IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

MICHAEL G. NEW,	)	PETITIONER'S REPLY TO RESPONDENT'S ANSWER TO PETITIONER'S WRIT-APPEAL PETITION FOR REVIEW OF ARMY COURT OF CRIMINAL APPEALS DECISION ON APPLICATION FOR EXTRAORDINARY RELIEF IN THE FORM OF A WRIT OF ERROR CORAM NOBIS
Petitioner-Appellant,	)	
v.	)	
UNITED STATES,	)	
Respondent-Appellee.	)	
	)	Crim. App. Dkt. No. 20120479
	)	USCA Misc. Dkt. No. 12-8025/AR

PETITIONER'S REPLY TO RESPONDENT'S ANSWER TO PETITIONER'S WRIT-APPEAL PETITION FOR REVIEW OF ARMY COURT OF CRIMINAL APPEALS DECISION ON APPLICATION FOR EXTRAORDINARY RELIEF IN THE FORM OF A WRIT OF ERROR CORAM NOBIS

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APPELLANT'S REPLY BRIEF

Pursuant to Rules 19(e) and 27(b) of the Rules of Practice and Procedure of the United States Court of Appeals for the Armed Forces, Petititoner-Appellant Michael G. New ("Mr. New") files herewith his Reply to Respondent-Appellee's Answer to his Writ-Appeal Petition for Review of Army Court of Criminal Appeals ("ACCA") Decision on Application for Extraordinary Relief in the Form of a Writ of Coram Nobis ("Answer").

ARGUMENT

According to the Government's Answer, (i) even though requested classified PDD 25 and PRD 13 contain exculpatory facts supporting Mr. New's defense that the deployment order violated a statute duly enacted by Congress, and (ii) even if these documents were determined to have been unconstitutionally and illegally withheld by the prosecution, Mr. New's coram nobis petition is "outside the scope of the court's purview as a political question," and therefore, "harmless beyond a reasonable doubt." *See* Answer at 15. Through this novel and mistaken application of the political question doctrine, the Government asks this Court to create a *de facto* exception to UCMJ 92(2), permitting a court-martial conviction of a member of the armed forces for violation of an unlawful order – if that order is issued by, or derives from, the President.

If the Government is allowed to prevail on this ground —

that the military courts have no jurisdiction to decide whether a military order emanating from the President is lawful — such orders would not just be deemed presumptively lawful, but conclusively lawful. Previously, neither the military judge at Mr. New's court-martial, nor ACCA on direct appeal, nor this Court ever used the political question doctrine to sweep Mr. New's United Nations Participation Act ("UNPA") defenses under the nonjusticiable rug. *See* Part II below. And the prosecution's nonjusticiability doctrine has absolutely no place in a coram nobis petition, in which the U.S. Supreme Court has determined that "Article I military courts have jurisdiction to entertain [such] petitions to consider allegations that an earlier judgment of conviction was flawed in a fundamental respect." *See* United States v. Denedo, 556 U.S. 904, 917 (2009).

I. TRIAL COUNSEL'S WITHHOLDING OF THE CLASSIFIED PDD 25 AND PRD 13 DOCUMENTS UNDERMINED THE NEUTRALITY AND INTEGRITY OF THE COURT-MARTIAL.

By its Answer, the Government has attempted to divert this Court's attention away from the threshold issues in this case: (i) whether the Government suppressed documents containing information favorable to Mr. New's claim that the military order that he disobeyed violated the UNPA, and (ii) whether that suppression impaired the "neutrality and integrity" of the court-martial of Mr. New.

A. The Government Improperly Ignores the Six Threshold Requirements.

While the Government does not specifically contest any of Mr. New's arguments as to how he has met the six "stringent threshold requirements" required by this Court to "establish eligibility for review"[1] of his coram nobis petition (*see* Answer at 10-11), it nevertheless insists it has not "concede[d]" the issue. *Id.* at 11 n. 52. To be sure, the Government asserts in a footnote that "appellant has arguably failed to fulfill the fifth requirement," but it asserts that it need not "address the six requirements in detail." *Id.*

In Denedo v. United States, 66 M.J. 114 (2008), this Court ruled differently: "[A]t a minimum" the legal standards governing substantive claims raised by a coram nobis petition "must ensure that relief is limited to circumstances in which the requested writ is 'necessary or appropriate' ...." *Id.* at 126. To implement this requirement, this Court "adopted":

> [T]he two-tiered evaluation used by the Article III courts for coram nobis review.... In the first tier, the petitioner **must** satisfy the threshold requirements for a writ of coram nobis.... **If** the petitioner does so, the court **then** analyzes, in the second tier, the [petitioner's substantive claim]. [*Id.* (emphasis added).]

