No. 12-_____

IN THE
Supreme Court of the United States

MICHAEL G. NEW,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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January 18, 2013

QUESTIONS PRESENTED FOR REVIEW

On May 16, 2012, Michael G. New filed with the Army Court of Criminal Appeals ("ACCA") a petition for extraordinary relief in the nature of a writ of error coram nobis from a conviction in a court-martial that was allegedly "flawed in a fundamental respect." On May 30, 2012, in a one-sentence order, ACCA denied relief. On June 22, 2012, New filed a writ-appeal petition from this order in the U.S. Court of Appeals for the Armed Forces ("CAAF"). On September 10, 2012, after consideration of New's coram nobis petition, and again on October 23, 2012, after reconsideration of that petition, CAAF denied relief, respectively, in two one-sentence orders. These rulings individually and together present for review the following questions:

1. Whether the military courts' perfunctory dispositions denying the requested coram nobis relief conflict with United States v. Denedo, 556 U.S. 904 (2009), wherein this Court ruled that it is "the responsibility of military courts to reexamine judgments in rare cases where a fundamental flaw is alleged"?

2. Whether this Court has certiorari jurisdiction under 28 U.S.C. Section 1259(3) to review an order of CAAF denying coram nobis relief when sought by a member of the armed services, in light of this Court's ruling in United States v. Denedo that 28 U.S.C. Section 1259(4) confers certiorari jurisdiction to review a Government's petition seeking reversal of a CAAF decision

granting such relief?

3. Whether CAAF wrongfully denied coram nobis relief from a "fundamentally flawed" court-martial by its failure to address the Government's misapplication of this Court's political question doctrine to whether President William J. Clinton's order to deploy New to a United Nations multilateral "peace operation" violated the United Nations Participation Act?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Michael G. New ("New") respectfully petitions for a writ of certiorari to review the decision and order of the United States Court of Appeals for the Armed Forces ("CAAF") which, after consideration of New's writ-appeal petition, the Government's Answer, and New's Reply, denied New's writ-appeal petition for review of the decision of the Army Court of Criminal Appeals ("ACCA") to deny New's Petition for Extraordinary Relief in the Nature of a Writ of Error Coram Nobis from a "fundamentally flawed" court-martial conviction and sentence for disobedience of a lawful order under Article 92(2), Uniform Code of Military Justice ("UCMJ") (10 U.S.C. Section 892(2)).

OPINIONS BELOW

On May 30, 2012, ACCA entered an order summarily denying New's coram nobis petition without opinion. (Appendix "App." 2a). The one-sentence order is unreported.

On September 10, 2012, "on consideration of the writ-appeal petition," CAAF entered an order summarily denying without opinion New's writ-appeal petition for review of the ACCA order denying his coram nobis petition. (App. 1a). Its one-sentence order is unreported.

On October 23, 2012, CAAF entered an order summarily denying New's timely petition for reconsideration of the CAAF order without opinion. (App. 4a). The one-sentence order is unreported.

JURISDICTION

Having "considered" New's petition, as stated in its Order, CAAF reviewed that petition as provided in 10 U.S.C. Section 867(a)(3), but denied relief. Accordingly, this Court has jurisdiction to entertain New's petition for a writ of certiorari to CAAF under 28 U.S.C. Section 1259(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Due Process Clause of the Fifth Amendment (App. 6a).

TREATY PROVISIONS INVOLVED

This case involves Chapters VI and VII of the United Nations Charter (App. 7a-15a).

STATUTES AND REGULATIONS INVOLVED

With respect to this Court's subject matter jurisdiction of this petition, this case involves Articles 67(a) and 67a(a) of the Uniform Code of Military Justice ("UCMJ") (10 U.S.C. Sections 867(a) and 867a(a)) (App. 16a-18a); 28 U.S.C. Section 1259 (App. 22a); and Rules 4 and 18, CAAF Rules of Practice and Procedure (App.29a-31a).

With respect to the merits of New's coram nobis petition, this case involves Articles 46 and 92(2) of the U.C.M.J. (10 U.S.C. Sections 846(a)(3) (App. 16a) and 892(2)) (App. 18a-19a); Rules of Courts-Martial 701 (App. 23a-29a); and Sections 6 and 7 of the United

Nations Participation Act (22 U.S.C. Sections 287d and 287d-1) (App. 19a-22a).

