

No.

IN THE
Supreme Court of The United States

MICHAEL G. NEW,

Petitioner,

v.

UNITED STATES,

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is the lawfulness of an order an element of the offense of disobedience of a lawful order, as defined in 10 U.S.C. Section 892(2), and therefore, a question for the military jury, not the military judge, in a court-martial proceeding, as provided for in 10 U.S.C. Section 851, and as required by United States v. Gaudin, 515 U.S. 506 (1995)?

2. If lawfulness is an element of the offense defined in 10 U.S.C. Section 892(2), was the military judge's failure to submit the issue of lawfulness to the military jury in this case "harmless error" under the rule of Neder v. United States, 527 U.S. 1 (1999)?

3. Was the order to don the uniform of the United Nations in this case given without the consent of Congress, and therefore, in violation of Article I, Section 9, of the United States Constitution in that the order, if obeyed, would have conferred upon "a person holding [an] office ... of trust under [the United States a] present, emolument, office or title ... from [a] foreign state"?

4. Is the lawfulness of an order to don the uniform of the United Nations, insofar as that order was generated by, and integrally related to and a component of, a presidential deployment of American soldiers under United Nations command and control in peacetime, a nonjusticiable political question:

(A) When the deployment is challenged as violating Sections 6 and 7 of the United Nations Participation Act (22 U.S.C. Sections 287d and 287d-1);

(B) When the deployment is challenged as placing an American soldier in "involuntary servitude" in violation of the Thirteenth Amendment to the United States Constitution;

(C) When the deployment is challenged as placing an American soldier under the command and control of a foreign officer “exercising significant authority pursuant to the laws of the United States” without his having been appointed in accordance with the appointments clause of Article II, Section 2, of the United States Constitution; and

(D) When the deployment entails a delegation of command and control by the President to a nonsubordinate foreign officer, and that delegation is challenged as violating the mandate that the President “shall be the Commander in Chief of the Army and Navy,” as prescribed by Article II, Section 2, of the United States Constitution?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Michael G. New respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces affirming petitioner New's court-martial conviction for disobedience of an order in violation of 10 U.S.C. Section 892(2) and sentence to a bad conduct discharge.

OPINIONS BELOW

The military judge's decisions denying petitioner's pretrial motions contesting the lawfulness of the order, and refusing petitioner's request that the issue of lawfulness be submitted to the military jury, were entered on January 19, 1996 (App. 131a) and are unreported. The court-martial's finding of guilt (App. 132a) and sentence to a bad conduct discharge (App. 133a) were entered on January 24, 1996 and are unreported. The decision of the United States Army Court of Criminal Appeals (ACCA) (App. 79a), affirming the military judge's rulings and the military jury's finding and sentence, was entered on April 28, 1999 and is reported at 50 M.J. 729 (1999). The decision of the United States Court of Appeals for the Armed Forces (CAAF) (App. 1a) affirming the decision of the ACCA was entered on June 13, 2001, and is reported at 55 M.J. 95 (2001).

JURISDICTION

The CAAF entered its decision on June 13, 2001. Because the CAAF previously granted petitioner's petition for review pursuant to 10 U.S.C. Section 867(a)(3), this Court has jurisdiction under 28 U.S.C. Section 1259(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the commander in chief and appointments provisions of Section 2 of Article II of the United

States Constitution (App. 135a), the foreign office and emoluments provision of Clause 8 of Section 9 of Article I of the Constitution (App. 134a), and the Thirteenth Amendment's prohibition against "involuntary servitude." (App. 136a.)

TREATY PROVISIONS INVOLVED

This case involves Chapter VI and Chapter VII of the United Nations Charter. (App. 137a, 140a.)

STATUTES AND REGULATIONS INVOLVED

The statutes involved in this case are: Articles 51 and 92(2) of the Uniform Code of Military Justice (UCMJ) (10 U.S.C. Sections 851 and 892(2)) (App. 152a, 154a); Sections 6 and 7 of the United Nations Participation Act (UNPA) (22 U.S.C. Sections 287d and 287d-1) (App. 155a, 156a); and 5 U.S.C. Section 7342 (App. 145a). The regulation involved in this case is Army Regulation (AR) 670-1, "Wear and Appearance of Army Uniforms and Insignia." (App. 159a.)

STATEMENT OF THE CASE

This case concerns the duty of an American soldier to obey a truly extraordinary order. On October 10, 1995, as a direct consequence of then President Clinton's decision to commit United States (US) troops to the United Nations Preventive Deployment Force (UNPREDEP) in the former Yugoslavian Republic of Macedonia (FYROM), Specialist (SPC) Michael G. New, along with his infantry battalion, was ordered to don the uniform of the United Nations (UN). Faced with the prospect not only of putting on a uniform of a foreign entity, but ultimately submitting to the command and control of

foreign military officers,¹ SPC New purposed not to obey an illegal order.

Whether the nation is at peace or at war, a soldier disobeys an order at his peril. If the order comes in a time of war, “the obligation to obey is one to be fulfilled without hesitation, with alacrity, and to the full...” W. Winthrop², Military Law and Precedents 572 (U.S. War Dept., Wash., D.C.: 2d ed. 1920) (hereinafter Winthrop’s Military Law). But when the order comes, “the time being peace, and the order not calling for present action but relating to something to be done in the future, the subordinate, if he apprehends that its execution will seriously impair his rights or privileges, may, at his own risk, respectfully *remonstrate*, setting forth his grounds.” *Id.* at 573, n.8 (emphasis original).

The order in this case did not come in a time of war, nor at a time requiring prompt action, but it came in a time of peace, distanced in both time and place from a combat area, giving rise to an opportunity for SPC New to “remonstrate” without putting his country or his fellow soldiers in jeopardy.

¹ Until President Clinton “authorized United States ... forces to serve under the command of the United Nations Operation in Somalia,” the “American people have nearly always been certain that when their sons and daughters went into harm’s way, they did so under the command of United States generals and admirals who took their orders from the President...” Houck, “The Command and Control of United Nations Forces in the Era of ‘Peace Enforcement,’” 4 DUKE J. OF COMP. & INT’L L. 1-3 (1993).

