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

REPLY BRIEF OF APPELLANT MICHAEL G. NEW

HERBERT W. TITUS
PREMIER LAW GROUP
Suite 150
477 Viking Drive
Virginia Beach, VA 23452
(757) 486-8700

WILLIAM J. OLSON
JOHN S. MILES
WILLIAM J. OLSON, P.C.
Suite 1070
8180 Greensboro Drive
McLean, VA 22102
(703) 356-5070

HENRY L. HAMILTON
RATCHFORD & HAMILTON, LLP
1531 Laurel Street
Columbia, SC 29201

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Counsel for Appellant Michael G. New

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ARGUMENT

The Appellees, Secretary of Defense Donald H. Rumsfeld and Secretary of the Army Francis J. Harvey (collectively "Rumsfeld") have not just opposed, but belittled, the judicial appeals of Appellant Michael G. New's ("New") from his court-martial conviction. Rumsfeld has deprecated New for having "repeatedly raised the claims currently pending before this Court," alleging "[t]his matter has been litigated fully." Brief for Appellees ("Rumsf. Br."), pp. 5, 8. Further, Rumsfeld has depreciated New's claims as "simpl[e] disagree[ments] with the legal conclusions," disconnected from the actual facts of the case (*id.* at 6), and has disparaged New's motive, gratuitously asserting that New "will never agree that the issues have been fully litigated until he obtains the decision he seeks." *Id.* at 31.

However, it is Rumsfeld, not New, who has ignored the facts, scope, and substance of the appellate review that New has received from the courts. This Court should address each of New's four constitutional claims, **not** as those claims have been reinterpreted by Rumsfeld, but rather as they are **alleged in New's Second Amended Complaint** ("Complaint"), resolving all factual differences and inferences in favor of New. *See* Brief of Appellant Michael G. New ("New Br."), pp. 14-15.

I. THE RUMSFELD BRIEF MISAPPLIES THE LEGAL TEST GOVERNING COLLATERAL REVIEW OF NEW'S COURT-MARTIAL.

At both the beginning and ending of the Argument section of his brief, Rumsfeld has attempted to persuade this Court that an "extremely limited" version of the standard of "full and fair consideration" laid down in Burns v. Wilson, 346 U.S. 137 (1953), applies to each and every claim in New's four-count Complaint. *See* Rumsf. Br., pp. 5-6 and 33-34. Most significantly, Rumsfeld has argued that the District Court's rulings on claims included in both

Counts I and II should be affirmed on the basis of this limited review. *See id.*, pp. 12-19 and 25, n.18.

This is not the first time that Rumsfeld has attempted to misapply the "full and fair" standard to Counts I and II of New's complaint. He did so in the District Court below,[1] but without success. *See* U.S. *ex rel.* New v. Rumsfeld, 350 F. Supp. 2d 80, 89-92 (D.D.C. 2004) ("Rumsfeld"). Although Rumsfeld has given lip service to the fourfold standard to be applied to collateral reviews of court-martials in this circuit (*see* Rumsf. Br., p. 6), he has virtually ignored that standard, repeatedly urging this Court to affirm the District Court's ruling solely because New's "arguments were given full and fair consideration" in the District Court. *See id.* at 5-8.

Indeed, Rumsfeld has asserted that "**five** federal courts" have "given **full and fair** consideration" to all of New's arguments and rejected them all. *Id.* at 5 (emphasis added). To the contrary, New has obtained **appellate** review of his court-martial in only **three** courts — the Army Court of Criminal Appeals ("ACCA"), the Court of Appeals for the Armed Forces ("CAAF"), and the District Court.[2] More importantly, **none** of these courts gave "full and fair consideration" to all of New's substantive claims on **this** appeal. Rumsfeld's count or claim to the contrary is not just an exaggeration, but a miscalculated effort to create the false impression that New is wasting this Court's time with an obviously "meritless" appeal. *See*

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[1] *See* Memorandum in Support of Defendant's Motion to Dismiss, pp. 13-14, R. 50.

[2] To reach Rumsfeld's count, one would have to include either the court-martial itself and New's unsuccessful effort to obtain discretionary review by the Supreme Court, or New's **original** habeas corpus petition dismissed, without reaching the merits, by the District Court and affirmed by this Court (*see* Rumsf. Br., p. 2).

Rumsf. Br., p. 8.