As this Court explained in Denedo, Mr. New "must establish a clear and indisputable right to the requested relief." *Id.* It

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[1] *See* Denedo v. United States, 66 M.J. 114, 126-27 (CAAF 2008).

is, therefore, illegitimate for the Government to refuse to concede, but then ignore whether this Court has jurisdiction to entertain Mr. New's petition because his "substantive argument inarguably lacks merit." *See* Answer at 11 n.52.

B. The Court-Martial Was Fundamentally Flawed.

The first threshold issue — whether Mr. New's substantive claim resulted from a "fundamental flaw" in the court-martial — is particularly significant. By refusing to join issue, the Government hopes this Court will dispense with a serious inquiry into whether Mr. New is entitled to coram nobis relief to ensure the neutrality and integrity of the court-martial judgment against him.

According to the U.S. Supreme Court, however, coram nobis does not lie unless there is a "fundamental flaw in the [original] proceedings." Denedo, 556 U.S. at 916. Otherwise, there is no jurisdictional predicate upon which to reopen the court-martial: "[J]udgment finality is not to be lightly cast aside." *Id.* Like Article III courts, "Article I military courts have jurisdiction to ... consider allegations that an earlier judgment of conviction was flawed in a fundamental respect." *Id*, 556 U.S. at 917. It is only then that a court-martial judgment may be opened, and "the military justice system [authorized to] take all appropriate means, consistent with their statutory jurisdiction, to ensure the neutrality and integrity of their

judgments." *Id.*

The Government has made only a desultory effort to counter Mr. New's allegations that his court-martial proceeding was fundamentally flawed. *See* Answer at 15 n.67. And none of those assertions, relegated to a single footnote, is persuasive.

First, the Government contends that "[i]t is unclear from the face of the record whether trial counsel's reference to the [classified PDD 25] document being '8-10 pages' was a statement made in full knowledge of its truth, or merely **uninformed conjecture**." Answer at 15 n.67 (emphasis added). As pointed out in Mr. New's Petition, the record plainly shows that, prior to trial counsel making this statement:

- the military judge specifically asked trial counsel if the classified PDD 25 document was a document he "possess[ed]," or could readily "gain possession of" it, to which trial counsel replied "it certainly is." Petition at 15.
- In response to Mr. New's civilian defense counsel specific inquiry as to the length of the classified version of PDD 25, trial counsel responded "somewhere in the eight to 10 pages --." Petition at 16.

There is nothing in the record to indicate that trial counsel was engaging in "uniformed conjecture," — "express[ing] an opinion without sufficient evidence of proof,"[2] or "speculating"[3] as to the length of the classified document, or acting in some

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[2] Webster's Encyclopedic Unabridged Dictionary, p. 310 (1983).

[3] *Id.*

otherwise "uninformed" manner. Rather, trial counsel described the document to the military judge and civilian defense counsel in such a way, and in such context, as to create the distinct impression that he was speaking from personal knowledge, having previously reviewed the document in question.

Second, the Government has argued that "[a]ppellant goes too far claiming at this stage of the proceedings that the non-disclosure was due to prosecutorial misconduct," because the record does not reveal whether the PDD 25 document actually "disclosed to the defense at the time of trial ... matches the PDD 25 attached by appellant." Answer at 15 n.67. The record does show, however, that the document, as it was represented by trial counsel to be "eight to 10" pages long, could not possibly have been the 29-page classified PDD 25. Further, the record also shows that trial counsel adroitly maneuvered the military judge to agree that the order to produce the classified PDD 25 was no more than an order to produce a document of "eight to 10" pages, not the actual 29-page document. *See* Petition at 17-18.