² As this Court has noted, the author, Colonel William Winthrop, “has been called the ‘Blackstone of Military Law.’” See Reid v. Covert, 354 U.S. 1, 19, n.38 (1957).

1. The Order: Advance Notice

It was in August of 1995, while stationed in Schweinfurt, Germany assigned to the 1st Battalion, 15th Infantry Regiment, 3d Infantry Division (1/15 Infantry) of the US Army, that SPC New, a medic, first learned that the 1/15 Infantry would be deployed in October 1995 as UNPREDEP (originally UNPROFOR) to Macedonia in FYROM. 55 M.J. at 97 (App. 3a-4a). To that end, the 1/15 Infantry was told that each soldier would be required to wear a shoulder patch, blue scarf, badge, blue field cap and blue beret, all bearing the emblem of the UN (the “UN uniform,”) ³ and to carry a UN identification card. 55 M.J. at 98 (App. 4a).

Two years earlier, SPC New had enlisted in the US Army, and had served with distinction, having received, in 1995, the Army Achievement Medal for treating a badly injured soldier in an emergency situation. He had served also in 1993 under US command in a US uniform in Kuwait during an operation undertaken by the US Army in cooperation with the UN. R., Exh. A. ⁴ In August 1995, however, SPC New submitted to his squad and platoon leaders that he believed that the order to don the UN uniform was unlawful (50 M.J. at 734 (App. 83a)) and that he could not obey the order unless it were consistent with his soldier’s oath to defend the US Constitution. R., App. Exh. XXVII and D. Exh. N.

³ The 1/15 Infantry battalion commander, Lieutenant Colonel Layfield, testified that these UN accouterments, collectively, were known as “UN uniform,” and individually, as the “UN uniform parts.” (R. 595-96.)

⁴ Record of Trial (“R.”) of Michael G. New dated Oct. 24, Nov. 17, and Dec. 13, 1995 and Jan. 18-19, 23-24, 1996. In courts-martial, trial exhibits are marked with capital letters for the defense (“Exh. A”) and with Arabic numbers for the prosecution (“Exh. 1”). Pretrial exhibits are called appellate exhibits (“App. Exh.”) and are marked with Roman numerals.

On August 23, 1995, SPC New's superiors responded by directing him to research the text and history of the UN Charter and reconsider his position. 55 M.J. at 98 (App. 4a). Thereafter, on August 31, and three times on September 6, 1995, four different noncommissioned officers counseled SPC New to obey the order. R., App. Exhs. XXXI, XXXIII, XXXIV, XXXV. Two of these counselors explained that, if SPC New persisted in his decision to disobey, he would violate Article 92 of the UCMJ, emphasizing that the order was lawful because the President had agreed to send US armed forces on a UN mission. R., App. Exhs. XXXIII, XXXV.

2. SPC New's Remonstrance

Unpersuaded, on September 19, 1995, SPC New remonstrated with his military superiors by submitting a detailed statement explaining why the order to don the UN uniform, as well as the impending deployment under UN command and control, would unconstitutionally transfer his allegiance from the United States of America to a foreign power. Additionally, SPC New reminded his superiors of his prior service in Kuwait and the difference between that service and the impending deployment to UNPREDEP in FYROM:

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....

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. Constitution protections. [R., App. Exh. XXVII.]

Seeking to “avoid controversy,” SPC New requested a “transfer,” or, if a transfer were impossible, an “honorable discharge,” indicating his willingness “to sadly and reluctantly withdraw from the U.S. Army quietly.” R., App. Exh. XXVII.

3. The Army’s Response

SPC New’s remonstrance and requests prompted a further admonition to don the UN uniform, this time from the battalion commander, who explained that the source of the order to don the UN uniform was derived directly from the authority of the President to deploy American soldiers to UNPREDEP in FYROM. 50 M.J. at 734 (App. 83a). *See* R. 597-99.

Afterwards, when SPC New indicated no change of mind, the entire 1/15 Infantry was ordered to attend an “Information Briefing” on the legal basis for the UNPREDEP deployment. On October 2, 1995, an Army judge advocate briefed the troops on the legality of the deployment (50 M.J. at 734 (App. 84a)), concluding with two projected slides, the first posing the question: “Why do we wear U.N. uniform items?” and the second, providing his “official” answer: “Because they look fabulous!”⁵ R., App. Exh. VII (pp. 24-25) (App. 166a-168a).

Immediately following this legal briefing, the battalion commander ordered the 1/15 Infantry to report to battalion formation on October 10, 1995, at 0900 hours, in the UN

⁵ At the court-martial, the briefing judge advocate was asked about that answer: “Is that a joke?” To which, he responded: “One that played pretty well.” R. 658.

uniform. 50 M.J. at 734 (App. 84a). On October 4, 1995, two days after the legal briefing, SPC New's company commander ordered the company to report in UN uniform to company formation on October 10, 1995, at 0845 hours. 50 M.J. at 735 (App. 84a-85a). At the time appointed for the company formation, all soldiers in SPC New's company, except SPC New, reported in the UN uniform. SPC New was pulled out of formation for disciplinary processing and, thereafter, declared nondeployable. 50 M.J. at 735 (App. 85a).

4. The Court-Martial: Pretrial

On October 21, 1995, the 1/15 Infantry was deployed to UNPREDEP in FYROM without SPC New, who stayed behind to answer charges that he had violated Article 92(2) of the UCMJ (10 U.S.C. Section 892(2)), as set forth in the following specification:

In that Specialist Michael G. New, U.S. Army, having knowledge 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 to Macedonia, i.e., U.N. patches and cap, an order which it was his duty to obey, did, at or near Schweinfurt, Germany, on or about 10 OCT 95, fail to obey the same. [50 M.J. at 735 (App. 86a, n.9).]

At his special court-martial, SPC New filed several pretrial motions challenging the lawfulness of the order to don the UN uniform. SPC New claimed that the order was unlawful because it was issued pursuant to a deployment that violated Sections 6 and 7 of the UNPA, as well as the commander in chief and appointments clauses of Article II, Section 2 of, and

the Thirteenth Amendment to, the US Constitution. SPC New also contended that the order to don the UN uniform violated the foreign office or emoluments clause of Article I, Section 9, of the Constitution. R., App. Exhs. XLVIII, XLIX, LI.