STATEMENT OF THE CASE

Michael G. New — a medical specialist having previously served honorably and without blemish in the United States Army — lives under "the ineradicable stigma of a punitive discharge,"[1] having been "deprived ... of substantially all benefits,"[2] resulting from a fundamentally flawed 1996 court-martial conviction[3] on a charge of disobeying a lawful order, namely, "to wear the prescribed [United Nations] uniform for the deployment to Macedonia," a multilateral U.N. peace operation in the former Yugoslavian republic.[4] Charged under Article 92(2) for disobedience of a lawful order, New sought through the court-martial discovery process documents that he reasonably believed supported his claim that President Clinton's deployment order, *inter alia,* violated the United Nations Participation Act ("UNPA").[5] *See* Writ-Pet. (App. 44a-45a).

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[1] Writ-Appeal Petition for Review of [ACCA] on Application for Extraordinary Relief in the Form of a Writ of Error Coram Nobis ("Writ-Pet.") (App. 59a).

[2] *Id.* (App. 59a).

[3] *Id.* (App. 50a-55a).

[4] *Id.* (App. 41a).

[5] *Id.* (App. 41a-44a).

Initially enacted in 1945 by Congress "under its constitutional powers to raise and support armies, to provide and maintain a navy and to make rules for the government and regulation of the land and naval forces," Section 6 of the UNPA was designed to protect members of the American armed forces from being placed under command authority of the UN in support of an unauthorized combatant operation, by requiring "advance" approval by both the U.S. Senate and House. H.R. Rep. No. 79-1383, as reprinted in 1945 U.S.C.C.A.N. at 933-34. Such use of the armed forces by the President was deemed neither an exercise of the treaty power nor of the war power, and thus required an agreement concurred in by both houses of Congress, setting forth the "precise details of the obligation — such as the exact amount of forces to be contributed ....." *Id.*

Four years later, the UNPA was amended, adding Section 7 to govern noncombatant assistance "to the political commissions of the [UN] engaged in peaceful settlement of disputes between nations." H.R. Rep. No. 81-591, as reprinted in 1949 U.S.C.C.A.N. 2068, 2070. Instead of requiring prior Congressional for each deployment, the amendment tightly limited "to 1,000 the U.S. personnel to be on detail to the [UN] at any one time, ... a clear indication that the Congress intends only that auxiliary personnel shall be made available, ... not ... any wholesale drawing upon American manpower resources." *Id.* at 2072. While "[m]embers of the armed forces so detailed would be subject to the orders of the [UN] ... [t]hey would ... retain the rights and perquisites which pertain to their status as members of the armed forces of the United

States on an assignment given them by the United States." *Id.*

Prior to ordering New to wear the U.N. uniform, and in response to New having voiced concerns that the order was illegal, one of New's superior officers personally counseled him, urging him to obey the order, explaining to him that the order and the deployment conformed to Presidential Decision Directive 25 ("PDD 25"). Writ-Pet. (App. 41a). Then, immediately before New was ordered to wear the U.N. uniform in preparation for the Macedonian deployment, an Army JAG officer briefed New and his unit that the legality of President Clinton's order to deploy as a member of the multinational Macedonian force under UN operational control rested, in part, on that same PDD 25. *Id.* (App.41a-42a).

At the outset of the court-martial, New's civilian defense counsel verbally requested that New be afforded access to PDD 25 which, counsel believed, was a classified document. *Id.* (App. 42a). The Army JAG briefing officer, now serving as the Army prosecutor, objected on the ground that the classified version of PDD 25 was irrelevant to the charge that New had failed to obey the order to wear "the U.N. patches and cap," the prescribed uniform for the deployment to Macedonia. *Id.* (App. 43a). The military judge disagreed, permitting the introduction of evidence related to the defense claim that the deployment order violated the UNPA. *Id.* (App. 43a-44a). After civilian defense counsel secured the necessary security clearance, the military judge ordered production of the classified document. *Id.* (App. 44a).