Actually, New's claims merit this Court's careful review precisely because New's arguments have **not** been given "full and fair consideration." First, as CAAF Judge Sullivan pointedly observed, the "judicial eliminat[ion] [of lawfulness of an order] as an essential element of a disobedience offense" marked a "**radical departure** from our political, legal, and military tradition," with a bare majority upholding the military judge's unprecedented ruling. *See* United States v. New, 55 M.J. 95, 115 (2001) ("New II") (Sullivan, J., concurring in the result) (emphasis added). Second, **no** military appellate court judge gave **any** consideration whatsoever to the merits of New's claims that the order to wear the United Nations ("U.N.") uniform violated the United Nations Participation Act ("UNPA"), and the commander-in-chief and appointments clauses of Article II, Section 2 of, and the Thirteenth Amendment to, the United States Constitution. *See* Compl. ¶¶ 26-27, J.A. ___. Indeed, the District Court found that the military courts had "**improperly aggregated all** of [New's] claims of illegality under the rubric of a 'challenge to the President's use of the Armed Forces'" in disregard of the Supreme Court's Baker v. Carr standards. Rumsfeld, 350 F. Supp. 2d at 96. Finally, **none** of the military courts ever specifically addressed, much less resolved on the merits, New's claim that the Battle Dress Uniform ("BDU") of an American soldier could not be "augmented" by a U.N. uniform — which the Army had stipulated to be unauthorized either by law or regulation — without the specific consent of Congress, as provided for in Article I, Section 9, Clause 8, of the United States Constitution. *See* Compl. ¶¶ 14-16, 46-49, 51-56, J.A. ___. *See also* Part III.C., below.

Having thus failed to receive full and fair consideration of his several constitutional

claims in the military courts, New brought this collateral attack against his court-martial conviction in the District Court. *See* Compl. ¶ 2, J.A. ___. In his Complaint, New sought review of his claims in Counts: (a) I and II according to the standards laid down by this Court in Kauffman v. Secretary of the Air Force, 415 F.2d 991, 997 (D.C. Cir. 1969) (whether the "military rulings on constitutional issues conform to Supreme Court standards, unless it is shown that conditions peculiar to military life require a different rule") and Cothran v. Dalton, 83 F. Supp. 2d 58, 66 (D.D.C. 1999) (whether the military courts' "error[s] [are] 'so fundamental as to have resulted in a miscarriage of justice'"); and (b) III and IV according to the standards of the plurality opinion in Burns v. Wilson, 346 U.S. at 142, 144 (whether "a military decision has dealt fully and fairly" with the claims raised at a court-martial). *See* Compl. ¶¶ 39-56, J.A. ___.

The District Court, however, failed to address these claims as alleged in New's Complaint, erroneously twisting each claim and then dismissing each on the ground that the Complaint, as misstated, did not state a claim upon which relief can be granted. *See* New Br., pp. 18-21 (Count I), 31-35 (Count II), and 45-47 (Counts III and IV).

In sum, contrary to Rumsfeld's mistaken assertion that five federal courts have "determined … [that New] was afforded a fair trial, in full compliance with the Constitution" (Rumsf. Br. at 5), New's constitutional and statutory claims have not been reviewed in accordance with this Court's standards of collateral review governing court-martial convictions.

II. CONTRARY TO RUMSFELD'S ARGUMENT, NEW'S DUE PROCESS CLAIM IN COUNT I OF THE COMPLAINT IS NOT A SIXTH AMENDMENT JURY TRIAL CLAIM.

In an effort to rebut New's argument that the District Court misstated his Due Process claim in Count I of his Complaint as a Sixth Amendment jury trial claim (*see* New Br., pp. 18-21), Rumsfeld has charged that "[i]n **every** briefing he has filed with the **District Court since 1996**, [New] has argued Count I was grounded in both the 5th and 6th Amendments" and that **"[s]uddenly, after nearly a decade of litigation on this issue,** [New] changes course and avers that Count I is really a purely 5th Amendment claim." Rumsf. Br. at 10. This argument is demonstrably false, and is calculated to prejudice this Court's consideration of the merits of New's claim.

New alleged in Count I of his Complaint that — by the military courts' ruling that "lawfulness" of an order is not an element of the offense defined in 10 U.S.C. § 892(2) — he was denied his Due Process right that each and every element of the offense charged at his court-martial must be proved beyond a reasonable doubt to the military jury. *See* Compl. ¶¶ 39-41, J.A. ___. Although Rumsfeld would have this Court believe that New has been litigating his Count I Due Process claim in the **District Court** for **ten** years,[3] the record unmistakably shows that this claim did not come before the District Court until May 8, 2002. At that time, New presented his Due Process claim, precisely as stated in Count I of his

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[3] New's claim in Count I was **not** even before the district court in 1996. Nor could it have been. New filed his habeas corpus petition on January 16, 1996, three days **before** the military judge "indicated that he intended to rule as a matter of law that the October 1995 order … was … a matter of law … to be resolved wholly by the military judge, not the military jury." *See* Petition for a Writ of Habeas Corpus, R. 1 and Compl. ¶ 18, J.A. __.

Complaint,[4] supported by a memorandum stating that the court-martial's failure to conform to the Due Process standards of Gaudin and Jackson had deprived New of his **right** to a military jury, "as prescribed by 10 U.S.C. Section 851(c)," **not** as guaranteed by the Sixth Amendment.[5] And this is precisely the claim that New made at his court-martial, as alleged in paragraph 19 of his Complaint. *See* Compl. ¶ 19, J.A. ___. *See also* Record of Trial, Vol. 2, pp. 434-37. Thus, Rumsfeld's contention that New "presumably … recognized that he needed both the 6th Amendment's guarantees surrounding the right to a jury trial and the 5th Amendment's guarantees surrounding due process of law to anchor his claims in Count I" (Rumsf. Br., p. 10) is flatly contradicted by both the District Court and court-martial records.