To support the unlawful deployment claims, SPC New introduced sworn testimony and numerous exhibits through retired Marine Lieutenant Colonel David Sullivan, a former CIA analyst, and a former US Senate Foreign Relations Committee staff member, who was qualified as an expert in international law. Mr. Sullivan concluded that, in his expert opinion, the UN operation to which the 1/15 infantry had been deployed was a UN Chapter VII operation which required Congressional approval. 50 M.J. at 736-37 (App. 87a-89a). The prosecution introduced no evidence, asserting primarily that all claims regarding the legality of the deployment raised nonjusticiable political questions. 50 M.J. at 737 (App. 89a).

The military judge ruled against SPC New on all of these statutory and constitutional claims. First, he ruled that the order to don the UN uniform, insofar as it was dependent upon the deployment order, was lawful (R. 426-27; App. 123a-124a); then he ruled that the lawfulness of the deployment was irrelevant because the order to don the UN uniform was issued merely “in preparation for the anticipated deployment of 1/15th Infantry to Macedonia.” (R. 428-29; App. 125a-126a). Finally, at the urging of the prosecution, the military judge ruled that all of the claims related to the lawfulness of the order, insofar as they rested on the lawfulness of the deployment, were nonjusticiable political questions. R. 431-33 (App. 129a-131a).

SPC New also claimed that he had no duty to obey the order to don the UN uniform. To that end, he relied on a “Stipulation of Fact,” the pertinent part of which stated that the UN uniform had “not been approved by the Director of The

Institute of Heraldry, U.S. Army, as required and mandated under provisions of paragraphs 27-16a and 27-16b of Army Regulation 670-1, ‘Wear and Appearance of Army Uniforms and Insignia’”; that “both the Department of Defense and the Department of the Army have not authorized either informally or formally the United Nations insignia and accoutrements”; and that the UN uniform had been “issued to SPC New [only] for the purpose of augmenting his U.S. Army ... BDU .” (emphasis original). R., Exh. P (App. 183a-185a).

In response to this claim, the prosecution asserted that the UN uniform (although otherwise prohibited by AR 670-1) was justified by paragraph 1-18 of AR 670-1 which provided for alterations in the authorized uniform for “safety” purposes in a “maneuver” area. Introducing **no** evidence to support these claims, the prosecutor merely asserted that “Macedonia ... is a maneuver area,” and that “the wearing of [UN] blue in a hostile environment is the best protection one can have from the boundless chaos of warfare.” At the same time, the prosecutor maintained that “the Government does not concede Macedonia is a hostile environment.” Indeed, he concluded his argument that UN blue is “recognized internationally as off limits to ... combatants,” even while insisting that “in Macedonia, we don’t have that situation.”⁶ R. 407-09 (App. 180a-182a).

⁶ The prosecutor faced a courtroom dilemma. If he contended that UNPREDEP was being deployed to a combatant environment, then the deployment of the 1/15 Infantry would be governed by Section 7 of the UNPA which required Congress’s specific approval, as maintained by SPC New and his expert witness. R. 345-49 (App. 173a-176a). On the other hand, if FYROM to which UNPREDEP was being deployed was a noncombatant environment, then his argument that the UN uniform was necessary for safety purposes would evaporate. In the less demanding court of public opinion, the US Army’s Office of Chief of Legislative Liaison issued an “Information Paper” maintaining, on the one hand, that “[f]or safety and security reasons, it is imperative that US forces be recognized [by

Notwithstanding the prosecution's insistence that UNPREDEP in FYROM was not a "combat" operation, the military judge ruled, as a matter of law, that the order was lawful, the UN uniform being a safety item in a maneuver area:

The wearing of distinctive uniforms or uniform accessories easily recognizable and identifiable in a combat environment or potential combat environment has a practical combat function which may enhance both the safety and/or tactical effectiveness of combat-equipped soldiers performing operations. As such, the modification of 1/15th Infantry soldiers' uniforms ... to include the adding of U.N. military uniform accoutrements, had a function specifically to enhance the safety of United States armed forces in Macedonia. [R. 426 (App. 123a)].

At the conclusion of the pretrial proceedings, the military judge ruled that all of SPC New's challenges to the lawfulness of the order to don the UN uniform were, both as to law and fact, interlocutory questions of law within the sole province of the military judge. R. 433, 448-49 (App. 131a). Thus, the military judge prohibited SPC New from submitting any of his factual or legal claims of unlawfulness to the military jury.⁷ 55 M.J. at 117, 119 (App. 47a-48a, 51a).

the UN uniform] by potential warring parties," and on the other, that American soldiers deployed to UNPREDEP would serve in a "noncombatant capacity." R., App. Exh. VII (App. 166a-168a).

⁷ Technically, the "court-martial panel" or the "court-martial members." The term "military jury" is used throughout this petition in accordance with the common parlance of military judges and lawyers. 55 M.J. at 117, n.2 (App. 46a, n.2).

5. The Court-Martial: Trial

At his special court-martial, SPC New exercised his right to be tried by a military jury consisting of at least one-third enlisted members. In light of the military judge's pretrial rulings excluding the issue of lawfulness from the military jury, the Army called only two witnesses. Neither prosecution witness offered any testimony concerning the alleged "safety" purpose of the UN uniform. Nor did the prosecution introduce any testimony that either the situs of the formation, Schweinfurt, Germany (where the order was disobeyed) or Macedonia was a "maneuver" area. R. 578-629.

At the close of the evidentiary portion of the trial, the military judge instructed the jury that the order to don the UN uniform was lawful, and that SPC New had a duty to obey that order, unless the military jury could find that SPC New had no knowledge of the order or was mistaken as to its contents. 55 M.J. at 119-20 (App. 51a-54a). So constrained, on January 24, 1996, the military jury found SPC New guilty, as charged, and sentenced him to a bad conduct discharge. R., App. Exhs. CVI, CVIII (App. 132a-133a).

