No.

IN THE

Supreme Court of the United States

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

v.

DONALD H. RUMSFELD, SECRETARY OF DEFENSE, AND
FRANCIS J. HARVEY, SECRETARY OF THE ARMY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

HENRY L. HAMILTON
RATCHFORD & HAMILTON
1531 Laurel Street
Columbia, SC 29201
(803) 779-0700

Attorneys for Petitioner
**Counsel of Record*
November 15, 2006

HERBERT W. TITUS*
WILLIAM J. OLSON
JOHN S. MILES
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
Suite 1070
8180 Greensboro Drive
McLean, VA 22102
(703) 356-5070

QUESTIONS PRESENTED FOR REVIEW

This case involves the court-martial of former Army Specialist, Michael G. New, on a charge of disobedience of a lawful order. New was convicted and sentenced to a bad conduct discharge after the military judge ruled that the lawfulness of the order was not an element of the offense and need not be proven beyond a reasonable doubt — a ruling that one judge on the Court of Appeals for the Armed Forces described as "a radical departure from our political, legal and military tradition." New's attempts to obtain collateral review of his conviction by an Article III court in accordance with constitutional standards thus far have been unsuccessful, presenting the following questions for review with respect to the decision below of the U.S. Court of Appeals for the D.C. Circuit.

1. Did the court of appeals, in abandoning D.C. Circuit precedent and applying a "fair consideration" standard of review with respect to the due process claims set forth in petitioner's complaint collaterally attacking his court-martial conviction, apply an incorrect standard of review in conflict with decisions of other United States courts of appeals?

2. Should this Court reconsider and modify, or even overrule, the "full and fair consideration" standard of review governing collateral attacks on court-martial convictions established in Burns v. Wilson, 346 U.S. 137 (1953)?

3. Did the court of appeals, in upholding dismissal of petitioner's claim — that his due process right to proof beyond a reasonable doubt of every fact constituting the offense defined in 10 U.S.C. Section 892(2) was violated by a court-martial ruling that "lawful" was not an element of the offense defined therein — sanction the denial of due process to petitioner in a way that conflicts with relevant decisions of this Court?

4. Did the court of appeals, in upholding dismissal of petitioner's claim — that his due process right to a complete defense was denied by a court-martial ruling that the alleged illegality of the Macedonian deployment (for which the order to wear the prescribed United Nations uniform was prescribed) was a nonjusticiable political question — sanction the denial of due process to petitioner in a way that conflicts with relevant decisions of this Court?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Page

ARTICLES

OTHER

PETITION FOR WRIT OF CERTIORARI

Petitioner, former Army Specialist Michael G. New, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, which affirmed the decision of the United States District Court for the District of Columbia granting respondents' motion to dismiss New's collateral attack on his 1996 court-martial conviction for failure to state a claim upon which relief can be granted.

OPINIONS BELOW

On December 22, 2004, the district court granted respondents' motion to dismiss under Rule 12(b)(6), Federal Rules of Civil Procedure ("F.R.Civ.P."). United States *ex rel.* New v. Rumsfeld, 350 F. Supp. 2d 80 (D.D.C. 2004) (Appendix ("App.") 15a). On May 23, 2006, the court of appeals affirmed. United States *ex rel.* New v. Rumsfeld, 448 F.3d 403 (D.C. Cir. 2006) (hereinafter "New v. Rumsfeld") (App. 1a). On August 17, 2006, the court of appeals denied New's petition for rehearing en banc (App. 54a).

JURISDICTION

The district court and the court of appeals had subject matter jurisdiction of New's collateral attack on his court-martial conviction under 28 U.S.C. Section 1331. *See* Schlesinger v. Councilman, 420 U.S. 738, 748-53 (1975). This Court has jurisdiction under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Due Process Clause of the Fifth Amendment (App. 133a), the Thirteenth Amendment (App. 134a) and the commander in chief and appointment provisions

of Section 2 of Article II (App. 132a) of the United States Constitution.

TREATY PROVISIONS INVOLVED

This case involves Chapters VI and VII of the United Nations Charter (App. 135a, 138a).

STATUTES AND REGULATIONS INVOLVED

This case involves Articles 51 and 92(2) of the Uniform Code of Military Justice ("UCMJ") (10 U.S.C. Sections 851 and 892(2) (App. 143a, 145a) and Sections 6 and 7 of the United Nations Participation Act ("UNPA") (22 U.S.C. Sections 287d and 287d-1) (App. 146a, 147a). It also involves Army Regulation ("AR") 670-1, "Wear and Appearance of Army Uniforms and Insignia" (App. 151a-152a).

STATEMENT OF THE CASE

This case concerns a conflict among the circuits with respect to the standard of review to be applied by an Article III court to a motion to dismiss a complaint, collaterally attacking a court-martial conviction and sentence, for failure to state a claim upon which relief can be granted under Rule 12(b)(6), F.R.Civ.P. This case also concerns whether petitioner's complaint states actionable claims that his court-martial for violation of 10 U.S.C. Section 892(2) denied petitioner his liberty without due process of law.

In order to present his concerns to this Court, petitioner details herein his diligent efforts over an 11-year period to obtain meaningful Article III judicial review of his court-martial for refusing to obey an unlawful order. Thus far, the Government has been equally diligent, yet more successful, in blocking such

judicial scrutiny. To be sure, New has presented his case to lower courts on numerous occasions, yet his core claims have been sidestepped, and applicable precedents disregarded. This petition for writ of certiorari represents a final effort to preserve the process due an Armed Forces service member who believes that he has performed his duty to obey only lawful orders.[1]

1. The Court-Martial.

On October 17, 1995, then-Army Specialist Michael G. New ("New") was charged with having knowingly disobeyed a lawful order, namely, "to wear the prescribed uniform for the deployment to Macedonia, *i.e.*, U.N. patches and cap." *See* Second Amended Complaint ("2d Compl.") ¶ 8 (App. 172a). On January 24, 1996, New was convicted and sentenced to a bad conduct discharge. *Id.*

At his court-martial, New's principal defense was that the order to wear the U.N. uniform was unlawful. 2d Compl. ¶¶ 9-11 (App. 172a-174a). Yet, over New's Fifth Amendment Due Process objection, the military judge ruled that the lawfulness of the uniform was not an element of the offense charged to be proved beyond a reasonable doubt to the military jury, but an issue of law for the judge. 2d Compl. ¶¶ 18-19 (App. 176a-177a). Further, the military judge ruled that New's challenges to the unlawfulness of the order based on the legality and constitutionality of the Macedonian deployment for which the U.N. uniform had been prescribed were nonjusticiable political questions. 2d Compl. ¶¶ 9, 10, 16 (App. 172a-173a, 175a-176a). On appeal, the Army Court of Criminal Appeals ("ACCA") and

---

[1] *See* Statement of Chairman of the Joint Chiefs of Staff: "[I]t 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 (February 17, 2006).

the United States Court of Appeals for the Armed Forces ("CAAF") affirmed. *See* United States v. New, 50 M.J. 729 (1999), and United States v. New, 55 M.J. 95 (2001) (App. 55a), respectively.