Finally, the Government points the finger at defense counsel, stating that "[w]hat is clear [from the record] is that defense counsel never objected about receiving an **incomplete** copy of PDD 25." Answer at 15 n.67 (emphasis added). As the Government must know, civilian defense counsel had no idea that the PDD 25 document of "eight to 10 pages" was "incomplete."

Without such knowledge, civilian defense counsel had no ground upon which to "object," or to charge that trial counsel was deceiving him and the military judge.[4]

As pointed out in the Petition, what was objectionable was trial counsel's evasive actions to avoid performing his duty to produce information favorable to Mr. New, as required by the due process principle of Brady[5] and the broader discovery rules of Article 46 and R.C.M. 701. *See* Petition at 18-20, 24-26, 28-29. The prosecution's failure to comply with these governing standards constitutes a "fundamental flaw" in the court-martial proceedings, infecting the neutrality and integrity of the court-martial judgment against Mr. New.

II. NEW WAS PREJUDICED AT HIS COURT-MARTIAL BY THE PROSECUTION'S FAILURE TO COMPLY WITH BRADY, ARTICLE 46, UCMJ, AND R.C.M. 701.

A. New's Discovery Claims Have Not Been Previously Addressed.

The Government argues that Mr. New's coram nobis claim

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[4] The Government faults Mr. New for bringing this matter to the attention of this Court "16 years after the close of evidence in this case." Answer at 15 n. 62. There is, however, no time limitation governing a coram nobis writ. Denedo, 66 M.J. at 126. And the Government does not dispute Mr. New's claim that he could not have obtained the classified document by any other means at the time of the court-martial. *See* Petition at 22-23. Indeed, evidence of lawlessness in government is usually hidden. Few could be expected to undertake the herculean effort required to obtain declassification of classified documents. However Mr. New persevered, and uncovered improperly withheld evidence that the Government concedes is exculpatory. *See* Answer at 15.

[5] Brady v. Maryland, 373 U.S. 83 (1963).

alleging "the Government's violation of discovery obligations, whether this information would have been considered discoverable and whether appellant has suffered prejudice from such a discovery violation[,] has been **directly addressed** by every reviewing court." Answer at 11 n. 52 (emphasis added). This is flatly untrue. Mr. New's coram nobis petition was triggered by his: (i) having obtained in November 2009 a copy of the actual classified PDD 25, and (ii) having thereafter reviewed his court-martial records, wherein he discovered that the classified PDD 25 document, as described by trial counsel at his court-martial, did not match the declassified PDD 25 document that he had obtained from the William J. Clinton Presidential Library. Petition at 14-20. This declassification occurred well after 2007, the year upon which Mr. New had exhausted his direct appeal and collateral review efforts. *See* Petition at 2-3.

At the court-martial, Mr. New requested production of the classified versions of both PDD 25 and PRD 13. Prior to his 2009 discovery that the PDD 25 document produced at trial was not the classified document produced by trial counsel, Mr. New had no ground upon which to contest the suppression of either classified document. *See* Petition at 21-22. Thus, for the first time, Mr. New is pressing a claim contesting the constitutionality and legality of the prosecutor's actions that denied Mr. New access to exculpatory information contained in the classified PDD 25 and

PRD 13 documents.

B. The Political Question Doctrine Was Never Applied to Rule that New's Challenge to the Lawfulness of the Deployment Order under the UNPA Was Nonjusticable.

The Government candidly admits that "the [two classified] documents would have given the defense **further facts** to point to in their argument that the deployment was unlawful...." Answer at 15 (emphasis added). In essence, the Government's Answer concedes that classified PDD 25 and classified PRD 13 contain evidence favorable to Mr. New's legal claim that the Macedonian deployment, for which the U.N. uniform was prescribed, violated the UNPA. *See* Petition at 25-30.

However, the Government then argues that, even if "discoverable, the nondisclosure of [the classified PDD 25 and PRD 13] documents in this case was harmless beyond a reasonable doubt."[6] Answer at 15. The Government's sole support for this contention is that such documents are totally irrelevant, because "[e]very court," including the military judge, "ruled that the lawfulness of the deployment was a nonjusticiable, political question." Answer at 14. The Government is completely mistaken.