6. The Army Court of Criminal Appeals

On appeal, the ACCA affirmed the military judge's ruling that the lawfulness of the deployment to Macedonia was either irrelevant to the lawfulness of the order to don the UN uniform, or was a nonjusticiable political question. The ACCA also affirmed the ruling of the military judge that the order to don the UN uniform was a lawful "safety" measure in a "maneuver" area, concluding that the issues of "safety" and "maneuver" area were questions solely for the military judge. 50 M.J. at 736-40 (App. 87a-97a).

7. The United States Court of Appeals for the Armed Forces

On June 13, 2001, the CAAF unanimously affirmed the military judge's ruling that the lawfulness of the order to don the UN uniform, insofar as it was based upon the lawfulness of the Macedonian deployment, was a nonjusticiable political question. 55 M.J. at 108-09, 116, 129-30 (App. 28a-30a; 44a-46a; 75a-76a). It split three to two, however, on whether the lawfulness of the order to don the UN uniform at the time and the place charged was a legal question solely for the military judge, or, as an essential element of the offense, was an issue for the military jury. *Compare* 55 M.J. at 100-06 (App. 9a-23a) *with* 55 M.J. at 115-16, 117-26 (App. 42a-44a, 48a-68a) and 55 M.J. at 129, 130 (App. 74a-75a, 77a).

The plurality of three affirmed on the ground that whether a soldier had a duty to obey an otherwise lawful order, no matter what the facts, was an issue of law for the military judge, because the lawfulness of an order “is not a discrete element of an offense under Article 92.” 55 M.J. at 100 (App. 10a). Calling the plurality's opinion a “radical departure from our political, legal and military tradition” (55 M.J. at 115 (App. 42a)), concurring Judge Sullivan “conclud[ed] ... that the lawfulness of the order allegedly violated in this case ... was an element of the charged offense, and accordingly under Article 51(c), and United States v. Gaudin, 515 U.S. 506, 522-23 ... should have been presented to the ‘military jury.’” 55 M.J. at 120 (App. 55a). Even so, Judge Sullivan and his concurring colleague, Judge Everett, affirmed SPC New's conviction on the sole ground that the military judge's failure to instruct the military jury on the lawfulness element of the offense was “harmless error.” 55 M.J. at 126-28, 130 (App. 68a-72a; 77a-78a).

Chiding the concurring judges, the plurality wondered how, if the military judge's error in usurping the role of the military jury was so egregious, "we – as an appellate court – would have ... more authority than the military judge to render a decision without requiring further proceedings to submit [the issue of lawfulness] to the [military jury]." 55 M.J. at 106 (App. 22a). Moreover, the plurality insisted that SPC New had "clearly produced a large volume of material contesting the lawfulness of the order ... which would be more than sufficient to go before a [military jury], if this were an element for resolution by [such jury]." 55 M.J. at 106 (App. 23a).

REASONS FOR GRANTING THE WRIT

I. THE DECISIONS BELOW CONFLICT WITH THIS COURT'S PRIOR RULINGS CONCERNING THE INTERPRETATION AND APPLICATION OF STATUTES ON ISSUES OF CENTRAL IMPORTANCE TO THE ADMINISTRATION OF THE UNIFORM CODE OF MILITARY JUSTICE.

At stake in this case is the lawfulness of President Clinton's decision to deploy US troops to UNPREDEP. All of the military courts' rulings that the order to don the UN uniform was lawful as a necessary safety measure in a maneuver area presupposed that it was lawful for the President to have ordered the deployment. 55 M.J. at 100, 106, 126, 127-28, 130 (App. 9a-9b, 23a-24a, 67a, 70a-71a, 77a-78a); 50 M.J. at 739 (App. 94a-96a); R. 425-29 (App. 122a-126a).

For the military courts to have ruled that the order to don the UN uniform was unlawful, then, would have put those courts at odds with the President. In ruling in favor of the

President, however, the military courts put themselves in conflict with this Court, ignoring its prior rulings governing the interpretation and application of statutes as well as other rulings of central importance to the administration of the UCMJ.

A. Disregarding the Plain Meaning of the Text and this Court’s Precedents, the CAAF Erred in Ruling that the Lawfulness of an Order Is Not an Element of the Offense Defined by 10 U.S.C. Section 892(2).

SPC New stands convicted of having violated 10 U.S.C. Section 892(2), which reads as follows:

Any person ... who ... having knowledge of any ... lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order ... shall be punished as a court-martial may direct.

The CAAF divided, three to two, over the question whether the prosecution needed to prove, beyond a reasonable doubt, as an element of the offense, that the order requiring SPC New to don the UN uniform was lawful. According to the CAAF plurality, the “lawfulness of an order, although an important issue, is not a discrete element of the offense.” 55 M.J. at 100 (App. 10a). Rather, the plurality reasoned that, according to military **tradition**, issues of law are always to be decided by the military judge, not by the military jury. 55 M.J. at 100-04 (App. 10a-18a). Therefore, the plurality rationalized, Congress must have “inserted the word lawful in the statutes governing disobedience” to address “the judicial role of the court-martial panel rather than creating an element for consideration by the fact finder.” 55 M.J. at 104 (App. 18a).

Judges Sullivan and Everett vehemently disagreed, the former calling the plurality's opinion a "radical departure from our political, legal and military tradition." 55 M.J. at 115 (App. 42a). Judge Sullivan stated that the plain words of the statute indicate that "lawfulness" is an element of the offense, and hence to be decided by the military jury, not the judge. 55 M.J. at 120 (App. 55a-56a). Furthermore, he pointed out that the Manual for Courts-Martial "has repeatedly identified the lawfulness of the order ... as an element of this offense." 55 M.J. at 121 (App. 56a). Finally, Judge Sullivan noted that the CAAF had, in 1989, "unanimously stated that '[i]n a prosecution for disobedience, lawfulness of the command is an element of the offense....'" 55 M.J. at 121 (App. 56a).

According to this Court's authoritative framework for ascertaining the elements of a statutory offense, one must "first look to the text of the statute." Neder v. United States, 527 U.S. 1, 13 (1999). This salutary rule is designed to insure that courts "construe the language so as to give effect to the intent of Congress," not to that of judges. United States v. American Trucking Ass'ns, 310 U.S. 534, 542-43, 544 (1940). Thus, this Court does not "look beyond" the "plain meaning" of the words of a statute, unless that meaning leads to "absurd or futile results" or "an unreasonable one 'plainly at variance with the policy of the legislation as a whole.'" *Id.*, 310 U.S. at 543.

