No. 05-5023

In The
United States Court of Appeals
for the District of Columbia Circuit

UNITED STATES *EX REL.* MICHAEL G. NEW,
Appellant,

v.

DONALD H. RUMSFELD, SECRETARY OF DEFENSE, *ET AL.*,
Appellees.

On Appeal from the United States District Court
for the District of Columbia

PETITION FOR REHEARING EN BANC OF APPELLANT MICHAEL G. NEW

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July 4, 2006

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States *ex rel.* Michael G. New,	)	
	)	
Appellant,	)	
	)	
v.	)	No. 05-5023
	)	
Donald H. Rumsfeld, Secretary of Defense, *et al*,	)	
	)	
	)	
Appellees.	)	

PETITION FOR REHEARING EN BANC

Pursuant to Rule 35(b), Federal Rules of Appellate Procedure, and Circuit Rule 35, Rules of the District of Columbia Circuit, Appellant Michael G. New ("Mr. New") petitions this Court for a rehearing en banc of the above-entitled case. The three-judge panel opinion in United States *ex rel.* Michael G. New v. Rumsfeld, 448 F.3d 403 (D.C.Cir. 2006) ("Panel Opinion"), was decided on May 23, 2006, and is set forth on pages A-1 through A-6 of the Addendum hereto.

STATEMENT OF REASONS FOR GRANTING THE PETITION

The Need to Secure and Maintain Uniformity in This Court's Decisions.

The three-judge panel wrongly sanctioned the district court's Fed. R. Civ. P. Rule 12(b)(6) dismissal of Mr. New's complaint prosecuting a non-habeas corpus collateral attack on his court-martial conviction, erroneously applying "a vague and watered-down standard [of review] of ... fair consideration"[1] that: (a) had previously been expressly rejected by this Court in Kauffman v. Secretary of the Air Force, 415 F.2d 991, 997 (D.C. Cir. 1969); and (b) is in direct conflict with the established precedent of this Circuit that, in a non-habeas collateral attack

[1] *See* Panel Opinion, A-3.

against a court-martial conviction, "constitutional rulings" of military courts must be found to be "correct by prevailing Supreme Court standards ... unless it is shown that conditions peculiar to military life require a different rule." *Id.* *See* Avrech v. Secretary of the Navy, 477 F.2d 1237, 1243-44 (D.C. Cir. 1973), *rev'd on other grounds*, 418 U.S. 676 (1974); Cothran v. Dalton, 83 F. Supp. 2d 58, 64 (D.D.C. 1999). Consequently, due to the confusion wrought by the panel opinion, neither lawyers nor the district court can know whether this Court's Kauffman standard of review has been *sub silentio* overruled by the panel or still governs the legal sufficiency of such complaints under Rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure. *See, e.g.,* Cothran v. Dalton, 83 F. Supp. 2d at 63 (Rule 12(b)(1) and 12(b)(6) motions to dismiss) and Williamson v. Secretary of the Navy, 395 F. Supp. 146, 147 (D.D.C. 1975) (motion for summary judgment).

This Proceeding Involves Two Additional Questions of Exceptional Importance.

(1) Whether the panel's ex post facto abandonment of an established standard of review unfairly prejudices a litigant's right to collateral review of his court-martial conviction. Mr. New reasonably relied upon, and properly pled his case under, the Kauffman standard of review — "the governing precedent in this Circuit." *See* United States *ex rel.* New v. Rumsfeld, 350 F. Supp. 2d 80, 89 (D.D.C. 2005). Yet the panel upheld the district court's dismissal of his complaint under Rule 12(b)(6) on the basis of an entirely new standard, in direct contradiction to the standard of review that has prevailed in this Circuit for nearly 40 years. *Compare* Panel Opinion, A-3, *with* Kauffman, 415 F.2d at 997.