Citing the opinion of the Army Court of Criminal Appeals, the Government admits that, at his court-martial, Mr. New "'made

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[6] By applying this standard of review, the Government has conceded that the burden is on the Government to demonstrate beyond a reasonable doubt that the prosecution's failure to produce the classified PDD 25 and PRD 13 was harmless error. *See* Petition at 30.

numerous pretrial motions challenging the legality of the FYROM UNPREDEP mission and its uniform.'" Answer at 3-4. Relying on the ACCA opinion, the Government then admits that "[t]he military judge ruled that these were interlocutory matters and **determined** that both the FYROM UNPREDEP mission and the mission uniform modifications were **legal**." Answer at 4 (emphasis added). However, the Government then contradictorily states that "the military judge **determined** that the legality of the deployment was a **nonjusticiable political question**" citing the 2006 opinion of the U.S. Court of Appeals for the District of Columbia Circuit Answer at 4.

Had the Government stuck with the ACCA court record, rather than relied on the U.S. Court of Appeals' abbreviated summary of that record, it would have discovered that, after a careful review of the testimony and arguments presented at the court-martial — including argument based upon the UNPA[7] — and "upon ... consideration of the **evidence provided**, the military judge **determined** that the orders were **lawful**."[8] Had the Government relied on the ACCA description of the court-martial record, it would have discovered that the military judge ruled on the legality of the Macedonian deployment, without regard for the

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[7] United States v. New, 50 M.J. 729 at 736-738 (ACCA 1999).

[8] New, 50 M.J. at 737 (emphasis added).

prosecution's claim "that the questions of the President's representations and the United States participation in FYROM UNPREDEP were nonjusticiable political questions." *Id.* Instead, as ACCA found, the military judge limited its application of the political question doctrine to the "issues of the utilization and funding of the armed forces [which] are beyond the consideration of the military trial courts." New, 50 M.J. at 738.

If there is any doubt about the court-martial record, this court put it to rest on appeal. Addressing the legality of the order, this Court "[held] that the military judge did not err in **determining** that the order given ... to wear [the] uniform with UN accoutrements was **lawful.**" New, 55 M.J. at 107 (emphasis added). Specifically, this Court affirmed the military judge's ruling, rejecting Mr. New's arguments that:

> the order stems from an illegal deployment of the Armed Forces because President Clinton **misrepresented the nature of the deployment to Congress and failed to comply with the United Nations Participation Act.** [*Id.*, 55 M.J. at 107 (emphasis added).]

Unmistakably, this Court ruled against these arguments, not on the ground that they posed nonjusticiable political questions, but on the merits based on the documents then before it — because "they would unacceptably substitute [Mr. New's] personal judgment[9] of the legality of an order for that of his superiors

[9] If the Government would have produced the classified PDD 25 and PRD 13 documents to which Mr. New was entitled, they would have revealed that Mr. New's UNPA claims were based upon

and the Federal Government." 55 M.J. at 107. In contrast to this ruling on the merits of Mr. New's claim that the order violated the UNPA, this Court found that "[w]hile the military judge determined that the order to wear the U.N. insignia was lawful, he **properly declined** to rule on the **constitutionality** of the President's decision to **deploy** the Armed Forces in FYROM as a **nonjusticiable political question**."[10] 55 M.J. at 109 (emphasis added).

By his petition, Mr. New is not challenging the constitutionality of the Macedonian deployment. Instead, Mr. New is contesting the deployment's legality under the UNPA based upon new evidence — unconstitutionally and illegally suppressed at his court-martial[11] — evidence that even the Government admits is exculpatory.[12] Indeed, the two classified documents taken

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much more than his "personal judgment."

[10] In its recitation of this Court's opinion on direct review, the Government quotes extensively from Judge Effron's concurring opinion (*see* Answer at 6-7), as if his concurrence was written as an "explanation" of the majority's application of the political question doctrine when, in fact, he was stating only his own opinion. *See* 55 M.J. at 110. Even so, Judge Effron does not apply the political question doctrine to a direct conflict between a presidential order and an act of Congress, such as Mr. New's UNPA claim. Rather, Judge Effron found nonjusticiable only those generalized efforts "to adjudicate the relationships between Congress and the President regarding the deployment of military forces." *Id*, at 6.