2. Initial Habeas Corpus Petition.

On January 16, 1996, eight days before his court-martial conviction, New filed a petition for a writ of habeas corpus in the U.S. District Court for the District of Columbia, and a motion to stay his court-martial. The motion was denied, and the court-martial proceeded to trial. In the meanwhile, the district court ordered the Government to respond to New's habeas petition.

On March 28, 1996, the district court ruled against New solely on the ground of "comity," having concluded that: (a) "the quality of justice in the military tribunals is [not] inferior to that which is provided by Article III courts"; and (b) "[o]nce the military proceedings are completed, ... New may ... move to reopen this proceeding." United States *ex rel.* New v. Perry, 919 F. Supp. 491, 500 (D.D.C. 1996).

On November 25, 1997, the U.S. Court of Appeals for the District of Columbia Circuit affirmed on the ground that "New has failed to exhaust his remedies for relief in the pending court-martial action." New v. Cohen, 129 F.3d 639, 648 (D.C. Cir. 1997), *cert. denied*, 523 U.S. 1048 (1998). In so ruling, the court of appeals observed that, while New's bad conduct discharge "foreclosed" a collateral attack by means of a habeas corpus petition, New "may be able" to obtain Article III court review pursuant to 28 U.S.C. Section 1331, citing Kauffman v. Secretary of the Air Force, 415 F.2d 991, 994 (D.C. Cir. 1969). *See* New v. Cohen, 129 F.3d at 648.

3. Habeas Proceeding Reopened.

On May 8, 2002, following unsuccessful appeals to ACCA and CAAF, and an unsuccessful petition for review by this Court,[2] New filed a motion to reopen his 1996 habeas corpus proceeding with leave to file an amended and supplemental petition for a writ of habeas corpus collaterally attacking his court-martial conviction and sentence. On June 18, 2002, the district court granted New's motion to reopen, allowing him to file an amended complaint "which sets forth an appropriate jurisdictional basis and sufficient facts upon which to sustain his claim," but denied his motion to file an amended habeas petition. On July 1, 2002, New filed his amended complaint, withdrawing his allegation of jurisdiction pursuant to 28 U.S.C. Section 2242, and substituting therefor allegations of jurisdiction resting upon 28 U.S.C. Sections 2241, 1331, 1361 and 2201. On March 17, 2004, New filed a Second Amended Complaint (App. 170a), waiving his right to seek damages under the Tucker Act, and continuing to rely on 28 U.S.C. Section 1331 to establish jurisdiction of his nonhabeas collateral attack, as provided in Kauffman v. Secretary of the Air Force, *supra.* *See* United States. ex. rel. New v. Rumsfeld, 350 F. Supp. 2d 80, 87 (App. 21a-22a).

4. Current Collateral Attack.

Counts I and II of New's Second Amended Complaint invoked the Kauffman ruling 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

---

[2] *See* United States v. New, 55 M.J. 95, *cert. denied*, 534 U.S. 955 (2001).

F.2d at 997. Accordingly, in **Count I** of his Second Amended Complaint, New alleged that CAAF's ruling that lawfulness was not an element of the offense defined in 10 U.S.C. Section 892(2) — which prohibits failure to obey "any ... **lawful** order issued by a member of the armed forces" (emphasis added) — denied him "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)." (Emphasis added.) 2d Compl. ¶¶ 39-41 (App. 181a). In **Count II**, New alleged that CAAF's ruling that New's defense — that the order which he was charged of disobeying was unlawful because the deployment for which it had been issued was unlawful — was a nonjusticiable political question "did not conform to Supreme Court standards" governing political questions, and, as a consequence, New was "denied the right to contest the prosecution's case against him ... **contrary to the Due Process standards of the United States Constitution, as set forth and confirmed by the U.S. Supreme Court** in Crane v. Kentucky, 476 U.S. 683 (1986), and Simmons v. South Carolina, 521 U.S. 154 (1994)." (Emphasis added.) 2d Compl. ¶¶ 42-44 (App. 182a).

5. Complaint Dismissed for Failure to State a Claim.

When respondents moved to dismiss New's Second Amended Complaint, under Rule 12(b)(6), F.R.Civ.P., the district court purported to examine its legal sufficiency according to the standard of review set forth in Kauffman:

> Noting that the Supreme Court has "never clarified the standard of full and fair consideration, and it has meant many things to many courts," the D.C. Circuit held [in Kauffman] 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".... [U.S. *ex rel.* New v. Rumsfeld, 350 F. Supp. 2d at 89.] (App. 27a).

Notwithstanding the Rule 12(b)(6) admonition to construe New's complaint liberally in his favor, and notwithstanding the explicit reference in Count I to the **Fifth Amendment** due process clause, the district court **misread Count I** as having stated a claim that "the military judge's failure to submit the [lawfulness of the order] violated petitioner's **Sixth Amendment right to jury trial."** New v. Rumsfeld, 350 F. Supp. 2d at 92 (App. 32a-33a) (emphasis added). Citing Supreme Court cases holding that the Sixth Amendment jury trial right does not apply to courts-martial, the court summarily dismissed Count I of the complaint. *See id.,* 350 F. Supp. 2d at 92-93. (App. 33a).

As for Count II, the district court criticized the military courts for not conforming to Supreme Court standards governing political questions, having "improperly aggregated all of [New's] claims of illegality under the rubric of a 'challenge to the President's use of Armed Forces," instead of "consider[ing] individually the justiciability of each of petitioner's specific challenges to the deployment order." *Id.* at 96. (App. 39a). Nevertheless, the district court dismissed New's claim — stating that the political question doctrine "does not exist to protect or advantage government litigants," even though the court acknowledged that the doctrine "works to the government's benefit in this case ... prevent[ing] the normal presumption of a military order's lawfulness from being rebutted." *Id.,* 350 F. Supp. 2d at 95. (App. 38a). The district court failed to address New's due process claim that the wrongful invocation of the political question doctrine had deprived New of his due process right to a "complete defense," contrary to Supreme Court

standards. *See id.*, 350 F. Supp. 2d at 93-101. (App. 34a-50a).