Not knowing whether the prosecutor had immediate access to the classified document, or whether there would be sufficient time to examine the document in Germany where the court-martial was being held, civilian defense counsel requested that the classified PDD 25 be produced at a mutually agreeable future time in the United States. *Id.* (App. 44 a). In response, trial counsel volunteered to produce the classified PDD 25 document "now." Civilian defense counsel asked "how long a document is it," to which, in turn, the prosecutor replied, "eight to 10 pages," whereupon civilian defense counsel agreed. *Id.* (App. 44a). After securing defense counsel's consent to this arrangement, the prosecutor elicited agreement from the military judge that production of that "eight to 10"-page document would comply with the court's order to produce the classified PDD 25. The military judge assented. *Id.* (App.44a).

Immediately following this arrangement, the military judge turned his attention to New's request for another document entitled either Presidential Decision Directive 13 ("PDD 13") or Presidential Review Directive ("PRD 13"). *Id.* (App. 45a). Civilian defense counsel represented to the military judge that a document known either as PDD 13 or PRD 13 had appeared in the press and, on information and belief, this document was essential to obtain an adequate understanding of PDD 25. *Id.* (App. 45a). Noting that the prosecutor had denied any knowledge of such a document, the military judge ruled against production of the document, asserting that the defense had as "good a chance at locating it as the government." *Id.* (App. 45a).

Eight and one-half years later, on November 19, 2009, New discovered that there was, in fact, a classified document entitled Presidential Review Directive 13 ("PRD 13"). *Id.* (App. 46a). Pursuant to a Mandatory Review request under the Presidential Records Act and Executive Order 12958, New not only uncovered the previously classified PRD 13, but the previously classified version of PDD 25 as well. As a result of his extraordinary diligence, New discovered that, indeed, PRD 13 was the forerunner to PDD 25, as his civilian defense counsel had surmised at the 1996 court-martial, and also that the actual classified PDD 25 was 29 pages in length — three times as long as the "eight to 10"-page document that the prosecutor had represented to be the classified PDD 25 document at the 1996 court-martial. *Id.* (App. 46a).

After review of PRD 13, New confirmed that both documents in fact contained exculpatory information relevant and material to New's motion to dismiss the court-martial charge against him on the ground that the Macedonian deployment for which the order to wear the U.N. uniform had been prescribed violated the UNPA. *Id.* (App. 46a-47a). Dated February 15, 1993,[6] well in advance of the 1996 deployment of New's unit to the UN peace operation in Macedonia, classified PRD 13 revealed that the Clinton Administration had questioned whether "the UN Participation Act need[ed] [to] ... be modified" to meet "the new challenges and environments for multilateral peacekeeping operations" and set that issue for review.

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[6] PRD 13 (App. 109a).

See Writ-Pet. (App. 46a-47a). *See also* PRD 13 (App. 116a-117a).

In response to this review directive, again fixed well in advance of the order issued to New's unit to deploy to the UN peace operation in Macedonia, the May 3, 1994 PDD 25[7] stated:

> [A]t some future appropriate time, the Administration will seek the following legislative changes:
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> – Amending Section 7 of the UN Participation Act first to remove the limitations on detailing personnel to the UN in Chapter VI operations and then, to the extent that it is politically feasible, to delete the prohibition against using that section as authority to support Chapter VII operations and combatant missions. [PDD 25 (App. 131a). *See also* Writ-Pet. (App. 47a).]

In the meantime, PDD 25 was issued, committing the United States to participation of the nation's military forces in UN multilateral operations in knowing disregard of the two key limitations set forth in the UNPA. Writ-Pet. (App. 47a). PDD 25 dispensed altogether with (i) UNPA Section 6's limitation that the President obtain prior specific approval from Congress to deploy any American armed forces to combatant "peace enforcement" operations, and (ii) UNPA Section 7's ceiling of no more than 1,000

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[7] PDD 25 (App 121a).

American armed forces being deployed in a noncombatant capacity at any one time. *See* Writ-Pet. (App. 47a) and PDD 25, Annex II (App. 138a-139a).

Instead of legal compliance with UNPA Sections 6 and 7, PDD 25 adopted a political cover stratagem of Congressional briefing and consultation[8] "enhancing Congressional involvement in matters related to UN peace operations" by the Clinton Administration's:

- [E]xpanding ... consultations with the bipartisan leaders and senior leadership of the relevant committees of both Houses of Congress....