Moreover, Rumsfeld's argument that New's Fifth Amendment Due Process claim cannot stand independent of a Sixth Amendment claim to jury trial is clearly wrong, and should be rejected as a matter of law. As CAAF Judge Everett observed, New's right to a jury trial was secured by 10 U.S.C. § 851(c), a statutory right that the military courts unlawfully and unconstitutionally took from New by wresting the word "lawful" out of 10 U.S.C.§ 892(2) contrary to Supreme Court standards of Due Process of Law:

> [T]he roles of the military judge and the court-martial members correspond to those of judge and jury in federal criminal trials. This result — although probably not constitutionally required — was intended by Congress when the [UCMJ] was enacted a half century ago. When Congress later passed the Military Justice Act of 1968 and changed the "law officer" title to "military judge," it made this intent even clearer. Accordingly, I conclude that

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[4] *Compare* ¶ 34(a) of Amended and Supplemental Petition for Writ of Habeas Corpus, with attached Amended and Supplemental Petition and Memorandum in Support, R. 25 *with* Compl. ¶¶ 40-41, J.A. ___.

[5] *See* Petitioner's Memorandum, pp. 20-21, R. 25.

> precedents like *United States v. Gaudin* … — which apply to trials in federal district court — apply equally to courts-martial. [New II, 55 M.J. at 129. (Everett, J., concurring in part and concurring in the result).]

III. THE RUMSFELD BRIEF RELIES ON A STRING OF INAPPOSITE PRECEDENTS.

A. Neither Cox Nor Yakus Refutes New's Claim in Count I that Lawfulness Is an Element of a 10 U.S.C. § 892(2) Offense.

In an effort to support his contention that the lawfulness of an order is not an element of the offense defined by 10 U.S.C. § 892(2), Rumsfeld has cited Cox v. United States, 332 U.S. 442 (1947) and Yakus v. United States, 321 U.S. 414 (1944). *See* Rumsf. Br. at 16. Neither case is relevant.

In Cox, two defendants were "indicted for leaving [a civilian public service camp] without permission," and another defendant was "indicted for failing to return after proper leave, in violation of § 11 of the Selective Training and Service Act of 1940 [("STSA")]." Cox, 332 U.S. at 443. All three defendants defended their actions on the ground that they had been wrongfully denied complete exemption from the draft as "ministers of religion" under § 5 of the STSA, not on the ground, as here, that such wrongful denial was an element of the offense charged. *Id.*, 332 U.S. at 443-52. Thus, the Supreme Court denied defendants' request **not** on the ground that the wrongful denial was not an element of the offense, and therefore, not subject to the jury trial guarantee, but because "[t]he concept of a jury passing independently on an issue previously determined by an administrative body or reviewing the action of an administrative body is contrary to settled federal administrative practice." *Id.*, 332 U.S. at 453.

Similarly in Yakus, a defendant, having been charged with violation of a maximum

price control regulation by the willful sale of beef at prices above the maximum, attempted to raise the defense that the regulation was invalid. *Id.*, 321 U.S., at 418. As in Cox, Yakus did **not** claim that the validity of the regulation in question was an element of the offense charged; rather, he claimed that the regulation "did not conform to the standards prescribed by the Act and that it deprived [him] of property without the due process of law…." *Id.* at 419. The Supreme Court denied the defense, **not** because it determined that the issues raised were not "elements" of the offense charged, but because: (a) the Emergency Price Control Act had specifically provided an administrative process by which the validity of proposed maximum prices could be raised (*id.* at 419-27); (b) the administrative process was the exclusive process for challenging the regulation (*id.* at 427-31); and (c) this exclusive process did not deprive defendant of his property without due process of law. *Id.* at 431-43.

Unlike the situations in Cox and Yakus, there was no independent administrative process available to New to contest the legality of the October 1995 order. *See* Perry, 919 F. Supp. 491 at 493-94. And unlike those cases, the offense with which New was charged contained, as part of the definition of the offense, the legality of the order. Thus, the rulings and reasoning in Cox and Yakus do not apply here.

B. Neither Ange, nor Conyers, nor Sanchez-Espinoza, nor Crockett, nor Lowry, nor Hariasiades, nor Antolok Refutes New's Count II Claims that the Order Violated UNPA.

In support of his contention that New's UNPA claims were properly dismissed by the military courts as nonjusticiable political questions, Rumsfeld has cited several cases in support of his claim that the decision "whether to deploy U.S. troops is not a judicial function." *See* Rumsf. Br. at 20. Relying primarily on Ange v. Bush, 752 F. Supp. 509 (D.D.C. 1990),

Rumsfeld has argued that inquiry into "the legal basis for the deployment of military personnel in support of the UN … 'asks the court to delve into and evaluate those areas where the court lacks the expertise, resources, and authority to explore.'" Rumsf. Br. at 20-21.