6. Appeal to the U.S. Court of Appeals for the D.C. Circuit.

New's appeal to the U.S. Court of Appeals for the D.C. Circuit challenged the district court's misconstruction of Count I of his complaint as one alleging a Sixth Amendment jury trial claim. Pointing to explicit language referring to the Fifth Amendment due process clause in Count I, New argued not only that the district court failed to liberally construe the complaint's allegations, but that it also was mistaken when it stated that "[w]ithout the jury trial guarantees of the Sixth Amendment ... due process alone is insufficient to give [New] what he seeks." *See* New v. Rumsfeld, 350 F. Supp. 2d at 93, n.8. (App. 33a).

Further, New contended that in both the Gaudin and Jackson cases cited in Count I, the Supreme Court had recognized that the Fifth Amendment due process requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of jury trial, while interrelated, are independently rooted. As New pointed out, the Supreme Court first laid down the Fifth Amendment due process requirement of proof beyond a reasonable doubt in a juvenile proceeding which — like a court-martial — is not subject to the Sixth Amendment right to jury trial. *See* In re Winship, 397 U.S. 358, 364 (1970), and McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1971).

As for Count II, New contended that, although the district court had correctly ruled that the military courts had failed to apply the Supreme Court's standards governing political questions, it erroneously had failed to address whether the military courts' invocation of the political question doctrine had denied New's due process right to contest the prosecution's case against him, as guaranteed by Crane v. Kentucky, *supra*, and

Simmons v. South Carolina, *supra*. New App. Br., pp. 31-35, Docket No. 05-5023, U.S. App. D.C. Further, New contested the district court's resolution of New's fourfold legal and constitutional objections to the Macedonian deployment, with special emphasis upon the district court's erroneous disposition of New's claims under the United Nations Participation Act, which contains judicially enforceable rules limiting the power of the President to deploy American armed forces members into service of the United Nations. New App. Br., pp. 35-40, Docket No. 05-5023, U.S. App. D.C.

7. The Court of Appeals Panel Opinion.

The court of appeals affirmed the district court, concluding that the military courts had given "fair consideration" to New's due process claims. *See* New v. Rumsfeld, 448 F.3d 403, 408-11 (D.C. Cir. 2006) (App. 1a, 7a-14a). With respect to Count I of his complaint, the panel disregarded New's allegations that the parties had stipulated that the U.N. uniform was generally unauthorized, and that the prosecution had utterly failed to prove its contention that the U.N. uniform in this case was justified by an exception allowing "foreign insignia" as a safety measure in a maneuver area. *Compare id.*, 448 F.3d at 405, 409 (App. 2a-3a, 9a-11a) *with* 2d Compl. ¶¶ 14-16 (App. 174a-176a). The panel effectively relieved the prosecution of its burden to show that the U.N. uniform fit within this "safety exception," placing the burden upon New to show otherwise. *See* New v. Rumsfeld, 448 F.3d at 409-10 (App. 9a-11a). Having done so, the panel then found "no fundamental defect in [CAAF's] consideration of the issue." *Id.*, 448 F.3d at 410 (App. 11a).

In like manner, the panel did not review New's allegations in Count II of his complaint that the failure of the military courts to abide by Supreme Court standards governing political questions had prevented New from contesting the lawfulness of the order

on the ground that the deployment for which the order was issued was unlawful. *See id.*, 448 F.3d at 410-11 (App. 11a-14a). Rather than making an independent determination that invocation of the political question doctrine conformed with Supreme Court standards (a) governing such questions or (b) insuring the due process right to a complete defense — as alleged in New's complaint — the panel simply asserted that "the military courts' use of the political question doctrine deserves deference...." *Compare id.*, 448 F.3d at 410 (App. 12a) *with* 2d Compl. ¶¶ 42-44 (App. 182a).

8. Petition for Rehearing En Banc.

New's petition for a rehearing en banc brought to the entire court's attention that the "fair consideration" standard of review applied by the panel to New's collateral attack on his court-martial conviction had been specifically rejected as "vague and watered-down" in Kauffman v. Secretary of the Air Force, 415 F.2d 991, 997 (D.C. Cir. 1969). Petition for Rehearing En Banc by Appellant Michael G. New ("New Rehear. Pet."), pp. 1, 8 (App. 153a, 160a). New further documented that the Kauffman standard — military court rulings on constitutional questions must "conform to Supreme Court standards, unless it is shown that conditions peculiar to military life require a different rule" — was the prevailing rule in the D.C. Circuit. New Rehear. Pet., pp. 8-10 (App. 160a-162a). And New demonstrated that the panel had adopted a different standard, without discussion of Kauffman and in utter disregard of the impact that its deviation from the Kauffman rule actually placed upon New, and would place upon litigants in the future. New Rehear. Pet., pp. 10-11 (App. 165a-166a).

On August 17, 2006, the court of appeals denied New's petition for rehearing en banc. (App. 54a.)

REASONS FOR GRANTING THE WRIT

I. The Standard of Review Applied by the Court of Appeals to New's Collateral Attack on His Court-Martial Conviction Conflicts with the Standards of Review Applied by Other Courts of Appeals, Calling for the Exercise of this Court's Supervisory Power to Settle an Important Federal Question.

Only four years ago, then-Circuit Judge Samuel Alito observed that "[t]he degree to which a federal habeas court may consider claims of errors committed in a military trial has long been the subject of controversy and remains unclear." Brosius v. Warden, 278 F.3d 239, 242 (3d Cir. 2002). "Nearly 50 years after it was decided," he further noted, this "Court's decision in Burns v. Wilson, 346 U.S. 137 ... (1953) is still the leading authority." *Id.*, 278 F.3d at 242-43. Yet, after all these years, he declared, "[l]ower courts have had difficulty applying the Burns 'full and fair' test," citing the District of Columbia Circuit Court's comment in Kauffman v. Sec. of the Air Force, 415 F.2d 991, 997 (D.C. Cir. 1969), that Burns "'has meant many things to many courts.'" Brosius, 278 F.3d at 243.