- [A]scertaining Congressional views when ... giving serious consideration to the deployment of U.S. military units in a UN peace operation....

- [H]olding monthly briefings for the combined majority and minority staffs of the foreign affairs, armed services, and appropriations committees....

- [P]roviding ... Congress with ... a comprehensive annual report on peace operations activities conducted during the previous fiscal year....
  [PDD 25, Annex VIII (App. 142a-145a).]

By these measures PDD 25 was designed to co-opt Congressional leaders, bypassing the limitations imposed by UNPA Sections 6 and 7 upon the President's authority to deploy American armed forces

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[8] Writ-Pet. (App. 47a).

in either UN Chapter VII combatant peace enforcement operations, or in UN Chapter VI noncombatant peace keeping operations. Writ-Pet. (App. 47a). *See also* PDD 25 (App. 133a).

The withheld classified PDD 25 and PRD 13 documents support New's defense at his court-martial that the deployment for which the UN uniform was ordered violated the UNPA, and that the Clinton Administration was well aware that its policy supporting such UN peace operations did not comply with the UNPA. Deprived of access to these two exculpatory documents, New was prejudiced in his effort to rebut the presumption of lawfulness of the order to wear the UN uniform prescribed for the multilateral deployment to Macedonia. As a direct consequence of the prosecutor's failure to produce the classified PDD 25, as ordered by the military judge, New's defense was limited to the testimony of an expert witness to refute the prosecutorial claim that the Macedonian deployment complied with UNPA. Writ-Pet. (App. 62a-63a). Deprived of evidence contained in the Government's own classified documents, the military judge found that New failed to discharge the heavy burden placed upon a soldier to rebut the presumption of the lawfulness of a military order. *See* United States v. New, 55 M.J. 95, 106-07 (2001).

New did not fare any better in ACCA or in CAAF.[9] Neither was he successful in his effort to secure review

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[9] *See* United States v. New, 50 M.J. 729 (ACCA 1999); United States v. New, 55 M.J. 95 (CAAF 2001).

from this Court on certiorari.[10] Nor did New succeed in his effort collaterally attacking his conviction in the United States District Court for the District of Columbia, and the United States Court of Appeals for the District of Columbia, both courts deferring to the judgments and opinions of the military courts.[11] On April 23, 2007, more than eleven years after his court-martial conviction, this Court denied New's petition for a writ of certiorari of an adverse opinion of the U.S. Court of Appeals for the District of Columbia.[12] Thus, by 2007 New had exhausted all of his available remedies to vacate his conviction and sentence.

However, as noted above, on November 18, 2009, New succeeded in his more than one and one-half year effort to seek and obtain declassification of PDD 25 and PRD 13. *See* PDD 25, Clinton Library Cover Letter (App. 119a-120a) and PRD 13, Clinton Library Cover Letter (App.107a-108a). In light of the newly discovered relevant, material, and exculpatory evidence in these two documents — to which New had been denied access by the prosecutor and military judge in his court-martial — New determined once again to seek judicial relief from his court-martial conviction and sentence.

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[10] New v. United States, 534 U.S. 955 (2001).

[11] United States ex rel. New v. Rumsfeld, 350 F. Supp. 2d 80 (D.D.C. 2004); United States ex rel. New v. Rumsfield, 448 F. 3d 403 (D.C. Cir. 2006).

[12] United States ex rel. New v. Gates, 550 U.S. 903 (2007).

On May 16, 2012, pursuant to Rule 20 of the military Joint Rules of Practice and Procedure of the Courts of Criminal Appeals, New filed a Petition for Extraordinary Relief in the Nature of a Writ of Appeal Coram Nobis. Painstakingly prepared in compliance with both CAAF's decision in Denedo v. United States ("Denedo I"), 66 M.J. 114 (CAAF 2008), and this Court's decision in United States v. Denedo ("Denedo II"), 556 U.S. 904 (2009), New's 35-page petition and 48-page supporting brief addressed: (i) each of the six threshold issues prerequisite to securing a decision on the merits of a coram nobis claim, and (ii) the merits of New's claim that he had been denied to his prejudice his due process and statutory discovery rights with respect to the classified PDD 25 and PRD 13. Writ-Pet. (App. 36a-37a, 48a-49a).