Neither Ange, nor any of the other cases cited by Rumsfeld in support of his argument, involved a presidential decision to deploy American troops on a U.N. mission under U.N. command, a decision explicitly governed by two statutes — 22 U.S.C. § 287d and 22 U.S.C. § 287d-1, enacted in 1945 and 1949, respectively. *See* New Br. at 35-40. Rather, the challenge in Ange was based on "the President's authority under the Constitution's War Powers Clause, U.S. Const. Art. I, § 8, cl. 11, and under the War Powers Resolution, 50 U.S.C. § 1541, *et seq.* (1973)." So was Conyers v. Reagan, 578 F. Supp. 324, 326, 327 (D.D.C. 1984), Sanchez-Espinoza v. Reagan, 568 F. Supp. 596, 598 (D.D.C. 1983), and Crockett v. Reagan, 558 F. Supp. 893, 895 (D.D.C. 1982), *affd.,* 720 F.2d 1355 (D.C. Cir. 1983), *cert. den.*, 467 U.S. 1251 (1984).[6] As pointed out in those cases, neither the constitutional War Powers provision nor the congressional War Powers resolution lays down any judicially discoverable rule governing the President's use of American armed forces **under U.S. command on a U.S. mission**, but leaves the relationship between Congress and the President fluid, subject to presidential discretion. *See, e.g.,* Ange, 752 F. Supp. at 513-14. In contrast, 22 U.S.C. §§ 287d and 287d-1 do **not** rest upon Congress's constitutional power to declare war, **but** rather upon its constitutional power to **make rules for the government and regulation of the land and naval forces** governing the deployment of American armed forces **under U.N.**

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[6] Although the challenge in Lowry v. Reagan, 676 F. Supp. 333 (D.D.C. 1987), was limited to the War Powers Resolution, the situation there is equally inapposite.

command on a U.N. mission. *See* New Br. at 37-40.

To be sure, 22 U.S.C. §§ 287d and 287d-1 do govern "the participation in" what Rumsfeld has characterized to be "a U.N. peacekeeping mission abroad … implicat[ing] the conduct of foreign affairs, an area that historically has been 'exclusively entrusted to the political branches of government.'" Rumsf. Br. at 20. But unlike Harisiades v. Shaughnessy, 342 U.S. 580 (1952), relied upon by Rumsfeld, application of those two sections of UNPA would **not** "require [this Court] to equate [its] political judgment with that of Congress." *See id.*, 342 U.S. at 590. To the contrary, their application would only require this Court to interpret and apply **rules** that, in the political judgment of Congress, were enacted to constrict a presidential decision to detail American troops to the service of the U.N. *See* New Br. at 38-40. Interpretation and application of such rules, even though linked to interpretation and application of the provisions of the U.N. Charter, are well within the competence and authority of the judiciary. *See, e.g.,* Japan Whaling Assn. v. American Cetacean Society, 478 U.S. 221, 229-30 (1986) ("The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.… [H]owever, the courts have authority to construe treaties …, and … interpreting congressional legislation is a recurring and accepted task for the federal courts.").

Finally, Rumsfeld has sought solace in Antolok v. United States, 873 F.2d 369 (D.C. Cir. 1989), which did not even apply the political question doctrine. Although one judge of the three-judge panel discussed the doctrine, one other expressly declined to concur with his views, and another found them "deeply flawed." *See id.* at 370, 379 and 390. Clearly,

Antolok does not help Rumsfeld here.

C. Neither Zobel, nor Fullilove, nor Eskra, nor Mendelsohn, nor UNPA, nor the Foreign Assistance Act of 1961 Refutes New's Claim that the Military Courts Failed to Give Full and Fair Consideration to His Article I, Section 9 Claim.

According to Rumsfeld, the military courts gave full and fair consideration to New's claim that the order to wear the U.N. uniform violated Article I, Section 9 of the Constitution because the military courts found that the order "enhanced the unit's tactical effectiveness and safety of the mission and therefore were permissible changes envisioned by Army Regulation 670-1, paras. 1-18 and 2-6d." Rumsf. Br. at 27-28. Article I, Section 9 does not, however, provide that an "emolument, Office, or Title, of any kind whatever from any … foreign State" may be granted by permission of the Army; it may be granted only by consent of Congress. *See* Article I, Section 9, Clause 8, U.S. Constitution. Thus, the military courts' finding that the U.N. uniform prescribed for the Macedonian deployment was permitted by Army regulation does **not** resolve, much less address, New's claim that the order, if obeyed, would have required him to violate the foreign emolument/office/title prohibition of Article I, Section 9.