The CAAF plurality opinion completely disregarded these ruling precedents, construing 10 U.S.C. Section 892(2) according to its own view of the general inappropriateness of submitting questions of law to a military jury, instead of to a judge, and then reading that policy into the statute. *See* 55 M.J. at 101-02 (App. 11a-13a). In doing so, the plurality also ignored modern military practice and military legal history, both of which support the conclusion that Congress intended

lawfulness to be an element of the offense charged in this case. *See* 55 M.J. at 121-22 (App. 56a-58a).

B. In an Attempt to Circumvent United States v. Gaudin, the CAAF Disregarded 10 U.S.C. Section 851(c).

At stake in the intra-court battle below was not only the proper interpretation of 10 U.S.C. Section 892(2), but also the applicability of United States v. Gaudin, 515 U.S. 506 (1995), to courts-martial. *Compare* 55 M.J. at 104-05 (App.18a-21a) *with* 55 M.J. at 123-26 (App. 62a-68a). According to Gaudin, a statute that makes an issue of law an element of a criminal offense gives rise to a mixed law/fact question for the jury, not for the judge. *Id.*, 515 U.S. at 511-19.

The CAAF plurality candidly confessed that Gaudin “compelled” them “to choose” in this case “between treating lawfulness as an issue of law for the military judge or an element for the [military jury].” 55 M.J. at 102 (App. 13a-14a). To justify their decision to delete lawfulness from the elements of the offense specified in 10 U.S.C. Section 892(2), the plurality insisted that the Gaudin rule must be applied only to civilian criminal cases where the right to trial by jury is constitutionally guaranteed. 55 M.J. at 104 (App. 18a-19a). To justify this limit on Gaudin, the plurality maintained that military policy dictated that “the validity of regulations and orders of critical import to the national security” should be matters of law for the judge, lest, if they were submitted to the military jury, they “be subject to unreviewable and potentially inconsistent treatment by different court-martial panels.” 55 M.J. at 105 (App. 20a-21a).

It is not for the CAAF to use military policy as a tool to delete an element from a Congressionally-defined offense. As Judge Sullivan pointed out in his concurring opinion, Congress

also enacted 10 U.S.C. Section 851(c) which prescribes that the military jury, like its civilian counterpart, “must decide whether the elements of an offense have been proved by the Government beyond a reasonable doubt.” 55 M.J. at 122-23, 125, n.9 (App. 60a-61a, 65a, n.9). Thus, as Judge Everett noted, whatever the CAAF plurality thought to be the proper role of military juries, Congress, by statute, has dictated that, with respect to the elements of an offense, the military jury must perform the same role as the constitutionally-guaranteed jury. 55 M.J. at 129 (App. 74a-75a).

As was true of the CAAF plurality’s failure to interpret 10 U.S.C. Section 892(2) to discern the elements of the offense, so the plurality also disregarded Congress’s intent regarding the role of the military jury in adjudicating the elements of that offense, as prescribed by 10 U.S.C. Section 851(c).

C. The Harmless Error Rule of Neder v. United States Does Not Apply to this Case.

Even though concurring Judges Sullivan and Everett concluded that the military judge had erred in his ruling that the lawfulness of the order to don the UN uniform was a legal issue, exclusively for the judge, they decided that, under Neder v. United States, 527 U.S. 1 (1999), the judge’s error was “harmless.” 55 M.J. at 126-28, 130 (App. 68a-72a, 77a-78a). The plurality strongly disagreed, maintaining that both judges had misread the record, SPC New having “clearly produced a large volume of material contesting the lawfulness of the order.” 55 M.J. at 105-06 (App. 22a-23a). This time the plurality was correct, and the two concurring judges erred.

As the plurality pointed out, the Neder rule only applies when the verdict of guilt is “supported by uncontroverted evidence” introduced at trial on every element of the offense,

even the element not submitted to the jury. 55 M.J. at 106 (App. 22a); Neder, 527 U.S. at 45. Otherwise, an appellate court could not rule, as this Court did in Neder, that it was “beyond a reasonable doubt that the jury verdict would have been the same absent the error.” *Id.*, 527 U.S. at 52. Neither Judge Sullivan nor Judge Everett made such a ruling, nor could either have so found upon this record.

Judge Sullivan maintained that “the judge **at trial** ... found as fact that the disobeyed order was issued for ‘safety’ purposes and while on ‘maneuver’” (emphasis added). 55 M.J. at 119 (App. 53a). This statement is patently erroneous. The military judge made his findings on safety and maneuver in support of his decision to deny SPC New’s **pretrial** motions, **not** “at trial.” R. 422-33 (App. 118a-131a). Thus, the military judge’s pretrial rulings were not based upon any evidence subsequently introduced at trial, as Judge Sullivan presumed. *See* 55 M.J. at 119-20 (App. 53a-54a). Rather, those rulings were based upon selections from the arguments of the prosecution and the US Army’s Office of Chief of Legislative Liaison, the latter of which was contained in a document marked Appellate Exhibit IV. Under the governing court-martial rules, an appellate exhibit may not even be considered by a military jury. *See* Rules of Practice Before Army Courts-Martial, Paragraph 15A (Jan. 1, 2001). Under Neder, then, such pretrial materials could not have constituted the basis for a trial verdict.

Nor does the Neder rule apply to a case such as here, where the evidence introduced at trial contained stipulated facts supporting the claim that the UN uniform was unauthorized. R., D. Ex. P (App. 183a). Even Judge Sullivan conceded that this was “evidence that [the] order to wear UN badges was ‘patently illegal.’” 55 M.J. at 127 (App. 70a). Inexplicably, Judge Sullivan later asserted that there was “no real contest on the unlawfulness of the order,” because SPC New had

“proffered no evidence that the safety conditions in Macedonia did not make wearing of [the UN uniform] appropriate or that the deployment was not a maneuver within the meaning of AR 670-1.” 55 M.J. at 127-28 (App. 71a).