A. Conflict among the Circuits.

In the 37 years since Kauffman, the Burns "full and fair consideration" test has continued to mean "many things to many courts."[3] After conducting its own review of the Burns decision,

---

[3] Only the Second, Fourth, Sixth and Seventh Circuits appear to have escaped the unenviable task of having to interpret and apply the Burns test. *See* Kasey v. Goodwyn, 291 F.2d 174, 178 (4th Cir. 1961); Baker v. Schlesinger, 523 F.2d 1031, 1035 (6th Cir. 1975); and Chandler v. Markley, 291 F.2d 157, 160 (7th Cir. 1961). There appears to be no court of appeals opinion in the Second Circuit. *See* J. Theuman, "Review by Federal Civil

the Kauffman court concluded that its "full and fair" test "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." *Id.*, 415 F.2d at 997. Until now, this rule has prevailed in the District of Columbia Circuit and has been applied by at least one district court in the Second Circuit. *See, e.g.,* Avrech v. Secretary of State, 477 F.2d 1237 (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); and New v. Rumsfeld, 350 F. Supp. 2d at 89 ("The governing precedent in this Circuit is Kauffman....") (App. 26a). *See also* Melvin v. Laird, 365 F. Supp. 511, 516 (E.D.N.Y. 1973).

By contrast, the courts of appeals in the First, Third, Eighth, and Ninth Circuits have concluded that the Burns rule left the door open for an independent review of constitutional legal claims made in a collateral attack on a court-martial conviction, even though such claims had received "full and fair consideration" in the military courts. *See* Allen v. VanCantford, 436 F.2d 625, 629-30 (1st Cir. 1971); Levy v. Parker, 478 F.2d 772, 779-83 (3d Cir. 1973), *rev'd on other grounds sub nom.* Parker v. Levy, 417 U.S. 733 (1974); Harris v. Cicone, 417 F.2d 479, 481 (8th Cir. 1966); Hatheway v. Secretary of the Army, 641 F.2d 1376, 1380 (9th Cir. 1981). In the Eighth and Ninth Circuits, however, this rule appears not to have been followed

---

Courts of Court-Martial Convictions — Modern Status," 95 A.L.R. Federal 472, 526-27 (1989). *See also* J, Chapman, "Reforming Federal Habeas Review of Military Convictions: Why AEDPA Would Improve the Scope and Standard of Review," ("Reforming Habeas Review"), 57 *Vanderbilt L. Rev*. 1387, 1399-1402 (2004).

consistently, leading one commentator to conclude that the courts in those circuits employ "an ad hoc approach."[4]

In the Federal Circuit, the court of appeals has endorsed the Court of Federal Claims' interpretation of Burns, deferring to the "full and fair consideration" of factual claims by the military courts, but conducting an independent examination of "serious" constitutional legal claims irrespective of whether such legal claims were fully and fairly considered by the military courts. *See* Bowling v. United States, 713 F.2d 1558, 1560-61 (Fed. Cir. 1983), *affirming* Bowling v. United States, 552 F. Supp. 54, 56-58 (Cl. Ct. 1982). This fact/law dichotomy was first launched in the Tenth Circuit in Kennedy v. Commandant, 377 F.2d 339 (10th Cir. 1967), where the U.S. Court of Appeals announced that it had "jurisdiction to determine whether the accused was denied any basic right guaranteed to him by the Constitution," unless "the constitutional issue involves a factual determination, [where] our inquiry is limited to whether the military court gave full and fair consideration to the constitutional questions presented." *Id.*, 377 F.2d at 342.

In 1990, in Dodson v. Zelez, 917 F.2d 1250, 1252-53 (10th Cir. 1990), the Court of Appeals for the Tenth Circuit abandoned the Kennedy fact/law dichotomy, joining with the en banc decision of the Fifth Circuit which had construed the "full and fair" test in Burns to require application of an elaborate "four-prong test," weighing in each case: (1) the substantiality of the constitutional claims; (2) the nature of the dispute, whether it be

---

[4] *See* J. Chapman, "Reforming Federal Habeas Review," 57 *Vanderbilt L. Rev.* at 1400. *Compare* Harris v. Cicone, 417 F.2d at 481 *with* Swisher v. United States, 354 F.2d 472, 476 (8th Cir. 1966). *Compare also* Hatheway, 641 F.2d at 1380 and Daigle v. Warner, 490 F.2d 358, 364-66 (9th Cir. 1974) *with* Broussard v. Patton, 466 F.2d 816 (9th Cir. 1972) and Sunday v. Madigan, 301 F.2d 871, 873 (9th Cir. 1962).

fact or law; (3) the special needs, if any, of the military; and (4) the consideration given to the claim by the military courts. *See* Calley v. Calloway, 519 F.2d 184, 199-203 (5th Cir. 1975). *See also* J. Chapman, "Reforming Habeas Review," 57 *Vanderbilt L. Rev.* at 1400.

In his Brosius opinion, Judge Alito acknowledged that the Tenth Circuit "has the most experience with habeas petitions filed by service members due to the location of the Disciplinary Barracks at Ft. Leavenworth, Kansas," but he and his two colleagues declined to follow its lead. After "abandon[ing] any hope of extracting a rule,"[5] from Burns, the Brosius court pioneered its own "unique"[6] approach:

> Whatever Burns means ... our inquiry in a military habeas case may not go further than our inquiry in a state habeas case.... Thus, we will **assume — but solely for the sake of argument —** that we may review determinations made by military courts **in this case** as if they were determinations made by state courts. Accordingly, we will **assume** that 28 U.S.C. § 2254(e)(1) applies to findings of historical fact made by the military courts [and] in considering other determinations made by the military courts, we will **assume** that 28 U.S.C. § 2254(d) applies. [Brosius, 278 F.3d at 245 (emphasis added).]

To add to the confusion and conflict, the panel in the instant case fashioned its own unique twist on Burns. The panel (a) ignored completely the Kauffman rule, even though it has

---

[5] *See* J. Chapman, "Reforming Federal Habeas Review," 57 *Vanderbilt L. Rev*. at 1401-02.

[6] *Id.* at 1401.

been the ruling precedent in the District of Columbia Circuit,[7] (b) dismissed summarily the four-factor test for "explicit review for constitutional violations," even though rendered by the full court of appeals in the Fifth Circuit,[8] and (c) brushed aside the Brosius effort including a definitive set of standards to harmonize the collateral attacks on court-martials with the statutory standards afforded state convictions review.[9] Instead, the panel invented an entirely new rule, purporting to apply "*Burns's* 'fair consideration'" test, but limiting its application to "non-habeas review ... of military judgments." *See* New v. Rumsfeld, 448 F.3d at 408 (App. 7a).