Citing Zobel v. Williams, 457 U.S. 55, 69 n.3 (1982), Fullilove v. Klutznick, 448 U.S. 448, 531 n.13 (1980), Eskra v. Morton, 524 F.2d 9, 13, n.8 (7th Cir. 1975), Mendelsohn v. Meese, 695 F. Supp. 1474, 1490 (S.D.N.Y. 1988), and UNPA and the Foreign Assistance Act of 1961, Rumsfeld has attempted to remedy this failure, arguing that New has not shown: (a) "that a soldier's use of U.N. accouterments" does not "constitute …[an] 'accept[ance]' of a 'present,' 'Emolument,' office or title"; (b) "the United Nations is a

'Foreign State'"; or (c) "that Congress has not consented to such action." *See* Rumsf. Br. at 26-27, n.19. Rather than refuting New's claim that the military courts failed to give full and fair consideration to New's claim that the U.N. uniform was prohibited by Article I, Section 9, Clause 8 of the United States Constitution, the Rumsfeld brief actually supports it: There is not one whiff of evidence in the court-martial record, or in the opinions of the ACCA or CAAF, that the military courts addressed or resolved any of the issues Rumsfeld has discussed in footnote 19 of his brief.

IV. RUMSFELD'S BRIEF ATTEMPTS TO DISTORT CERTAIN ISSUES ON THIS APPEAL.

In his Summary of Argument, Rumsfeld has falsely presumed that New "does **not** dispute any of the facts" included in the Factual Background portion of the Rumsfeld brief. Rumsf. Br. at 5 (emphasis added). In fact, New vigorously disputes at least four of Rumsfeld's factual allegations, which appear to have been miscast so as to distort certain issues on this appeal.

A. New Has Suffered, and Will Continue to Suffer, Significant Deprivation of Liberty from His Bad Conduct Discharge.

Rumsfeld has erroneously minimized the consequences visited upon New as a result of his court-martial sentence to a bad conduct discharge, by insinuating that, apart from the discharge, New has suffered no "other deprivation of liberty." *See id.* at 3. Rumsfeld's claim directly contradicts the instructions of the military judge at New's court-martial:

> [T]he **ineradicable stigma** of a punitive discharge is commonly recognized by our society. A punitive discharge will place limitations on employment opportunities. And will deny the accused other advantages which are enjoyed by one whose discharge characterization indicates that he has served honorably. A **punitive discharge will affect an accused's future** with regard to his **legal**

> **rights**, economic opportunities and **social acceptability**.
> … A bad-conduct discharge is a **severe** punishment …. [Record of Trial, Vol. 3, pp. 946-47 (Jan. 24, 1996) (emphasis added). *See also* Complaint, ¶ 3 and Prayer for Relief, J.A. ___, ___.]

B. New's Objections to the Order Were Not Personal and Political, but Constitutional.

Rumsfeld has downplayed the nature of New's objections to the order to wear the U.N. patches and cap, characterizing them as merely a "reluctance to wear the U.N. accouterments." *See* Rumsf. Br., p. 4. According to the District Court opinion cited in support of this statement, however, New "informed" his superiors "that he **would not** wear U.N. insignia until he was provided with constitutional authority for the order." Perry, 919 F. Supp. at 493 (emphasis added). That is not an expression of "reluctance," but a statement of New's "refusal," to wear the U.N. insignia. And it is a statement of refusal based upon constitutional grounds, not upon individual conscience or political agenda.

According to Rumsfeld, New "decided to disobey orders that he did not agree with …, but that were otherwise legal." Rumsf. Br., p. 8. Indeed, Rumsfeld has attempted to dismiss New's "arguments" that the U.N. uniform was unlawful — regardless of the lawfulness or unlawfulness of the Macedonian deployment for which it was prescribed — "because they would unacceptably substitute [New's] **personal** judgment of the legality of an order for that of his superiors and the federal government." Rumsf. Br., pp. 28-29 (emphasis added). Furthermore, Rumsfeld would have this Court throw out all of New's arguments against the legality of the order on the ground that New's "personal political agenda does not justify disobeying the orders of his commanders." *Id.* at 29-30. In short, Rumsfeld has reduced New's arguments to "personal opinion" and "personal belief," implying that New's objections

are totally subjective, undeserving of an answer on the merits. *Id.* at 30, n.22.

This picture is totally inaccurate and completely unfair. From the beginning, New did not invoke religious or political objections to the order. Rather, he objected on the ground that to serve under U.N. command violated his oath to the United States Constitution. *See* Perry, 919 F. Supp. at 493. At his court-martial, New reiterated his objection, carefully specifying the constitutional provisions, statutory sections, and Army regulations upon which he relied in support of his contention that the order was unlawful. *See* Compl. ¶¶ 9-11, J.A. ___. Rumsfeld's argument that New's objection to the order was "personal" and "political" (*see* Rumsf. Br. at 29-30, n.22), and that his constitutional defense at the court-martial was just an expedient "effort to frame his arguments as a Constitutional issue" (*see id.* at 8), is unsupported by the record and should be rejected.

C. There Is No Lawful Basis for Shifting the Burden of Proof of the Unlawfulness of a Military Order onto a Defendant in a Court-Martial Charging a Violation of 10 U.S.C. § 892(2).