It was not SPC New’s burden, however, to disprove the prosecution’s case; rather, in light of the stipulated facts that the UN uniform was generally unauthorized, the prosecution had the burden to prove beyond a reasonable doubt that the uniform fit within the “safety” exception. But it did not do so. Judge Sullivan made a herculean effort to make up for the prosecution’s omission, citing testimony elicited through two defense witnesses and claiming that such testimony established the “uncontroverted” fact that the “order to wear [the UN] badges was given by [SPC New’s] commanders ... for safety purposes.” 55 M.J. at 127 (App. 71a). Even a cursory glance at the testimony recorded on the pages cited by Judge Sullivan reveals no such evidence. R. 667, 710 (App. 186a-187a).

Unlike the situation in Neder, SPC New vigorously contested the “safety” and “maneuver” issues at pretrial, noting his objections to the military judge’s interlocutory ruling and listing them among the factual issues in dispute. R. 442-44 (App. 177a-179a). SPC New, therefore, was clearly prejudiced. The “harmless error” rule of Neder simply does not apply.

D. The Decisions Below Inexplicably Ignored SPC New’s Claim that the Order to Don the UN Uniform Violated Article I, Section 9, of the US Constitution.

In both his pretrial motions and his appellate briefs, SPC New contended that, AR 670-1 notwithstanding, the order to don the UN uniform violated the foreign “emoluments” and

“office” provision of Article I, Section 9, of the US Constitution. Not once did any judge below address this specific claim, although it appears that the CAAF plurality may have attempted to treat it by miscasting SPC New’s “transfer of allegiance” claim as though he were “substituting [his] personal judgment of the legality of an order for that of his superiors and the Federal Government.” 55 M.J. at 107 (App 24a-25a). This is a serious misconception.

Article I, Section 9, Clause 8, of the US Constitution makes clear that receipt of any “present, emolument, office, or title ... from any ...foreign state” by a “person holding any office ... of trust” under the United States is **not** a matter for the “personal judgment” of any officer of the Federal Government, even when that officer is the President of the United States, but requires the explicit “consent of Congress.”

By the order to don the UN uniform, SPC New’s military superiors conferred upon SPC New, an American soldier, the office of a UN soldier to serve UNPREDEP in FYROM. There is no Act of Congress authorizing the President to order an American soldier to assume such a foreign office. To the contrary, Section 6 of the UNPA requires specific approval by Congress before the President may order any combatant-type deployment, such as UNPREDEP in FYROM, which is undertaken pursuant to Chapter VII of the UN Charter. R. 345-49 (App. 173a-176a); Reinhardt, “The United States Military and United Nations Peacekeeping Operations, 19 HOUS. J. INT’L L. 245, 267-68 (1996); *See* Fink, “The Blurring of the Mandate for the Use of Force in Maintaining International Peace and Security,” 19 MD. J. OF INT’L TRADE 1, 25-44

(1995); Glennon, “The Constitution and Chapter VII of the United Nations Charter,” 85 AM. J. INT’L L. 74 (1991).⁸

In short, the courts below ignored the fact that SPC New was court-martialed for refusing the uniform of allegiance of a foreign government, contrary to the very purpose of Article I, Section 9, Clause 8, which is to ensure that “officers of the U.S. [are] independent of external influence.” J. Madison, Notes of Debates in the Federal Convention 516 (Reprint Tansill edition, Norton: N.Y. 1987).

II. THE MISAPPLICATION OF THE “POLITICAL QUESTION DOCTRINE” TO THIS COURT-MARTIAL IS AN IMPORTANT FEDERAL QUESTION THAT SHOULD BE DECIDED BY THIS COURT.

The CAAF unanimously ruled that this Court’s “political question doctrine” precluded the military courts from adjudicating SPC New’s claims that the order to don the UN uniform was unlawful because it was issued pursuant to a presidential deployment of an American soldier in violation of

⁸ Not only has Congress not consented to presidential action conferring the office of UN soldier on an American soldier, but it has not consented to any American soldier’s receiving the UN uniform as a “gift or decoration,” pursuant to the provisions of 5 U.S.C. Section 7342. (App. 145a-151a.) There is no question that the UN uniform provided to SPC New was provided by the UN, not the US Army. R., App. Exh. X (App. 166a). Thus, the UN uniform is a “gift or decoration” within the meaning of 5 U.S.C. Section 7342(a)(3) and (4), the receipt of which is banned by 5 U.S.C. Sections 7342(b)(2) and 7342(a)(1)(D), the UN being a “foreign government” under 5 U.S.C. Section 7342(a)(2)(B). The only exception to these rules provided by Congress is for the receipt of “gifts” from a foreign government if “tendered ... as a souvenir or mark of courtesy” (5 U.S.C. Section 7342(c)(1)(A)), an exception that clearly does not apply to the UN uniform ordered here.

Sections 6 and 7 of the UNPA, Section 2 of Article II, and the Thirteenth Amendment of the United States Constitution. This ruling was contrary to precedent, and is plainly wrong.

A. Wrongful Application of the Political Question Doctrine Denied Due Process of Law to SPC New.

Prior to the instant case, the CAAF has consistently required proof that an order “required the performance of a military duty” before it would presume that the order was lawful. *See United States v. McDaniels*, 50 M.J. 407 (1999); *See United States v. Nieves*, 44 M.J. 96, 98 (1996); *Unger v. Ziemniak*, 27 M.J. 349, 350, 358-59 (1989); *United States v. Smith*, 21 U.S.C.M.A. 231, 45 C.M.R. 5 (1972); *United States v. Gentle*, 16 U.S.C.M.A., 437, 37 C.M.R. 57 (1966); *United States v. Musguire*, 9 U.S.C.M.A. 67, 25 C.M.R. 329 (1958); *United States v. Robinson*, 6 U.S.C.M.A. 347, 350-54, 20 C.M.R. 63 (1955). These rulings are reflected in the Military Judge’s Benchbook, which instructs that “[a]n order, to be lawful, must relate to specific military duty and be one which the member of the armed services is authorized to give.” Military Judge’s Benchbook, para. 3-16-3d (Dept. of Army Pamphlet 27-9:1996). Similarly, the Manual for Courts-Martial states that, for an order to be lawful, the officer who issued the order “must have authority to give such an order. Authorization may be based on law, regulation, or custom of the service....” Manual for Courts-Martial, 1969 (Rev. ed.) para. 14.c.(2)(a)(ii). *See Winthrop’s Military Law, supra*, at 572.