To reach this conclusion, the panel omitted from its discussion of Burns any reference to the paragraph in the Burns plurality decision that called for a review of the record to ascertain whether "a military decision has dealt **fully and fairly with an allegation in** [an] application" for habeas corpus. *Compare* New v. Rumsfeld, 448 F.3d at 407-08 (App. 5a-7a) *with* Burns v. Wilson, 346 U.S. at 142-44 (emphasis added). Instead, the panel transformed the Burns "full and fair" test into a meagre "fair consideration" one in a non-habeas collateral attack. *See* New v. Rumsfeld, 448 F.3d at 408 (App. 7a).

---

[7] *Compare* New v. Rumsfeld, 448 F.3d at 406-08 (App. 4a-7a) *with* 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 (D.D.C. 1972).

[8] *See* New v. Rumsfeld, 448 F.3d at 407-08 (App. 6a).

[9] *See* New v. Rumsfeld, 448 F.3d at 407-08 (App. 6a-7a).

In order to reach this unprecedented conclusion, the panel turned to this Court's opinion in Schlesinger v. Councilman, 420 U.S. 738, 753 (1975), from which it erroneously drew the lesson that "non-habeas review is if anything more deferential than habeas review of military judgments...." New v. Rumsfeld, 448 F.3d at 408 (App. 7a). But the Councilman "point" on which the three-judge panel relied did **not** draw a distinction between the standard of review in habeas and nonhabeas collateral attacks. Rather, Councilman's holding spoke only to the difference between the jurisdictional bases of the two proceedings. *Id.*, 420 U.S. at 750-53. Indeed, the Councilman court did not even address the merits of the constitutional claim, refraining on the equitable ground that the petitioner had failed to exhaust his "remedies in the military system." *Id.*, 420 U.S. at 758-59.

Remarkably, the panel apparently found no opinion supporting its view that Councilman ushered in a more deferential standard of review governing collateral attacks on court-martial convictions, because the petition did not meet the "custody" requirements of a habeas corpus petition. *See* New v. Rumsfeld, 448 F.3d at 406-08 (App. 4a-7a).[10] Instead, by drawing a distinction between habeas and nonhabeas collateral attacks, the panel decision in this case has added to the conflict over Burns among the circuits. Additionally, it has created confusion within the District of Columbia Circuit, a confusion that the entire appellate court refused to address in response to New's petition for rehearing en banc.

B. Confusion Within the District of Columbia Circuit.

As New pointed out in his brief in support of his petition for rehearing en banc, the panel ruling applying its version of the

---

[10] *See also* J. Theuman, "Review by Federal Civil Courts of Court-Martial Convictions — Modern Status," 95 ALR Federal 472, 524-41 (1989).

Burns "fair consideration" test directly contradicts Kauffman. New Rehear. Pet., pp. 6-11 (App. 159a-164a). First, like New's collateral attack, the collateral attack in Kauffman was a nonhabeas proceeding. *See* Kauffman, 415 F.2d at 995. Second, the Kauffman court, after careful review of "full and fair" consideration language in Burns, rejected that test, dismissing it as "a vague and watered-down standard," totally inadequate to confer the "benefits of collateral review of military judgments ... [in] civilian courts." *See* Kauffman, 415 F.2d at 997. Third, the panel's idiosyncratic "fair consideration" test undermines the Kauffman standard that dictates independent judicial "review [of] constitutional rulings of [military courts to] find [whether] the[y] [are] correct by prevailing Supreme Court standards." *See id.*

The panel's inexplicable refusal not only to adhere to the Kauffman standard, but to ignore it altogether, undermines the Kauffman precedent, leaving it on the books without guidance to future litigants on how to evaluate and then compose a nonhabeas collateral attack complaint, and without guidance to the district court judges in the District of Columbia Circuit on how to appraise the sufficiency of such a complaint on a motion to dismiss under Rule 12(b)(6), F.R.Civ.P., or the merits of any claim in such a complaint on a motion for summary judgment under Rule 56, F.R.Civ.P. Furthermore, the panel decision has prejudiced New who, in reliance on the Kauffman standard, wrote Counts I and II of his complaint. *See* 2d Compl., ¶¶ 37, 41 and 44 (App. 180a-182a). By assessing the legal sufficiency of New's complaint by its extremely deferential application of its modified "fair consideration" test in the D.C. Circuit, the three-judge panel applied a standard to New's complaint that had been explicitly repudiated in Kauffman. Such an *ex post facto* application of a previously discarded standard is unfair and

unjust,[11] highlighting the need for the exercise of this Court's supervisory power to settle this important federal question.

C. Burns v. Wilson Should Be Reconsidered.

As the Third Circuit panel in Brosius noted, the Burns "full and fair" consideration test was not the product of a "majority opinion." Brosius, 278 F.3d at 243. As the panel also observed, Justice Frankfurter "did not vote to affirm or reverse but stated the Court should have put the case down for reargument." *Id.*, 278 F.3d at 243, n.1. Indeed, Justice Frankfurter implored his colleagues to give the case more serious consideration:

> It is my view that this is not just a case involving individuals. Issues of far-reaching import are at stake which call for further consideration. They were not explored in all their significance in the submissions made to the Court. [Burns v. Wilson, 346 U.S. at 149-50].

After the Court had denied a motion for rehearing, Justice Frankfurter again expressed his concerns, this time even more strongly:

> Fundamental issues which have neither been argued by counsel nor considered by the Court are ... involved. On such important questions, the military authorities, the bar, and the lower courts ... ought not to be left with the **inconclusive determination which our disposition of the case ... implies**. [*Id.,* 346 U.S. at 844 (emphasis added)].

---

[11] *See* Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 679-82 (1930).

Additionally, Justice Frankfurter claimed that the plurality's "assertion that 'in military habeas corpus the inquiry, the scope of matters open for review, has always been more narrow than in civil cases' ... is ... **demonstrably incorrect.**" *Id.* (emphasis added).