In a transparent effort to find some support his argument for shifting of the ultimate burden of proof of an order's legality from the prosecution to the defense in a court-martial for violation of a "lawful" order (*see* Rumsf. Br., p. 14, n.13, and p. 28), Rumsfeld has modified the facts surrounding New's decision not to obey the October 1995 order to wear the U.N. uniform. Rumsfeld has asserted that New's "non-commissioned officers explained to [New] that the U.N. accouterments **only** served to distinguish American soldiers from warring factions **in the area**, and that his **failure** to wear the prescribed uniform **constituted disobedience of a lawful order**." *See* Rumsf. Br., p. 4 (emphasis added). But the sentence from the District Court opinion upon which Rumsfeld has ostensibly relied **actually** reads:

"[New] was informed [by his non-commissioned officers] that the U.N. arm patch and headgear served to distinguish United States soldiers from warring factions in the **Republic of Macedonia** and that he would be **subject to discipline** if he disobeyed the order…." *See* Perry, 919 F. Supp. at 493 (emphasis added). By inserting the word "only," omitting the reference to Macedonia, and changing the nature of the warning given, Rumsfeld has embellished the circumstances in order to introduce a sense of urgency — as if the order to wear the U.N. uniform had been issued in a combat-like environment — when, in fact, it had been issued in advance in the Federal Republic of Germany, hundreds of miles away from what the prosecution would, at New's court-martial, insist was a necessary "safety" measure in a "maneuver" area. *See* Perry, 919 F. Supp. 493 and Compl. ¶ 15, J.A. ___.

The Rumsfeld brief's factual embellishment is objectionable, first, because it appears to be a calculated attempt to overcome the fact that, at New's court-martial, the prosecution introduced no evidence that the U.N. uniform was a "safety" measure in a "maneuver" area, having relied solely upon unsupported and contradictory representations in the prosecution's arguments to the military judge. *See* Compl. ¶¶ 15, 17, and 21, J.A. ___. But the embellishment is even more objectionable because it sets the stage for the Rumsfeld brief's overarching theme — that it was New's burden, not the prosecution's, to prove that the U.N. uniform was **not** justifiable as a "safety" measure in a "maneuver" area. *See* Rumsf. Br., p. 28.

Although Rumsfeld has acknowledged that the Uniform Code of Military Justice ("UCMJ") condemns **only** disobedience of "lawful" military orders (*see* Rumsf. Br. pp. 9-16), Rumsfeld has insisted that:

> In the final analysis, **this case is about orders. Soldiers must obey orders and failure to do so is done at their peril.** There is no more fundamental difference between the men and women who serve in the armed forces today and their counterparts in the rest of our society than the fact that members of our military, when told what to do, must do so unhesitantly. [*Id.* at 6-7 (emphasis added).]

Remarkably, Rumsfeld derived this statement from a quotation from In re Grimley, 137 U.S. 147, 153 (1890), as it appears in Parker v. Levy, 417 U.S. 733, 744 (1974). But Rumsfeld has put his own spin on the Grimley quotation in Parker, which actually reads:

> "An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier." [Parker, 417 U.S. at 744.]

New has never questioned the importance of prompt obedience to orders, nor the right of his superiors to command such obedience. He has only insisted that his "duty of obedience" is limited to "lawful" commands. And that is exactly the premise upon which UCMJ Article 92(2) is based — that a soldier may be court-martialed and convicted only if he, "having knowledge of [a] **lawful** order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order." *See* 10 U.S.C. § 892(2) (emphasis added). Indeed, the presumed lawfulness of an order is precisely the premise upon which the soldier's prompt "duty of obedience" rests — as the quotation from Colonel William Winthrop's Military Law and Precedents, cited in footnote 4 of Rumsfeld's brief, attests:

> [A]ll military authority and discipline are derived from one source — the Sovereign, so in our army every superior, in giving a **lawful** command, acts for and represents the President, as the Commander-in-Chief and Executive Power of the Nation.... [*see* Rumsf. Br., p. 7, n.4 (emphasis added).]

In his brief, however, Rumsfeld has disregarded the significant difference between a **presumption** of lawfulness and the **burden** of proving lawfulness. *See id.* at 14, n.13, and 28.

Indeed, this distinction is the very point upon which two CAAF judges rested their dissents from the majority decision that "lawfulness" was not an element of the offense. As CAAF Judge Sullivan, recalling his oath as a cadet at West Point to "at all times obey the **legal** orders of my superior officers," stated:

> As a cadet … and as a soldier, I was taught that (i) all **lawful** orders in the U.S. Army were to be obeyed; and (ii) however, **if you believed that an order was unlawful, you could disobey it but you would risk a court-martial where a "military jury" would either validate or reject your decision** to disobey. [New II, 55 M.J. at 117. (Sullivan, J., concurring in the result) (emphasis added).]