In this case, the prosecution predicated the lawfulness of the order to don the UN uniform upon the authority of a commander to alter the normal US Army uniform for “safety” purposes in a “maneuver” area. In response, the military judge ruled that “the adding of [the] UN ... uniform has a function specifically designed to enhance the safety of United States

armed forces in Macedonia.” R. 426 (App. 123a). Had there been no impending order to deploy the 1/15 Infantry to UNPREDEP, then , there would have been no order to don the UN uniform, there being no justifying “safety” reason.

The order to deploy, therefore, “generated” the order to don the UN uniform. In United States v. Noyd, 18 U.S.C.M.A. 483, 489, 40 C.M.R. 195 (1969), the CAAF proclaimed that “[a]n order, apparently valid on its face, may be illegal because it is based on, **or has its generating source in, an unlawful command of a superior** (emphasis added). See United States v. Voorhees, 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954). Had the CAAF applied its ordinary rule, SPC New’s claim that the UNPREDEP deployment was unlawful, if sustained, would have defeated the presumption that the order to don the UN uniform was lawful. Thus, the prosecution would have failed to prove a violation of 10 U.S.C. Section 892(2).

The CAAF refused, however, to apply its normal rule, holding instead that the “political question doctrine” precluded the military courts from addressing the lawfulness of the order to deploy. Whether the lawfulness issue is for the military judge (as the CAAF plurality concluded) or an element of the offense for the military jury (as the two concurring CAAF judges maintained), surely CAAF Judge Effron was correct when he stated in his separate opinion below that “the political question doctrine may not be used as an excuse for avoiding issues committed by law to the court-martial process ... [w]here the legal principles are directed at the rights and responsibilities of servicemembers.” 55 M.J. at 110-11 (App. 33a).

The plurality concluded that the “rights and responsibilities” of SPC New were not implicated by their decision to avoid his claims concerning the illegality and unconstitutionality of the Macedonian deployment, because

those claims, like a soldier's claim of "conscientious objection," are outside the jurisdiction of the court-martial. 55 M.J. at 106-08 (App. 24a-28a). This ruling, however, directly conflicts with prior rulings of the federal district and appellate courts in a habeas corpus proceeding brought by SPC New to stop the court-martial. United States ex rel. New v. Perry, 919 F. Supp. 491 (D.D.C. 1996), *aff'd*, New v. Cohen, 129 F.3d 639 (D.C. Cir. 1997), *cert. denied*, 523 U.S. 1048 (1997). Those courts specifically distinguished SPC New's claim from that of a conscientious objector, noting that the latter's claim, if sustained, entitled the objector to immediate discharge from the military, and hence, was not subject to court-martial jurisdiction. In SPC New's case, however, fully anticipating that the military courts would rule on the merits of SPC New's claims, the two Article III courts ruled that a soldier who is charged with disobedience of a lawful order remains subject to court-martial jurisdiction. Perry, 919 F. Supp. at 496-97, 499; Cohen, 129 F.3d at 642-44, 646.

According to these rulings, then, CAAF's reliance on such conscientious objector cases as United States v. Johnson, 17 U.S.C.M.A. 246, 38 C.M.R. 44 (1967), and United States v. Lenox, 21 U.S.C.M.A. 314, 319, 45 C.M.R. 88, 93 (1972), is totally misplaced. As those cases point out, and as the Article III courts observed in SPC New's habeas proceeding, a conscientious objector whose request for discharge has been wrongfully denied may avail himself of an administrative process for relief. Johnson, 17 U.S.C.M.A. at 92; Lenox, 21 U.S.C.M.A. at 317-19; Perry, 919 F. Supp. at 496-97; Cohen, 129 F.3d at 646-47. The courts in SPC New's two habeas corpus proceedings found no such administrative means available to present a claim of the unlawfulness of an order. Perry, 919 F. Supp. at 497; Cohen, 129 F.3d at 646. For the military tribunals to utilize the political question doctrine to deny him his day in court, then, takes away his right to

challenge the unlawfulness of the order to don the UN uniform as having been “generated” by an earlier unlawful order.⁹

The CAAF’s ruling – that the political question doctrine justified denying SPC New the right to have his claim that the UNPREDEP deployment was unlawful adjudicated on the merits – while at the same time affirming the lawfulness of the order to don the UN uniform because it was required for “safety” purposes during that same deployment, is simply indefensible. At the very heart of the constitutional prohibition against the deprivation of life, liberty and property except by Due Process of Law is the rule of law, not politics. To permit the Government to rely upon the UNPREDEP deployment to establish its case that the UN uniform was ordered for “safety” purposes in a “maneuver” area, and at the same time to deny SPC New the right to be heard on his challenge to the legality and constitutionality of that deployment, violates the Due Process Clause. *Cf. Crane v. Kentucky*, 476 U.S. 683, 690 (1986); *Simmons v. South Carolina*, 521 U.S. 154, 175 (1994) (O’Connor, J., concurring) (“[O]ne of the hallmarks of due process in our adversary system is the defendant’s ability to meet the State’s case against him.”)

⁹ The CAAF’s reliance on *United States v. Huet-Vaughn*, 43 M.J. 105 (1995), is also misplaced. *See* 55 M.J. at 109 (App. 29a-30a). Huet-Vaughn was not even charged with disobedience of an unlawful order, but with “desertion with intent to avoid hazardous duty and shirk important service....” *Id.*, 43 M.J. at 115. In defense, Huet-Vaughn claimed that she did not intend to avoid service in the Persian Gulf, but “to contest the legality of the decision to employ military forces in the ... Gulf.” The CAAF ruled her claim to be “a nonjusticiable political question” and “irrelevant” to the offense charged. *Id.*, 43 M.J. at 115. That is not the case here, where the order at issue “has its generating source in ... an unlawful command of a superior.” *United States v. Noyd*, *supra*, 18 U.S.C.M.A. at 489.