Justice Frankfurter's admonition and critique have proved prophetic. In 1975, for example, citing Burns, the Government urged the U.S. Court of Appeals for the Fifth Circuit to limit its review to "a determination that the military courts have fully and fairly considered [Lieutenant William] Calley's claims" of constitutional deficiencies in his collateral attack on his court-martial conviction for the "premeditated murder ... of not less than 102 Vietnamese civilians at My Lai...." Calley v. Calloway, 519 F.2d 184, 190, 194 (5th Cir. 1975). Sitting en banc, the Court of Appeals refused. After conducting a careful review of the history of collateral review of courts-martial — both habeas and nonhabeas, and pre- and post-Burns (*id.* 519 F.2d at 194-203) — the full appellate court concluded that the Burns decision bequeathed a problematic and uncertain standard of review. *See* Calley, 519 F.2d at 198 and 198, n.20. It was problematic because, as Justice Frankfurter had "substantiated" in Burns, one of its premises — "that in 'military habeas corpus the inquiry, the scope of matters open for review, has always been more narrow than in civil cases' — was "historical[ly] inaccura[te]." Calley, 519 F.2d at 198 n.20. It was "uncertain" because courts have both limited their inquiry to "whether the military courts fairly considered the petitioner's claims," and broadened their inquiry to apply the same standard as applied to civilian cases, "unless it is shown that conditions peculiar to military life require a different rule. Kauffman...." *Id.*, at 198, n.21.

Because Burns sounded such an uncertain trumpet, the Fifth Circuit concluded that it was necessary to reformulate the

standard of review. *See* Calley, 519 F.2d at 228-29. But neither the entire Fifth Circuit's reformulation, nor any other effort by a court of appeals, can solve the conflicts and confusions created by the Burns decision. Only this Court is able to do that. And, after over 50 years of futility in the lower courts, it is time for this Court to clarify the standard of review governing collateral attacks on court-martial convictions.

II. New's Due Process Claims Were Resolved by the Courts below in a Way That Conflicts with Relevant Decisions of this Court.

This case came to the U.S. Court of Appeals for the District of Columbia on appeal from the district court's ruling dismissing New's collateral attack on his court-martial conviction for failure to state a claim upon which relief can be granted. According to the rule governing appeals from the grant of a motion under Rule 12(b)(6), F.R.Civ.P., the court of appeals was duty-bound to "read the facts alleged in the complaint in the light most favorable" to New. *See* H.J., Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 249 (1989). According to his complaint, and in reliance on a Stipulation of Fact, New alleged that the U.N. uniform was an "unauthorized" foreign insignia, violative of both statute and regulation. *See* 2d Compl. ¶¶ 11, 14 (App. 173a-175a). Further, according to the complaint, the prosecution claimed that the U.N. uniform in this case met an **exception** to the rule that the uniform was unauthorized, and it was the prosecution that then argued (without introducing any evidence) that the U.N. uniform was justified as a "safety" measure in a "maneuver" area. *See* 2d Compl. ¶ 15 (App. 175a).

The court of appeals not only failed to read these allegations in the complaint, as it was duty-bound to do; it actually ignored them, erroneously asserting that "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"... or when safety considerations make it appropriate." New v. Rumsfeld, 448 F.3d at 405 (App. 2a). By misstating New's defense, the court of appeals erroneously assumed that the U.N. uniform was presumed to have been lawful as a "safety" measure, and that New had failed to rebut that presumption. *See id.*, 448 F.3d at 409-10 (App. 9a-11a). In fact, however, **the presumption was rebutted by a stipulation of the parties** that was entered into evidence. See 2d Complaint, ¶14 (App. 175a). As CAAF Judge Sullivan's observed in his opinion in United States v. New, once the presumption was rebutted, the prosecution was compelled to make the "safety" claim in light of the fact that the defense produced "some evidence that [the] order to wear UN badges was '**patently illegal'** because it '**directed the commission of a crime.**'" *Id.*, 55 M.J. at 127 (App. 123a) (emphasis added). Indeed, as Judge Sullivan concluded, "the Government must prove the lawfulness of the disobeyed order [to don a proscribed uniform] without the benefit of the inference of lawfulness" that would have otherwise arisen from the presumption that a military order is lawful. *Id.* (App. 124a).

However, the court of appeals ignored New's allegations in the complaint in disregard of this Court's rule that a complaint should not be dismissed unless "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations."[12] And the court of appeals utterly **failed to address** New's fundamental claim that he had been denied due process of law at his court-martial by the military judge's ruling that the factual issues underpinning **the alleged lawfulness of the order to wear the U.N. uniform, under the**

---

[12] H.J., Inc. v. Northwestern Bell Tele. Co., 492 U.S. at 249-50.

exception which had been raised by the prosecution, need not be proved beyond a reasonable doubt to the military jury. *See* 2d Compl. ¶¶ 17-24 (App. 176a-178a).

A. By Erroneously Ruling that Lawfulness Was Not an Element of the Offense of Disobeying of a "Lawful" Order, the Military Courts Denied Mr. New His Due Process Right that Every Fact Constituting the Offense Charged Against Him Be Proved Beyond a Reasonable Doubt.

Fully 36 years ago, this Court confronted the question whether the rule that the Government prove a "criminal charge beyond a reasonable doubt" was constitutionally mandated and, if so, whether that guarantee should be extended to a juvenile proceeding in which a person was charged with the commission of an act which, if committed by an adult, was a crime. *See* In re Winship, 397 U.S. 358, 362, 365 (1970). The Court answered both questions in the affirmative, ruling that "the Due Process Clause protects an accused against conviction except upon proof beyond a reasonable doubt of **every fact** necessary to constitute the crime with which he is charged." *Id.*, 397 U.S. at 364, 368 (emphasis added).

This case presents for decision the question whether this well-settled constitutional due process standard of proof beyond a reasonable doubt applies to courts-martial. Must the military prosecution prove beyond a reasonable doubt "every fact necessary to constitute" a violation of an offense defined by the UCMJ? CAAF Judge Sullivan asserted[13] that 10 U.S.C. Section

---

[13] *See* United States v. New, 55 M.J. at 118 (App. 103a). ("[A] military accused has a codal and constitutional right to have members of his court-martial, not the military judge, determine whether the Government has proved, beyond a reasonable doubt, each and every element of the offense

851(c) codifies this constitutional due process principle by requiring the military judge to instruct the military jury "as to the elements of the offense and charge" and:

> (1) that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt;
> (2) that ... if there be reasonable doubt as to the guilt of the accused the doubt must be resolved in favor of the accused and he must be acquitted;
> ...
> (4) that the burden of proof to establish the guilt of the accused beyond reasonable doubt is upon the United States. [*Id.*]

In New's court-martial, however, the military judge violated this constitutional and statutory mandate by ruling that the "lawfulness" of an order was **not** an element of the offense of disobedience of a "lawful" order, even though the charge against New specified, in the language of 10 U.S.C. Section 892(2), that he, "having knowledge of a **lawful** order ... which it was his duty to obey, did ... fail to obey the same." *See* 2d Compl. ¶ 3 (App. 170a-171a).

