to an officer that has not been appointed consistent with Article II, Section 2, Paragraph 2 providing, in pertinent part, that all "officers of the United States" must be appointed by the President, "with the advice and consent of the Senate," or in the case of "inferior officers ... in the President alone, in the courts of law, or in the heads of departments."

Buckley

v.

Valeo

, 424 U.S. 1, 126, 132 (1976);

Weiss

v.

United States

, --- U.S. ---, 127 L Ed 2d 1 (1994).

Having violated this constitutional provision in deploying Task Force Able Sentry to UNPREDEP in FYROM, the deployment is unlawful. Therefore, the order to Specialist New prescribing the wearing of U.N. insignia is unlawful.

CONCLUSION

The purpose of the United Nations Participation Act and of the constitutional provisions allocating authority over the armed forces between Congress and the President was to prevent the President from claiming prerogative power over the use of United States armed force in the implementation of American foreign policy. By deploying Task Force Able Sentry contrary to statute and constitutional limitation, the President has assumed absolute power over the military forces of the nation. Such an assumption of power is unlawful and unconstitutional.

Because the Macedonia deployment is unlawful, all orders pursuant to that deployment are equally, and for that reason, unlawful. Specialist Michael G. New, in failing to obey the order to wear the U.N. insignia, did not violate a lawful order. Therefore, the charge must be dismissed.

Dated: December 6, 1995

By:

RONALD D. RAY

Counsellors at Law

3317 Hall's Hill Road

Crestwood, KY 40014-9523

(502) 241-5552

FAX (502) 241-1552

HANK HAMILTON, ESQ.

Ratchford & Associates

1531 Laurel St.

Columbia, SC 29201

(803) 779-0700

FAX (803) 252-6218

FOOTNOTES

[1] This memorandum is preliminary in nature. Completion of discovery is necessary to be fully equipped to argue the Motion to Dismiss.