By asserting that "military orders must be strictly obeyed and not contested by subordinates" (*see* Rumsf. Br., p. 7), Rumsfeld would have this Court assume just the opposite — that "[s]oldiers must obey orders and failure to do so is done at their peril" of not being able to convince a military judge of the unlawfulness of an order. *Id.* at 6. *See also id.* at 29. That is not the traditional view, which holds that soldier disobeys an order "at his peril," because, at the time that he makes his decision to disobey, the soldier necessarily acts upon what he then knows, whereas "the facts of the case and reasons [for the order are] often unknown in part at least to himself and in the possession only of the superior." *See* W. Winthrop, Military Law and Precedents (U.S. War Dept., Wash., D.C.: 2d ed. 1920), quoted in New II, 55 M.J. at 118 (Sullivan, J., dissenting and concurring). According to Rumsfeld, however, a soldier disobeys **not** just at the peril of incomplete knowledge, but at the peril of not being able to sustain his "**heavy**" burden of proving the order's unlawfulness. Rumsf. Br. at 28 (emphasis added).

As applied to this case, Rumsfeld has argued that it was not enough for New to have

rebutted the presumption of legality of the order to wear the U.N. uniform — as he did, when the prosecution agreed to the Stipulation of Fact that the uniform, as such, was an unauthorized augmentation of his BDU. As CAAF Judge Sullivan observed, that constituted "**some** evidence that [the] order to wear UN badges was 'patently illegal'...." *See* New II, 55 M.J. at 127 (Sullivan, J., concurring in the result) (emphasis added). Instead, Rumsfeld has argued that New could have discharged his burden **only** by an affirmative "show[ing] that the uniform order was not authorized by regulation to maintain his constitutional challenge." Rumsf. Br., p. 28. Thus, Rumsfeld has rejected New's claim — that because the Stipulation of Fact rebutted the presumption that the legality of the U.N. uniform, the Army was required to come forward with evidence that it was otherwise lawful — on the ground that New has "turn[ed] the issue of lawfulness on end, [as] he tries, **yet again**, to **shift the burden of proving lawfulness onto the Army.**" Rumsf. Br., p. 28 (emphasis added). It is Rumsfeld — **not** New — who is doing the burden-shifting. And in his attempt to relieve the prosecution of the burden of proving beyond a reasonable doubt every element of the offense defined in 10 U.S.C. § 892(2), Rumsfeld has placed upon New an inordinate burden in violation of the Due Process Clause. *See* New Br., pp. 25-30.

D. The Order Was Issued under Conditions Inviting a Deliberative Response.

In an effort to cast doubt on New's resolve to disobey the order to wear the U.N. uniform unless he could be convinced of its constitutionality, Rumsfeld has stated that New "**concurred** with the counseling statements, and indicated that he understood the consequences and ramifications of his refusal to wear the prescribed uniform." Rumsf. Br., p. 4 (emphasis

added). Once again, Rumsfeld has rested a factual allegation upon the district court's original *habeas* decision in 1996 and, once again, he has misrepresented its contents. Not only did the 1996 opinion **not** indicate "concurrence," but it affirmatively stated that New responded to the counseling by "submit[ting] a statement to superior officers in his chain of command indicating that he viewed the U.N. Charter to be inconsistent with the United States Constitution and his oath of enlistment." Perry, 919 F. Supp. at 493.

According to Rumsfeld, "military orders must be strictly obeyed and not contested by subordinates" (Rumsf. Br. at 7), even though the circumstances in this case obviously did not require immediate obedience, there being a two-month period between the time that New was notified of the impending order and the order itself. But that fact did not deter Rumsfeld from citing Martin v. Mott, 25 U.S. 19 (1827), wherein a militia man disobeyed a presidential order to report for active duty pursuant to a statute that authorized the President to declare a military "exigency." *Id.*, 25 U.S. at 29. In rejecting the defense that the order was illegal, the Court wrote:

> The [President's] power … is to be exercised upon **sudden emergencies**, upon **great occasions of state**, and under circumstances which may be **vital** to the **existence** of the Union. A **prompt and unhesitating obedience** to orders is indispensable to the complete attainment of the object. [*Id.*, 25 U.S. at 30 (emphasis added).]

Conveniently, Rumsfeld omitted this portion of the opinion. Further, Rumsfeld omitted from his quotation from Colonel Winthrop — that a military order must be obeyed "without hesitation, with alacrity and to the full; nothing short of a physical impossibility…" (*see* Rumsf. Br., p. 7, n.4) — Winthrop's further observation that, in "time [of] 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." Winthrop, Military Law and Precedents 573, n.8 (italics original) (emphasis added).

And that is exactly what New did. The order issued to New to wear the U.N. uniform was **not** issued in time of war or in a combat zone. *See* Rumsf. Br., p. 20. The order to wear the U.N. uniform was "given in anticipation of a **future** deployment." *Id.* at 22 (emphasis added). Indeed, New was first advised "[o]n August 21, 1995, … that his unit would be deployed in October 1995 to … the United States contingent to the on-going United Nations Preventive Deployment Force," at which time New was "told that he, as well as the rest of his unit, would be required to wear the shoulder patch and headgear of the United Nations throughout the entire deployment." *Id.* at 3-4. Thus, New had a two-month period in which to "remonstrate" with his superiors that the order was unlawful. And remonstrate he did.