On May 30, 2012, without any response from the Judge Advocate General, ACCA entered the following order: "On consideration of the Petition for Extraordinary Relief in the Nature of a Writ of Coram Nobis, the petition is DENIED." App. 2a.

On June 22, 2012, New filed a writ-appeal petition to CAAF, as provided in Rule 4(b)(i), CAAF Rules of Practice and Procedure, seeking an order (i) to vacate and set aside New's conviction and sentence, or in the alternative, (ii) to find that New's petition meets the six threshold coram nobis requirements, and to reverse and remand to ACCA for a ruling on the substantive claim in his coram nobis petition. Writ-Pet. (App. 39a-40a).

On July 2, 2012, pursuant to CAAF Rule 27(b) and 28(b)(2), the Judge Advocate General ("JAG") filed an Answer. Answer to Petitioner's Writ-Appeal Petition for Review of [ACCA] Decision on Application for Extraordinary Relief in the Form of a Writ of Error Coram Nobis ("Ans.") (App. 68a). While JAG did not "concede that [New] has satisfied all six threshold requirements for *coram nobis*," JAG did "not address the six requirements in detail,"[13] except to claim that "it 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 the truth, or merely uninformed conjecture."[14] Instead, JAG simply contended that New's "substantive argument inarguably lacks merit,"[15] because "while [PDD 25 and PRD 13] would have given the defense further facts to point to in their argument that the [Macedonian] deployment was illegal,"[16] that issue was a "nonjusticiable political question" outside the jurisdiction of the military courts. *See id.* (App. 83a-85a).

On July 16, 2012, New filed his Reply. Rebutting JAG's contention that the prosecutor's reference to the page length of the classified version of PDD 25 may have been no more than mere supposition, New

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[13] *Id.* at n.52 (App. 80a).

[14] *Id.* at n.67 (App. 84a).

[15] *Id.* at n.52 (App. 80a).

[16] Ans. (App. 85a).

maintained that the court-martial record established that the prosecutor's statement was deliberately misleading. Petitioner's Reply to Respondent's Answer to Petitioner's Writ-Appeal Petition ("Reply") (App.94a-95a). Additionally, New countered JAG's suggestion that New's substantive due process and statutory discovery claims had been litigated before[17] because those claims were based upon evidence that had not been discovered until 2009, well after 2007, the year in which New had exhausted his rights on direct review and collateral attack. *Id.* (App. 97a-98a). Finally, New refuted JAG's erroneous assertion that the military courts had ruled that New's UNPA claims were nonjusticiable political questions,[18] and urged CAAF to reject JAG's effort to misuse the political question doctrine to avoid the question whether the Macedonian deployment violated a statute duly enacted by Congress. *Id.* (App. 103a-105a).

On September 10, 2012, after review of New's writ-appeal petition, the Government's Answer and New's Reply, CAAF issued an order, stating "[o]n consideration of the writ-appeal petition, it is, by the Court, this day ... ORDERED: That said writ-appeal petition is hereby denied." (App. 1a).

On September 20, 2012, New filed a timely petition for reconsideration. And on October 23, 2012, CAAF denied that petition. (App. 4a).

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[17] *Id.* at n.52 (App. 80a).

[18] Reply (App. 98a-102a).

REASONS FOR GRANTING THE PETITION

I. THE PERFUNCTORY DISPOSITION OF PETITIONER'S CORAM NOBIS PETITION BY THE MILITARY COURTS CONFLICTS WITH UNITED STATES V. DENEDO (DENEDO II).

Until June 8, 2009, it was unclear whether the extraordinary writ of coram nobis was available to persons convicted by courts-martial. In Denedo II, this Court settled the matter, ruling that such persons had access to the ancient writ:

> Our holding allows military courts to protect the integrity of their dispositions and processes by granting relief from final judgments in extraordinary cases when it is shown that there were fundamental flaws in the proceedings leading to their issuance. [*Id.* at 916.]

Thus, this Court ruled that "Article I military courts have jurisdiction to entertain *coram nobis* petitions to consider allegations that an earlier judgment of conviction was flawed in a fundamental respect," just as "Article III courts [which] have a like authority." *Id.* at 917. With such authority, this Court ruled, comes responsibility:

> The result that we reach today is of **central importance** for military courts. The military justice system relies upon courts that **must take all appropriate** means, consistent with their statutory jurisdiction, to **ensure**

> **neutrality** and **integrity** of their judgments. [*Id.* (emphasis added).]