Surely, the application of the political question doctrine here, when it deprives SPC New of a critical defense, is “too blunt an instrument for advancing” the Government’s claimed interests. *Cf. Degen v. United States*, 517 U.S. 820 (1996). Moreover, because lawfulness is an element of the offense, the CAAF ruling contradicts the Due Process Clause, which obligates the Government to prove beyond a reasonable doubt every element of an offense. *Jackson v. Virginia*, 443 U.S. 307, 316 (1979).

B. Misapplication of the Political Question Doctrine Directly Conflicts with this Court’s Prior Rulings.

In his pretrial motions, SPC New laid out a fivefold challenge to the legality of the deployment to UNPREDEP in FYROM. Two of those challenges claimed violations of Sections 6 and 7 of the UNPA. The other three were constitutional claims, alleging violations of the commander in chief and appointments clauses of Article II, Section 2, of the US Constitution, and of the Thirteenth Amendment. The CAAF dismissed all five of these claims as nonjusticiable political questions.

To reach this conclusion, the CAAF plurality mischaracterized SPC New’s five distinct claims as a single challenge to the “constitutionality of the President’s decision to deploy Armed Forces in FYROM.” 55 M.J. at 109, 110-11 (App. 29a, 31a-32a). Both concurring judges agreed with this erroneous description. 55 M.J. at 116, 129-30 (App. 45a; 75a). Not only did the CAAF mischaracterize these claims, but it also misapplied this Court’s prior rulings in dealing with them.

First, the CAAF misapplied the political question doctrine to preclude review of SPC New’s claims that the order to deploy violated Sections 6 and 7 of the UNPA. According to

Section 6 of the UNPA, the President may commit American soldiers to participate in a UN combatant operation undertaken pursuant to Chapter VII of the UN Charter only after securing “by Appropriate Act or joint resolution” Congressional approval of an agreement between the President and the UN. 22 U.S.C. Section 287d (App. 155a). According to Section 7, the President is authorized by Congress to commit American soldiers to a noncombatant role as “observers [or] guards” in a peacekeeping effort under Chapter VI of the UN Charter, limiting the President to assign no more than 1,000 such soldiers at any one time and requiring formal assurance from the President that the soldiers so detailed would not perform combatant roles “contemplated by Chapter VII of the United Nations Charter.” 22 U.S.C. Section 287d-1 (App. 156a).

To support these two statutory claims, SPC New presented, through a qualified expert witness, a large volume of evidence, including UN Resolutions related to the combatant nature of UNPREDEP and the absence of Congressional approval. R. 324-75; App. Exh. LXIII with Attachments A-R. Thus, SPC New placed before the military judge credible evidence related to questions of statutory interpretation and application, and of construction and application of a treaty. This Court has ruled that such issues are **not** nonjusticiable political questions. Japan Whaling Ass’n v. American Cetacean Society, 478 U.S. 221, 229-30 (1986) (“[T]he courts have 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.”) Therefore, any claim “that [the President] acted in excess of powers granted him by Congress” is entitled to “judicial relief,” even when it involves the military. Harmon v. Brucker, 355 U.S. 579, 581-82 (1958).

As for SPC New’s three constitutional claims, Baker v. Carr, 369 U.S. 186 (1962), established that whether such claims

raise political questions depends primarily upon “the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination.” *Id.*, 369 U.S. at 210. The CAAF ignored such criteria, failing to examine properly each of SPC New’s constitutional claims.

As for SPC New’s first constitutional claim, that the order to deploy under UN command and control constituted “involuntary servitude” contrary to the Thirteenth Amendment, the issue is clearly justiciable. *See* Bailey v. Alabama, 219 U.S. 219 (1911); Butler v. Perry, 240 U.S. 328 (1916); Arver v. United States, 245 U.S. 366, 390 (1918).

As for SPC New’s second constitutional claim that, by the order to deploy as a member of UNPREDEP, he was placed under the command and control of a foreign military officer who had not been appointed in accordance with the procedural provisions set forth in Article II, Section 2, of the US Constitution, this Court has addressed on the merits a variety of claims of such violations of the appointments clause. *See, e.g.*, Shoemaker v. United States, 147 U.S. 282 (1893); Buckley v. Valeo, 424 U.S. 1, 124-41 (1976); Morrison v. Olson, 487 U.S. 654 (1988); Freytag v. Commissioner, 501 U.S. 868 (1991); Weiss v. United States, 510 U.S. 163 (1994). Included among these adjudicated claims is whether an appointee in question is an “officer of the United States,” that is, a person “exercising significant authority pursuant to the laws of the United States.” Buckley v. Valeo, *supra*, 424 U.S. at 126. Whether the UN officer in command and control of UNPREDEP exercises significant authority over American soldiers so deployed is, therefore, a justiciable question. *Cf.* Riley v. St. Luke’s Hospital, 252 F.3d 749 (5th Cir. 2001).

Finally, as for SPC New’s third constitutional claim that, by deploying American soldiers under the command and control of foreign military officers the order violated the constitutional mandate that “[t]he President shall be Commander in Chief of the Army and Navy of the United States,” this, too, is a justiciable question. The constitutional text states that the presidential role as commander in chief is mandatory, not discretionary, indicating on its face that the President’s role as commander in chief is a matter of obligation, not a matter of personal will. Thus, an issue of wrongful delegation of executive power, as contrasted with an issue of wrongful exercise, is susceptible to judicial review. *See Bowsher v. Synar*, 478 U.S. 714 (1986).

As Justice Scalia recently observed in *Printz v. United States*, 521 U.S. 898, 936 (1997), wrongful delegation of executive power “effectively transfers [power] without meaningful Presidential control...” With respect to the President’s constitutional powers over America’s armed forces, Chief Justice Taney wrote over 150 years ago that the very heart of the role of commander in chief is “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). Turning American soldiers over to UN command and control – to foreign officers who neither report to nor take orders from the President – however “limited” or “temporary” the situation may be (R., App. Exh. IV (App. 161-65a)), “shatter[s]” both the “vigor and accountability” that the constitutionally-prescribed “unity in the Federal Executive” was designed to preserve. *See Printz v. United States, supra*, 521 U.S. at 936.

CONCLUSION

For the reasons stated, this Court should grant this petition for a writ of certiorari.

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