(2) Whether the panel abandoned the federal rule requiring that it "read the facts alleged in the complaint in the light most favorable to petitioner[]" and affirm the dismissal of a

complaint **only** if "'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations'" in adjudicating a Fed. R. Civ. P. Rule 12(b)(6) motion. *See* H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 249-250 (1989). Contrary to Kowal v. MCI Communications Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994) and Schuler v. United States, 617 F.2d 605, 608 (D.C. Cir. 1979), the panel failed to give Mr. New's complaint the "spacious" and "liberal" reading required under Rule 12(b)(6), erroneously: (a) disregarding Mr. New's well-pleaded allegation that, by Stipulation of Fact at his court-martial, the U.N. uniform that he was ordered to wear was *prima facie* unauthorized; and (b) attributing to Mr. New's "defense" the government's claim that, pursuant to an army regulation, the otherwise unauthorized U.N. uniform was permitted. *Compare* Panel Opinion, A-1 *with* Second Amended Complaint for Declaratory Judgment, Injunctive Relief and an Order in the Nature of a Writ of Mandamus Amending Petition for Writ of Habeas Corpus ("Compl.") ¶¶ 9-14, and 39-44, R. 48, J.A. 19-21.[2]

ARGUMENT

I. THE DEFERENTIAL STANDARD OF REVIEW ADOPTED BY THE PANEL FAILS TO DISCHARGE THE CONSTITUTIONAL DUTY OF THIS COURT.

It is well established that a member of America's armed forces is duty-bound to obey **only** "lawful" orders. As Judge Sullivan observed in United States v. New, 55 M.J. 95, 115 (2001), "[t]housands of military orders are given each day in our armed forces [and] Article 92(2), Uniform Code of Military Justice, 10 U.S.C. § 892, legislatively reflects the traditional Anglo-American view that only the disobedience of 'lawful' orders is prohibited." So

[2] Record references are to the district court Docket Sheet entries, and are designated "R." References to the previously-filed Joint Appendix in this Court are designated "J.A."

entrenched is this duty to obey **only lawful orders** that a service member charged with violating the "law of war" may not excuse that violation by the defense that he was only following the orders of his superior. *See* Army Field Manual 27-10, the Law of Land Warfare.

When the nation is at war, as it is today in Afghanistan and Iraq, this military code of conduct is most severely tested. Yet, before the National Press Club on February 17, 2006, in response to the question — "should people in the U.S. military disobey orders that they believe are illegal?" — General Peter Pace, Chairman of the Joint Chiefs of Staff, unhesitatingly replied: "**it is the absolute responsibility of everybody in uniform to disobey an order that is either illegal or immoral**." http://www.jcs.mil/chairman/speeches/060217NatPressClubLunch.html (emphasis added).

It is one thing for the nation's chief military spokesman to affirm — **in the court of public opinion** — a soldier's duty to obey **only lawful** orders. It is quite another — **in a court-martial proceeding** — to recognize that duty when an individual member of the armed forces **actually** refuses to obey an order, as was the case when, on October 10, 1995, Army Specialist Michael New refused to obey an order to "to wear the prescribed uniform for the deployment [of his unit] to Macedonia, i.e., U.N. patches and cap," on the grounds that it was an unlawful order. *See* Compl., ¶ 8, R. 48, J.A. 10-11.

Facing court-martial charges of disobedience of a lawful order in violation of Article 92(2) of the Code of Military Justice (10 U.S.C. § 892(2)), the military judge ruled that the central issue of the case — the lawfulness of the order — was **not** an element of the offense, and consequently, the prosecution did not have the burden of proving beyond a reasonable doubt the lawfulness of the order. *See* Compl., ¶¶ 18-22, R. 48, J.A. 15-16. This ruling to take the

question of lawfulness away from the military jury — and as a consequence, to place the burden of "proving illegality" upon Mr. New[3] — was affirmed by a three-to-two vote of the Court of Appeals of the Armed Forces, despite the observation by one of the minority judges that the military judge's ruling constituted a "radical departure from our political, legal and military tradition." United States v. New, 55 M.J. at 115, 120-25 (Sullivan, J., concurring in the result).