With respect to New's coram nobis petition and writ-appeal petition, both ACCA and CAAF failed to discharge this responsibility.

In accordance with Denedo II,[19] on May 16, 2012, New filed his coram nobis petition with ACCA. As noted above, New's petition was comprehensive — 35 pages in length. Attached to the petition were three appendices. Appendix A contained 53 pages excerpted from the court-martial transcript. Appendix B contained 15 appellate exhibits, 178 pages in length, from the court-martial record. Appendix C contained copies of the declassified PDD 25 (29 pages) and PRD 13 (15 pages) obtained by New from the Clinton Presidential Library pursuant to his Mandatory Review Request. *See* Writ-Pet. (App. 36a-37a). Both the petition and the supporting brief addressed the six "stringent threshold requirements" necessary to "establish a clear and indisputable right to the requested relief," as required by CAAF's decision in Denedo I.[20] *See* Writ-Pet. (App. 48a-60a). And both the petition and the brief addressed New's substantive claim that he had been wrongfully denied due process of law and prejudiced at his court-martial by the prosecutor's failure to produce material and exculpatory evidence as required by Brady v. Maryland, 373 U.S. 83 (1963), and by Article 46,

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[19] *See id.* at 914.

[20] *See* Denedo I, 66 M.J. at 126.

UCMJ, and R.C.M. 701 of the Rules of Courts-Martial. *See* Writ-Pet. (App. 60a-66a).

Within 10 and one-half business days after filing, ACCA issued a terse one-sentence order denying New's petition. ACCA Order (App. 49a). Such perfunctory disposition of New's coram nobis petition is not consistent with Denedo II's admonition that ACCA, the original court of judgment, "take all appropriate means ... to ensure the neutrality and integrity of [its] judgment." *See* Denedo II at 917. Rather it is ACCA's responsibility to "reexamine judgments in rare cases where a **fundamental flaw** is **alleged** and other judicial processes for correction are unavailable...." *Id.* (emphasis added). Instead, it appears that ACCA determined that the rule of "finality" of judgments was so "inflexible" that it "trumps each and every competing consideration." *See id.* at 916.

This reading of the ACCA order is reinforced by JAG's Answer filed in response to New's writ-appeal petition to CAAF. In that document, JAG addressed in two separate footnotes whether New had met the six threshold coram nobis requirements, the necessary prerequisites for New to be entitled to a review of his substantive due process and statutory discovery claims.

In footnote 52, page 11, of its Answer, JAG asserted that it "does not concede that appellant has met all six threshold requirements for *coram nobis,*" but it chose not to "address the six requirements in detail," because "appellant's substantive argument inarguably lacks merit." Ans. at n.52 (App. 80a). While JAG suggested

that New had "arguably failed to fulfill the fifth requirement,"[21] that suggestion did not stand in the way of the obvious inference that JAG waived any objection that New had failed to satisfy those stringent requirements.

In footnote 67, page 15, JAG appears to address obliquely the question whether New has met the first requirement, that the court-martial was fundamentally flawed. Ans. at n. 67 (App. 84a). In both his petition before ACCA and his writ-appeal petition before CAAF, New contended that the court-martial was fundamentally flawed by the prosecutor's representation that the classified PDD 25 document was one that was "eight to 10" pages in length when, in fact, as New discovered well after the court-martial, the actual document was obviously a different document that was 29 pages in length. Writ-Pet. (App. 44a, 46a, 51a-53a). JAG argued that New "goes too far claiming at this stage of the proceeding that the non-disclosure was due to prosecutorial misconduct." Ans. at n. 67 (App. 84a). New's claim of misconduct did not rest upon mere "non-disclosure," but upon a knowing or reckless misrepresentation concerning classified PDD 25, a document that the prosecutor had represented to the military judge and defense counsel was definitely in his possession. Reply (App. 94a).