Throughout the month of September 1995, New was counseled and exhorted to obey the order, in response to which New submitted a written statement "indicating that he viewed the U.N. Charter to be inconsistent with the United States Constitution and his oath of enlistment" stating, in relevant part:

> "I am an American who was recruited for and voluntarily joined the U.S. Army to serve as an American soldier. I am not a citizen of the United Nations. I am not a United Nations Fighting Person. I have never taken an oath to the United Nations, but I have taken the required oath to support and defend the Constitution of the United States of America.
>
> "3. I am not trying to avoid a difficult or dangerous assignment or to get out of the Army. I served in Kuwait last year and have offered to serve anywhere in the world, in my American uniform, in the capacity as a U.S. Army medic under American command and U.S. Constitutional protections. I have worked diligently to be a good soldier, and have received early promotion

> and recognition for my efforts…. In order to avoid controversy or to avoid placing the Army in a bad light, I have requested a transfer to a unit that is not required to wear the U.N. uniform. I was told that such was not possible and I was even reluctantly willing to accept an honorable discharge, and I was willing to sadly and reluctantly withdraw from the U.S. Army quietly. That request was also denied. However, I will not wear a UN … uniform or serve under UN … Command, and I will strongly contest any discharge that is less than honorable." [Perry, 919 F. Supp. at 493.]

In an obvious effort to prejudice New's cause before this Court, Rumsfeld has likened New's objection to an order to wear a U.N. uniform for deployment for what Rumsfeld, himself, called a "U.N. peacekeeping mission" to a military order issued "in combat operations in both Afghanistan and Iraq." *Compare* Rumsf. Br., p. 20 *with* Rumsf. Br., p. 8. While that analogy is expressly stated only in the Summary of Argument, it is the undercurrent propelling the overarching theme of the brief that military orders must be quickly and unhesitatingly obeyed. The actual facts of this case, however, belie that claim — the order in question was issued two months in advance, in Germany, for a deployment scheduled in another country, hundreds of miles away, **not** for immediate execution in a combat zone. Insofar as Rumsfeld's arguments are tainted by the implication of an order issued in a combat situation (*see* Rumsf. Br., pp. 6-8, 18-22, 26-29, 33-34), they should be completely disregarded.

V. THE LEGALITY OF MILITARY ORDERS MUST NOT BE IMMUNE FROM ARTICLE III COURT REVIEW.

The bottom line for Rumsfeld is that the nation can ill afford review of the lawfulness of military orders by Article III courts, or for that matter, even by military juries — "especially … today when the military is engaged not only in United Nations missions around the world, but in combat operations in both Afghanistan and Iraq." *See* Rumsf. Br. at 8. Just

the opposite is the case.

The duty to obey is a duty to obey **lawful** orders. And soldiers are schooled in the UCMJ (*see* 10 U.S.C. § 937), including the difference between lawful and unlawful orders, in order to guard against the great danger of unquestioning, indiscriminate obedience to orders. If soldiers are expected to obey orders according to the UCMJ, it is incumbent upon the President, as commander in chief, to ensure that only lawful orders be issued by American commanders. The duty to issue only lawful orders is not, however, just for the soldiers' sake, but for the overall success of any military enterprise.

If legality of an order to assign an American soldier to serve under a foreign command is reviewable only by the military courts — which are part of the executive branch of government — and not by an independent judiciary, then the very foundation of liberty established by the constitutional separation of powers and checks and balances will be lost. *See Federalist No. 47.* As the Senate Committee on Armed Forces reported in support of the Military Justice Act of 1983:

> The Committee continues to believe that a sound and fair system of military justice is essential to a strong national defense. [W]e need a system of military justice which supports the commanders efforts to instill respect, obedience and … superior performance in their subordinates. At the same time any vehicle of military discipline cannot ignore the tenets of fundamental fairness which are the standards of a democratic society. To do so, and create the potential for the capricious exercise of the broad authority commanders have over their subordinates, would risk disrespect and disobedience in the ranks and possibly even a dilution of public support for our military system. [Senate Report No. 98-53, p. 2 (98th Congress, 1st Session: 1983).]

CONCLUSION

New has alleged, in each of the four counts of his Complaint, a claim upon which relief can be granted as required by Supreme Court standards of Due Process of Law and by this Court's standards of collateral review of court-martial convictions. For the reasons stated herein, and in New's opening brief, the District Court's decision dismissing each of the four counts of New's Complaint under F.R.Civ.P. Rule 12(b)(6) should be reversed, and the case remanded to the District Court on the terms requested in New's opening brief.

Respectfully Submitted,

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Herbert W. Titus
PREMIER LAW GROUP
Suite 150
477 Viking Drive
Virginia Beach, VA 23452
(757) 486-8700

William J. Olson
John S. Miles
WILLIAM J. OLSON, P.C.
Suite 1070
8180 Greensboro Drive
McLean, VA 22102
(703) 356-5070

Henry L. Hamilton
RATCHFORD & HAMILTON, LLP
1531 Laurel Street
Columbia, SC 29201

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Counsel for Appellant Michael G. New