[11] *See* Petition at 24-30.

[12] *See* Answer at 15.

together demonstrate that the Clinton Administration had implemented (i) a policy of deployment of American armed forces in support of U.N. peace operations in disregard of the specific limits set forth in UNPA, and (ii) a legislative strategy to modify those limits to conform to its policy at a later time. *See* Petition at 11-12. As decided by this Court on direct appeal, the political question doctrine – upon which the Government has opposed Mr. New's Petition – simply has no application here.

C. The Government's Misapplication of the Political Question Doctrine Should Be Rejected.

The Government's Answer would misuse the political question doctrine and leave it to the unreviewable prerogative of the President to insist that all of his orders, and any order predicated thereon, be obeyed by members of the armed forces without question. If such a doctrine were to be embraced, it would effectively put the President above the law. In effect, the Government is asking this Court to enshrine into law the legal theory used by President Richard M. Nixon to justify his actions even after he was forced to resign: "When the President does it, that means it is not illegal."[13]

In a promiscuous application of the political question doctrine, the Government asserts that, even if the military judge

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[13] *See* Interview with David Frost (May 20, 1977). http://www.youtube.com/watch?v=ejvyDn1TPr8

had such exculpatory documents, he would have reached the same result. While the Government might find superficial sustenance for this position in the ACCA's dismissive statement that the political question doctrine commands respect for the "President's powers as well as the powers of ... Congress," it would be hard-pressed to explain how allowing the President to violate the UNPA would demonstrate respect for Congress. Had the withheld classified documents been produced at Mr. New's court-martial, the deployment order would have been seen much more clearly as Mr. New saw it – evidencing disrespect for Congress and its laws. *See* Petition at 11-12.

The Government's position is simply this: if Mr. New is correct that the deployment order violated the UNPA, there is nothing that Mr. New, the military judge, court-martial panel, or any Article I or Article III court could do about it either previously or now. However, as this Court ruled on direct appeal, the political question doctrine applies only in those cases where the defense of unlawfulness is based on "the Constitution's allocation of war powers," not as here, where Mr. New's defense rests upon a claim of violation of a statute. *See* Ange v. Bush, 752 F. Supp. 509, 512-15 (D.D.C. 1990).

It is difficult to conceive of any other policy that could do more damage to the rule of law, especially to the harm that would ensue to the vitality of America's all-volunteer military

force. Reliance on the political question doctrine of nonjustiabiilty, as the Government has proposed, would transform a soldier's sworn duty to preserve, protect, and defend the Constitution into a blind obligation to obey the President as Commander-in-Chief.[14]

The ability to assert a defense of unlawfulness at a court-martial charging disobedience of a "lawful" order is an essential protection for all members of the armed forces. Current Article 92(2) expressly requires that a court martial be based only on the violation of a "lawful order." Even prior to the addition of this language, it had always been understood that an order had to be lawful. *See, e.g.*, U.S. v. New, 50 M.J. 95, 129 (Everett, J., concurring). If this Court were now to defer to the Government's argument, then members of the Armed Forces would be nothing more than personal pawns of the President, no longer under the protection of constitutionally-enacted statutes. Such misapplication of the political question doctrine would do grave damage to the military and to the nation.

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[14] In Germany during the period leading up to World War II, "All military personnel and all civil servants swore a new oath of personal loyalty to Hitler as Führer.... [T]he 'Führer principle' (Führerprinzip) extended down through the ranks of the ... armed forces. It allowed for agencies of the ... armed forces to operate outside the law when necessary to achieve the ideological goals of the regime, while maintaining the fiction of adhering to legal norms." U.S. Holocaust Memorial Museum, Holocaust Encyclopedia, "Third Reich." http://www.ushmm.org/wlc/en/article.php?ModuleId=10007331

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was filed electronically with the Court on July 16, 2012, and that a copy of the foregoing was transmitted electronically via Amber.j.roach3.mil@mail.mil, to Government Appellate Division, Acting Chief Lt. Col. Amber J. Roach on July 16, 2012.

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