On appeal to CAAF, by a vote of three to two, a narrow majority affirmed this strained construction, ruling that "lawfulness of an order ... is not a discrete element of an offense under [10 U.S.C. Section 892(2)]." United States v. New, 55 M.J. at 100 (App. 64a). Rather, it found that the word "lawful," as it appears in the statute, is mere "surplusage," providing only an "opportunity for the accused to challenge the validity of the ... order" as a matter of law before the military judge, thereby

---

with which he is charged.") (Sullivan, J., concurring in the result).

relieving the prosecution from having to prove lawfulness beyond a reasonable doubt to the military jury. *Id.,* 55 M.J. at 105 n.7 (App. 73a).

Dissenting from this ruling, CAAF Judge Sullivan pointed out that, by so construing 10 U.S.C. Section 892(2), the CAAF majority's holding was a "radical departure from our political, legal, and military tradition." *Id.*, 55 M.J. at 115 (App. 95a). He further challenged the majority, asserting that, by erroneously construing the congressionally defined offense, dispensing with the clear language of Congress that lawfulness is an element of the offense (*id.,* 55 M.J. at 121 (App. 110-111)),[14] the majority had breached the due process standard that requires "the Government [to] prove[], beyond a reasonable doubt, each and every element of the offense of which he is charged," in direct conflict with this Court's opinions in United States v. Gaudin, 515 U.S. 506 (1995) and Sullivan v. Louisiana, 508 U.S. 275 (1993). *Id.*, 55 M.J. at 117, 118, 123-25 (App. 99a, 101a-103a, 117a-118a). Indeed, by holding that the lawfulness of an order was an interlocutory issue for the military judge,[15] the CAAF majority imposed the burden of proving the unlawfulness of the order upon New. *Id.*, 55 M.J. at 108 (App. 80a).

Unlike the lawfulness of a search or seizure which concerns factual determinations extraneous to the offense charged, the "lawfulness" of an order entails factual determinations intrinsic to the offense charged. As CAAF Judge Sullivan observed,

---

[14] As CAAF Judge Sullivan pointed out: "...Congress could have enacted a statute prohibiting disobedience of orders without regard for the order's lawfulness, but chose not to do so." *Id.* (App. 111a.)

[15] As CAAF Judge Sullivan emphasized: "An interlocutory question ... is generally understood to be one that 'does not bear on the ultimate merits of the case.'" *Id.*, 55 M.J. at 122. (App. 112a.)

"there are facts at issue in this case which had to be resolved before the lawfulness of the order under the uniform regulation could be decided." United States v. New, 55 M.J. at 122 (App. 113a). Thus, in this case the military judge decided that the order to wear the U.N. uniform was "lawful" because, as a matter of fact, "the adding of U.N. military uniform accoutrements had a function specifically to enhance the safety of United States armed forces in Macedonia." 2d Compl. ¶ 17 (App. 176a). By taking the issue of lawfulness away from the military jury, the prosecution was relieved of having to prove beyond a reasonable doubt **every fact constituting the offense** with which New had been charged.

In this way, the military judge and the affirming military appellate courts neglected the "vital role" that the "reasonable doubt standard" plays in American criminal jurisprudence. According to this Court in In re Winship:

> [The reasonable doubt standard] is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence — that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law.... [A] person accused of a crime ... would be at a severe disadvantage ... amounting to a **lack of fundamental fairness** ...." [*Id.*, 397 U.S. at 363 (emphasis added).]

As CAAF Judge Sullivan observed, "facts at issue in the [New] case ... had to be resolved before the lawfulness of the order under the uniform regulation could be decided," thus indicating that the issue of lawfulness was a "mixed question of law and fact." United States v. New, 55 M.J. at 122 (App. 113a-114a). According to the CAAF majority, however, because the ultimate question of an order's lawfulness is one of "law," facts

relevant to the issue of lawfulness are part of a legal inquiry for the military judge, **not** for the military jury as an element of the offense. *See id.*, 55 M.J. at 100-102 (App. 64a-67a).

The CAAF majority's distinction between law and fact directly conflicts with this Court's ruling in United States v. Gaudin, where this Court rejected the Government's argument that "*only the factual components* of the essential elements" need be proved beyond a reasonable doubt to the jury. *Id.*, 515 U.S. at 511 (italics original). Instead, the Gaudin court ruled that its Due Process decision in In re Winship and related cases "confirm[] that the jury's constitutional responsibility is not merely to determine the facts, but to **apply the law to those facts** and draw the ultimate conclusion of guilt or innocence." Gaudin, 515 U.S. at 514.

The district court attempted to escape Gaudin, dismissing it as irrelevant, because "the Sixth Amendment right to trial by jury does not apply to courts-martial." New v. Rumsfeld, 350 F. Supp. 2d at 92 (App. 33a). But this effort was erroneous, as the Gaudin Court relied heavily upon the due process principle that the Constitution requires the Government to prove beyond a reasonable doubt "every element of the crime ... charged." *See id.*, 515 U.S. at 510. *See also* 515 U.S. at 523-24 (Rehnquist, C.J., concurring). To be sure, the due process principle of proof beyond a reasonable doubt is interrelated with the jury trial guarantee, but the former also exists independently from the latter, as evidenced by this Court's ruling in In re Winship, a juvenile proceeding which — like a court-martial — is not subject to the Sixth Amendment right to jury trial. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1971); Jackson v. Virginia, 443 U.S. 307, 309 (1979).

By failing to apply these due process standards to the military court's ruling that lawfulness was not an element of the offense

with which New was charged, both the district court and the court of appeals fell short of their duty to ensure that "the tenets of fundamental fairness" prevail in the administration of the UCMJ. *See* Sen. Report 98-53, pp. 2, 8-9, 10-11, 33-34 (98th Cong., 1st Sess.). And, in so doing, the courts below failed to implement this Court's precedents applying the due process guarantee of proof of every fact constituting an offense beyond a reasonable doubt.

B. By Erroneously Ruling that Mr. New's Legal and Constitutional Objections to the Military Deployment for Which the Order Was Issued Were Nonjusticiable Political Questions, the Military Courts Denied New His Due Process Right to Present a Complete Defense to the Charge Against Him.