In Count I of his complaint collaterally attacking his conviction and sentence, Mr. New alleged that this "radical departure" did not conform to Supreme Court standards of due process of law (*see* Compl., ¶¶ 30, 39-41, R. 48, J.A. 18, 19-20), which this Court in Kauffman held were necessary "to protect the rights of servicemen." Kauffman, 415 F.2d at 997. According to the panel, however, a serviceman's rights — even his "right" to disobey an unlawful order — are protected sufficiently so long as the military courts have given "fair consideration" to the serviceman's claim. *See* Panel Opinion, A-3.

By so deferring to the military courts, the panel has sent a message to every member of the armed forces that what the head of the Joint Chiefs of Staff has told the American people — that it is "every" service member's "absolute responsibility" to disobey "illegal and immoral order[s]" — is mere military **rhetoric.** The military **reality** is that a member of the armed services may discharge his duty to obey only lawful orders, not only at his peril of being charged with disobedience of a "lawful" order, but at his peril of having to overcome an almost conclusive presumption of lawfulness, as if the issue of unlawfulness were an affirmative defense, rather than part of the prosecution's *prima facie* case that the order was lawful beyond a

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[3] *See* United States v. New, 55 M.J. 95, 108 (2001) ("An order is presumed lawful and the defense has the burden of proving illegality unless the order is 'palpably illegal on its face.'").

reasonable doubt.

At stake, then, in this petition for rehearing en banc is whether the military **policy** that only lawful orders are to be obeyed will be reflected in military **practice**. Deferring to the military courts, as the panel has done, provides no check or balance upon the natural inclination of the military to rule in favor of the superior authority — from the commander-in-chief in the White House to the lieutenant in the field — over the soldier, sailor, marine or airman. Indeed, instead of adopting a procedure that would have sent a beneficial message that the primary burden rests with the superior authority to issue **only** lawful orders, the military courts in Mr. New's case chose to send a perilous message to the enlisted man — just obey orders.

If this Court allows the panel opinion to stand, then it will have abandoned members of the armed forces who conscientiously try to perform their duty to obey only lawful orders and, thereby, it will have reduced their "absolute responsibility ... to disobey an order that is ... illegal" to mere sentiment, divorced from the practical reality that they have no real choice, but must obey every military order, even if unlawful, or suffer punishment for their refusal.

II. THE PANEL'S DECISION CONFLICTS WITH THE STANDARD OF REVIEW ESTABLISHED IN THIS CIRCUIT IN KAUFFMAN V. SECRETARY OF THE AIR FORCE, 415 F.2d 991 (D.C. Cir. 1969).

In 1969, this Court ruled in Kauffman v. Secretary of the Air Force, 415 F.2d 991 (D.C. Cir. 1969), that it had jurisdiction of a collateral attack on a military court-martial judgment even though the petitioner was not in custody and, therefore, was not eligible under 28 U.S.C. § 2241 to file a habeas corpus petition. Relying upon United States v. Augenblick, 393 U.S. 348 (1969), this Court concluded that the stigma attached to any military discharge, other than an honorable one, was sufficient to support this Court's jurisdiction to conduct a collateral review of alleged

"errors ...[that] rise to a constitutional level." *Id.*, 415 F.2d at 995.

As for the scope of review of any alleged constitutional error, the Kauffman Court concluded that the test of "fairness" set out by the Supreme Court in Burns v. Wilson, 346 U.S. 137 (1953), "requires that military rulings on constitutional issues conform to Supreme Court standards, unless it is shown that conditions peculiar to military life require a different rule." Kauffman, 415 F.2d at 997. To that end, the Kauffman Court conducted an independent review of the military courts' resolutions of those issues to ascertain whether the military rulings "disposed of them in accordance with Supreme Court standards." *See id.*, 415 F.2d at 1000.

In the district court below, Judge Friedman at least purported to adhere to the Kauffman standard, and to have reviewed the legal sufficiency of Michael New's constitutional claims contained in his complaint by independently measuring those claims against Supreme Court standards. *See* United States *ex rel.* New v. Rumsfeld. 350 F. Supp. 2d 80, 89-90, 92-101 (D.D.C. 2004). However, in its review of Judge Friedman's ruling, the panel completely disregarded the Kauffman standard of review, adopting an entirely new approach whereby Mr. New's constitutional claims were reviewed according to a newly-crafted "more deferential" test of "fair consideration." *See* Panel Opinion, A-2 - A-6.

The panel deferred to the military courts, but **not** pursuant to the Kauffman requirement that the Government "show[] that conditions peculiar to military life require a different [due process] rule." *Compare* Panel Opinion, A-2, *with* Kauffman, 415 F.2d at 997. To the contrary, the panel did **not even acknowledge** the existence — much less the relevance — of Kauffman, even though the Kauffman court had: (a) carefully reviewed the exact same "fair consideration" language in Burns v. Wilson, 346 U.S. 137 (1953), as relied upon by the three-judge panel; and

(b) specifically **rejected** the "fair consideration" test as "a vague and watered-down standard," totally inadequate to confer the "benefits of collateral review of military judgments ... [in] civilian courts." *Compare* Kauffman, 415 F.2d at 997, *with* Panel Opinion, A- 2 - A-3.

In an apparent attempt to justify its utter disregard of Kauffman, the panel faulted the district court for treating Mr. New's complaint as a habeas corpus petition rather than as a nonhabeas complaint for collateral review. *See* Panel Opinion, A-2. Then, in reliance upon selected portions of Schlesinger v. Councilman, 420 U.S. 738 (1975) — admittedly "not a part of the holding" — the panel forged an entirely new rule for this Circuit "that non-habeas review is ... more deferential than habeas review of military judgments." Panel Opinion, A -2- A-3.

The panel's ruling directly contradicts Kauffman. Even a cursory reading of Kauffman establishes that it concerned a **non-habeas collateral attack** on a court-martial conviction. Kauffman, 415 F.2d at 995. Indeed, the Supreme Court in Schlesinger v. Councilman — a case heavily relied upon by the three-judge panel (*see* Panel Opinion, A-2 - A-3) — cited Kauffman in support of its conclusion that Article III courts have jurisdiction of collateral attacks on courts-martial even when such attacks are made by persons not in custody and, therefore, not entitled to habeas corpus review. *See* Schlesinger v. Councilman, 420 U.S. at 752, n. 25. Indeed, even today Kauffman is considered to be the leading case — not only in this Circuit — extending civilian court collateral jurisdiction over court-martial convictions and sentences. *See, e.g.,* New v. Cohen, 129 F.3d 639, 648 (D.C. Cir. 1997); Homcy v. Resor, 455 F.2d 1345, 1349 (D.C. Cir. 1971); Owings v. Secretary of the Air Force, 447 F.2d 1245, 1261 (D.C. Cir. 1971); Cothran v. Dalton, 83 F. Supp. 2d 58, 63 (D.D.C. 1999); Williamson v. Secretary of the Navy, 395 F. Supp. 146, 147 (D.D.C. 1975); Staton v. Froehlke, 390 F. Supp. 503, 505 (D.D.C. 1975); Stolte v.

Laird, 353 F. Supp. 1392, 1395 (1972); Hatheway v. Secretary of the Army, 641 F.2d 1376, 1379 (9th Cir. 1981) (and cases cited). *See also* J. Chapman, "Reforming Federal Habeas Review of Military Convictions: Why AEDPA Would Improve the Scope and Standard of Review," 57 *Vanderbilt L. Rev.* 1387, 1399-1402 (2004).

In short, had the panel considered Kauffman, it would have found **absolutely no support** for its position that Mr. New's non-habeas collateral attack called for the more "deferential" test of "fair consideration"; rather, the panel would have found that the rule in this Circuit called for its independent "review [of] the constitutional rulings of [the military courts to] find [whether] the[y] [are] correct by prevailing Supreme Court standards." *See* Kauffman, 415 F.2d at 997.