In a court-martial for disobedience of a lawful order, a military order is presumed to be lawful. *See* United States v. New, 55 M.J. at 108, 118 (App. 80a, 102a). Unless an order is "palpably illegal upon its face," the presumption of lawfulness, if left unrebutted, greatly increases the likelihood of conviction. *See id.*, 55 M.J. at 108, 118 (App. 80a, 103a). By stipulation of fact, New introduced evidence that the U.N. patches and cap, being "foreign ... insignia," were "not [to] be worn on" a soldier's Battle Dress Uniform, pursuant to AR 670-1, ¶¶ 3-4 (App. 151a-152a). Thus, New rebutted the inference of lawfulness of the order to wear the U.N. uniform. *See* United States v. New, 55 M.J. at 127 (Sullivan, J., concurring) (App. 123a).

In response, the prosecution argued that the U.N. patches and cap were specifically authorized by AR 670-1, ¶¶ 1-18 and 2-6d (App. 150a), which together provide that a "commander in charge of a unit within [a] **maneuver** area" may require "the

wear of organizational ... items ... with the uniform when **safety** considerations make it appropriate." *See id.* (emphasis added). In order to support this claim, the prosecution was compelled to argue that the Macedonian deployment for which the uniform was "prescribed" was a "maneuver" area, and that the U.N. uniform had been prescribed as a "safety" measure in that area, "the wearing of [U.N.] blue in a hostile environment [being] the best protection one can have from the boundless chaos of warfare." *See* 2d Compl. ¶ 15 (App. 175). But there was no evidence supporting such an argument. In fact, any such evidence would have been virtually fatal to the prosecution's case — for it would have confirmed New's showing that the Macedonian deployment was an illegal "combatant" operation, having not received the specific written approval of Congress, as prescribed by the UNPA, 10 U.S.C. Section 287d (*see* 2d Compl. ¶¶ 9, 12 (App. 172a-174a)). Not surprisingly, the prosecution inconsistently refused to concede that "Macedonia is a hostile environment" while simultaneously insisting that the U.N. patches and cap were needed to protect New's unit from "combatants" in the area. *See* 2d Compl. ¶ 15 (App. 175a).

The military courts let the prosecution escape this dilemma, however, by refusing to rule on the deployment's legality and constitutionality on the ground that all of New's challenges — violation of Sections 278d and 278d-1 of the UNPA, the commander in chief and appointment provisions of Article II, Section 2 of, and the Thirteenth Amendment to, the Constitution — were nonjusticiable political questions. 2d Compl. ¶¶ 13, 16, 26, 27 (App. 174a, 176a, 178a, 179a); United States v. New, 55 M.J. at 108-09, 116 (App. 8a-83a, 97a, 99a). As the district court found, the military courts "improperly aggregat[ed] all of [New's] claims of illegality under the rubric of a 'challenge to the President's use of the Armed Forces.'" U.S. ex rel. New v. Rumsfeld, 350 F. Supp. 2d at 96. (App. 39a). Indeed, none of New's claims depended upon any of the

constitutional provisions dividing the war powers between Congress and the President. *See* 2d Compl. ¶¶ 9 and 10 (App. 172a-173a). For example, New's UNPA claims rested upon specific treaty provisions and statutory rules limiting the President's discretion to deploy American armed forces in the service of the United Nations. *See* 22 U.S.C. Section 287d and 287d-1 (App. 146a-147a; H. Rep. 79-1383, reprinted in U.S.C.C.A.N., 927, 933-34 (79th Cong., 1st Sess. 1945).

Not only did the military courts misapply this Court's political question doctrine, but they misused that "doctrine [to] prevent[] the normal presumption of a military order's unlawfulness from being rebutted." *See* U.S. ex rel. New v. Rumsfeld, 350 F. Supp. 2d at 95. (App. 38a). The military courts thus permitted the prosecution to rely upon the Macedonian deployment to justify the U.N. uniform as a "safety" measure in a "maneuver" area, while simultaneously denying New any opportunity to challenge the legality and constitutionality of that deployment. In doing so, the military courts deprived New of his constitutionally guaranteed due process right to a "meaningful opportunity to present a **complete defense**." *See* Crane v. Kentucky, 476 U.S. at 690 (emphasis added).

According to this Court's due process principles, a defendant in a criminal case has a "fundamental constitutional right to a fair opportunity to present a defense." *Id.*, 476 U.S. at 687. While the military courts obliged the prosecution in its need to rely upon the Macedonian deployment to justify an otherwise unauthorized uniform, they refused to rule on the merits of New's claims that the entire Macedonia operation violated (a) the UNPA rules governing both combatant and noncombatant operations as separately provided for by the U.N. Charter, (b) the constitutional provisions limiting the appointment and commander in chief powers of the President, and (c) the Thirteenth Amendment prohibition against

involuntary servitude. In so doing, the military courts blocked New's "ability to meet the [prosecution's] case" against him, contrary to "one of the hallmarks of due process in our adversary system." *See* Simmons v. South Carolina, 512 U.S. 154, 175 (1994) (O'Connor, J., concurring). And the court of appeals perpetuated this error by its failure to apply this Court's due process principles to a review of New's court-martial.

CONCLUSION

As CAAF Judge Sullivan observed, "as a cadet at West Point and as a soldier," he was taught to obey "all lawful orders," but if he "believed that an order was unlawful [he] could disobey it but [he] would risk a court-martial where a **'military jury'** would either validate or reject [his] decision to disobey." United States v. New, 55 M.J. at 117 (Sullivan, J., concurring) (emphasis added) (App. 101a). If the ruling in New's court-martial is left standing, this well-established "political, legal and military tradition" (*id.*, 55 M.J. at 115) (App. 95a) will have been abandoned. By relieving the prosecution from having to prove the lawfulness of military orders beyond a reasonable doubt, and foreclosing claims on the ground of nonjusticiability, the military courts have embraced a policy that provides no judicial check or balance upon the executive discretion of superior authority — from the commander in chief in the White House to the lieutenant in the field — at the expense of the soldier, sailor, marine, or airman.

For this reason, and for the reasons stated in the body of this petition, former Army Specialist Michael G. New's petition for a writ of certiorari should be granted.

Respectfully submitted,

HENRY L. HAMILTON
RATCHFORD & HAMILTON
1531 Laurel Street
Columbia, SC 29201
(803) 779-0700

Attorneys for Petitioner
**Counsel of Record*
November 15, 2006

HERBERT W. TITUS*
WILLIAM J. OLSON
JOHN S. MILES
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
Suite 1070
8180 Greensboro Drive
McLean, VA 22102
(703) 356-5070