While the panel may have discovered that not all courts of appeal necessarily agreed with Kauffman's standard governing collateral review of court-martial proceedings and convictions (*see* Calley v. Calloway, 519 F.2d 184, 198 n. 21 (5th Cir. 1975)), there is **no** support for the panel's newly-minted, two-tiered standard of review based upon whether the complaint presented a non-habeas, rather than a habeas, collateral attack on a court-martial conviction. *See, e.g.,* R. Rosen, "Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial," 108 *Military L. Rev.* 5, 56-66 (1985); J. Theuman, "Review by Federal Civil Courts of Court-Martial Convictions — Modern Status," 95 A.L.R. Federal 472, 524-41 (1989).

In a vain attempt to bolster its deferential review standard for non-habeas collateral attacks, the panel cited Priest v. Secretary of the Navy, 570 F.2d 1013 (D.D.C. 1977), claiming that Priest applied the panel's version of the standard of review that it had gleaned from Schlesinger v. Councilman. *See* Panel Opinion, A -2. But Priest's reliance upon Schlesinger v. Councilman was limited to the question of whether the court had jurisdiction. Priest, 570 F.2d at

1016. The Priest court did not draw on Schlesinger v. Councilman for the standard of review by which to measure the constitutional claims of the petitioner. Instead, the Priest court reviewed the petitioner's First and Fifth Amendment contentions to ascertain whether the military courts' disposition of them conformed to Supreme Court standards. *See* Priest, 570 F.2d at 1016-19.

Although the Priest court did not cite Kauffman, it did rely upon Avrech v. Secretary of the Navy, which similarly had limited Schlesinger v. Councilman to the jurisdictional issue. Avrech, 520 F.2d 100, 102 n. 5 (D.C.Cir. 1975). Indeed, when Avrech first came before this Court, it ruled that "[t]he question ... seems settled in this Circuit by Kauffman ... where the court said: 'We hold that the test of fairness requires that military rulings on constitutional issues conform to Supreme Court standards, unless it is shown that conditions peculiar to military life require a different rule.'" Avrech v. Secretary of the Navy, 477 F.2d 1237, 1244 (1973), *rev'd on other grounds*, 418 U.S. 676 (1974).[4]

There is, therefore, no legitimate basis whatsoever for the panel to have concluded that the Supreme Court in Schlesinger v. Councilman *sub silentio* established a standard of review different from that established in Kauffman; nor is there any reason to believe that the Supreme Court meant that its standard governing the threshold issue of jurisdiction also serves as the substantive standard of review of the merits of the constitutional claims. *See* Schlesinger v. Councilman, 420 U.S. at 752-53 and n. 25. Had the Supreme Court meant to address the standard of review, it surely would have harkened back to its decision in Burns v. Wilson, which

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[4] The Supreme Court reversed, holding that the court of appeals had incorrectly applied Supreme Court standards to Avrech's First Amendment contention, not that the court had applied an incorrect standard of review. *See* Secretary of the Navy v. Avrech, 418 U.S. 676, 677-78 (1974).

had spawned the "full and fair consideration test," and the interpretative gloss placed upon that test by Kauffman. *See* Schlesinger v. Councilman, 420 U.S. at 752-53. Instead, the High Court declined to review the merits of the petitioner's claim, dismissing the case on equity grounds for failure to exhaust administrative remedies. *Id.*, 420 U.S. at 753-61.

The panel's refusal to follow Kauffman thoroughly confuses the governing precedents in this Circuit, prejudicing other petitioners who, in the future, would seek collateral review of courts-martial and other military judgments adversely affecting their liberties. Not only would such petitioners not know how to evaluate and then draft their collateral attack complaints, but district court judges in this Circuit would not know whether the Kauffman rule, or the panel's "watered-down" rule, applied to Rule 12(b)(6) motions or motions for summary judgment.

III. THE PANEL'S DECISION INVOLVES A QUESTION OF EXCEPTIONAL IMPORTANCE FOR THE ADMINISTRATION OF COLLATERAL ATTACKS ON MILITARY JUDGMENTS IN THIS CIRCUIT.

Mr. New's collateral attack on his court-martial conviction came to this Court on an appeal from a district court ruling that erroneously granted the government's motion to dismiss on the grounds that New's complaint failed to state a claim upon which relief can be granted. *See* U.S. *ex rel.* New v. Rumsfeld, 350 F. Supp. 2d at 83. Purporting to rely upon the standard of review laid down in Kauffman, the district court concluded that Mr. New had failed to state a claim that his court-martial conviction did not meet Supreme Court constitutional standards. *See id.*, 350 F. Supp. 2d at 89, 92. In so doing, District Court Judge Friedman purported to do as other district court judges in this Circuit have consistently attempted to do since Kauffman — assess Rule 12(b)(6) motions and motions for summary judgment by the Kauffman standard that constitutional issues must be resolved by military officials in conformity to Supreme Court

standards, unless it is shown that conditions peculiar to military life require a different rule. *See, e.g.,* Cothran v. Dalton, 83 F. Supp. 2d at 63 (Rule 12(b)(1) and 12(b)(6) motions to dismiss); Huff v. Secretary of the Navy, 413 F. Supp. 863, 867 (D.D.C. 1976) (cross-motions for summary judgment); Staton v. Froehlke, 390 F. Supp. 503, 505, 507 (D.D.C. 1975) (cross-motions for summary judgment); Carlson v. Schlesinger, 364 F. Supp. 626, 628, 631-32 (D.D.C. 1973) (cross motions for summary judgment); Stolte v. Laird, 353 F. Supp. 1392, 1393, 1395 (D.D.C. 1972) (cross motions for summary judgment).

If the panel's opinion is left uncorrected, it virtually bars the courthouse door to Mr. New, who, in specific reliance upon Kauffman, alleged that "Plaintiff was unlawfully and unconstitutionally convicted by a court-martial, as affirmed by [the United States Court of Appeals for the Armed Forces] which failed to conform to U.S. Supreme Court standards, without having shown that conditions peculiar to military life justified such failure." *See* Compl. ¶ 37, R. 48, J.A. 19. Indeed, Mr. New specifically relied upon Kauffman to formulate and to advance his two major constitutional claims: (a) that the military courts' ruling — that lawfulness was not an element of the offense — "unlawfully and unconstitutionally denied his liberty and property without due process of law, contrary to the due process standards set forth by the U.S. Supreme Court in Gaudin v. United States, 515 U.S. 506 (1995), and in Jackson v. Virginia, 443 U.S. 307 (1979)" (Compl. ¶ 41, R. 48, J.A. 20); and (b) that the military courts' ruling — that the legality and constitutionality of the deployment for which the uniform was prescribed was a nonjusticiable "political question" — "unlawfully and unconstitutionally denied [Mr. New's] right to contest the prosecution's case against him, ... contrary to ... Due Process standards ... set forth ... in Crane v. Kentucky, 476 U.S. 683 (1986), and Simmons v. South

Carolina, 521 U.S. 154 (1994)." Compl. ¶ 44, R. 48, J.A. 20.

By its failure to follow Kauffman in its affirmance of the district court's decision granting the Government's motion to dismiss for failure to state a claim upon which relief may be granted, the panel, in effect, assessed the legal sufficiency of Mr. New's complaint by a standard **completely unknown and unknowable** at the time that the New complaint was drafted. Such an *ex post facto* application of a new standard to evaluate the legal sufficiency of Mr. New's complaint is totally unfair and unjust.

IV. THE PANEL FAILED TO APPLY THE FEDERAL RULE GOVERNING THE ADJUDICATION OF A RULE 12(b)(6) MOTION TO DISMISS.

As noted above, this appeal came to this Court on a ruling by the district court granting the defendant's motion to dismiss for failure to state a claim upon which relief can be granted. In assessing the correctness of such a ruling, this Court has consistently adhered to the federal rule that all "statement[s] of material fact [in the complaint] must be accepted as true," and that no facts may be "draw[n] upon ... from outside the pleadings." Taylor v. Federal Deposit Insurance Corp., 132 F.3d 753, 762 (D.C. Cir. 1997). Indeed, "the complaint is [to be] construed liberally in the plaintiff['s] favor ... grant[ing] plaintiff[] the benefit of all inferences that can be derived from the facts alleged." Kowal v. MCI Communications Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994). As the Supreme Court has definitively summarized the governing rule: "[Courts must] read the facts alleged in the complaint in the light most favorable to [the] petitioner[] [a]nd ... only affirm the dismissal of the complaint if 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 249 (1989).

The panel opinion utterly ignored this fundamental rule. Not once in its opinion did the panel acknowledge that the appeal had been taken from the district court's ruling dismissing Mr. New's complaint on a Rule 12(b)(6) motion. Nor did the panel make any effort to glean the facts of the case from the four corners of Mr. New's complaint. As a result, the panel misstated Mr. New's primary defense against the prosecutor's claim that the order to wear the U.N. uniform was lawful.

As alleged in paragraphs 11 and 14 of Mr. New's complaint, Mr. New's argument concerning the order's illegality was based primarily upon a Stipulation of Fact that the U.N. uniform prescribed for the Macedonian deployment was generally **unauthorized** by constitution, statute, or regulation. *See* Compl. ¶¶ 11, 14, R. 48, J.A. 12, 13. In disregard of this very specific allegation of **fact**, the panel erroneously attributed to Mr. New the prosecution's response to that stipulation — as alleged in paragraph 15 of the Complaint — as if the prosecution's response were Mr. New's primary defense. *Compare* Panel Opinion, A-1 ("New's defense **focused** on the lawfulness of the order — specifically its consistency with Army Regulation 670-1..., which permits commanders to require uniform modifications 'to be worn within [a] maneuver area,' par. 2-6d, or 'when safety considerations make it appropriate....'" (emphasis added)) *with* Compl. ¶ 15, R. 48, J.A. 13-14. Had the panel read Mr. New's complaint "liberally," as it was required under the federal rule, it would have acknowledged that the prosecution had made this claim in response to the Stipulation of Fact — to which it had agreed at the court-martial — that the uniform was otherwise unauthorized. *See* Compl. ¶¶ 11, 14-15, R. 48, J.A. 12-14.

By its failure to follow the rule governing review of grants of motions to dismiss for failure to state a claim upon which relief can be granted, the panel failed even to consider

whether the military courts gave any consideration to New's claim that his court-martial convictions did not conform to the Supreme Court's Due Process standards in Jackson v. Virginia, 443 U.S. 307, 319 (1979): that no conviction may be obtained by the prosecution if no "rational trier of fact could have found the essential element[] of [lawfulness of the order] beyond a reasonable doubt." *See* Compl. ¶ 41, R. 48, J.A. 20 and Brief of Appellant Michael New, p. 29. As clearly alleged in paragraph 15 of Mr. New's complaint, the prosecution **never** supported with **evidence** its contention that the otherwise unlawful U.N. uniform was justified as a "safety" measure in a "maneuver" area; rather, the prosecution supported its position only by **naked argument**. And, even then, the prosecution's argument was internally inconsistent and contradictory, contending on the one hand that "'the wearing of [UN] blue in a hostile environment is the best protection one can have from the boundless chaos of warfare'" and, on the other, that "the Macedonia operation was a noncombatant one ...." *See* Compl. ¶ 15, R. 48, J.A. 13-14. Instead of following the rule governing Rule 12(b)(6) motions, and construing the complaint most favorably to Mr. New, the panel did just the opposite, accepting, as a "presumption," the government's allegation that "safety considerations justified the uniform order," in disregard of Mr. New's allegation that the parties had stipulated that the uniform was generally unauthorized. *Compare* Panel Opinion, A-5 *with* Compl. ¶ 14, R. 48, J.A. 13.

Thus, even under its inappropriate standard of "fair consideration," the panel's decision is woefully deficient, having been made in disregard of the federal rule governing review of Rule 12(b)(6) motions.

CONCLUSION

For the reasons stated above, Mr. New's petition for rehearing en banc should be granted.

Respectfully submitted,

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