While JAG unashamedly contended below that "it is unclear from the face of the record whether trial counsel's reference to the document being '8-10 pages'

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[21] *Id.* (App. 80a).

was a statement made in full knowledge of its truth, or merely uninformed conjecture,"[22] it is perfectly clear that JAG is not interested in the facts as they appear in the record, nor in making any effort to clear the matter up, if the record were found to be unclear. After all, if the prosecutor knew that his representation was false — as JAG admits is possible — concealing exculpatory evidence, the production of which had been ordered by the military judge, then surely New has established that there was a "fundamental flaw" in the court-martial. No doubt New thus opened the door to full coram nobis review of his claim of violations of the Brady rule, Article 46, UCMJ and military discovery regulations.

Not only was JAG not interested in rectifying the "neutrality and integrity" of the record, neither was CAAF, which, like ACCA, perfunctorily denied New any relief in an almost identical, dismissive one-sentence order. The summary disposition of New's coram nobis petition stands in stark contrast to the careful and thorough assessment of the Denedo petition, giving rise to the question "why." Two differences between the cases offer a plausible explanation.

First, at issue in Denedo I was whether Denedo had been prejudiced in his defense due to **ineffective assistance of defense counsel**. *See* Denedo I, 66 M.J. at 127. CAAF ruled that Denedo's "petition facially establishes a sufficient basis for coram nobis

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[22] Ans. at n.67 (App. 84a).

review, but a ruling on his petition would be premature without a Government response, consideration by the Court of Criminal Appeals as to whether counsel's performance was deficient and, if so, whether Appellant was prejudiced thereby." Denedo I, 66 M.J. at 129. At issue in New's case is whether New was prejudiced due to **prosecutorial misconduct** in relation to the discovery of exculpatory and material evidence. In its Answer, JAG did not refute New's claims, asserting only that the record is "unclear" at "this stage of the proceedings." Ans. at n. 67 (App. 84a).

The other key difference between the coram nobis petition in Denedo I and in this case concerns the distinctly different court-martial charges, and their respective defenses. Denedo was charged with conspiracy, larceny and forgery in connection with a scheme to defraud a community college, not a service-connected offense, and to which he pled guilty. Denedo I, 66 M.J. at 118. By contrast, New was charged with disobedience of a lawful order to wear the UN uniform prescribed for deployment to a UN multilateral operation sanctioned by his commander in chief, the President of the United States, to which charge he pled not guilty. With respect to the Denedo I petition, CAAF risked nothing by ordering a careful review of Denedo's court-martial judgment. With respect to New, however, any order that reopened his court-martial would have significant chain of command implications.

CAAF did not issue an order for further proceedings to obtain clarity on New's court-martial, either by

appointing a special master or by remanding New's petition to the appropriate CCA, as it did in Denedo I. Instead, CAAF slammed the door shut, refusing to correct an error of fact on the record. Yet the very purpose of the common law writ of error coram nobis is "to correct errors of fact," even an error "'of fact not apparent on the face of the record,'" but in conflict with unimpeachable documentation from official government sources. *See* United States v. Morgan, 346 U.S. 502, 507-08 (1954). Moreover, the factual error here is "'of the most fundamental character (*id.* at 509),'" implicating a prosecutorial cover-up wherein trial counsel misled the military judge and defense counsel, pretending to produce a document required by the military judge's discovery order, but substituting another. Such prosecutorial failures to comply with the Brady rule have become a serious and growing problem threatening the neutrality and integrity of the criminal justice system. *See* "Posts Tagged 'Brady Violations'" (Main Justice, Politics, Policy and the Law).[23]

CAAF has boasted that "[t]he military justice system has been a leader with respect to open discovery and disclosure of exculpatory information to the defense. *See* United States v. Williams, 50 M.J. 436, 439 (1999). Indeed, broader than the Brady rule, Article 46, UCMJ, "mandate[s] that 'the trial counsel, the defense counsel, and the court-martial shall have **equal opportunity** to obtain ... evidence in accordance with regulations as the President may

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[23] http://www.mainjustice.com/tag/brady-violations/.

prescribe.'" *Id.*, 50 M.J. at 440 (emphasis added). "[D]ocuments, tangible objects, and reports ... must be disclosed upon request. RCM 701(a)(2) and (5)." *Id.* at 440 n. 3. Trial counsel also has "'a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case ....'" *Id.* at 441. Thus, in United States v. Simmons, 38 M.J. 376 (CMA 1993), CAAF "held that the prosecution 'must exercise due diligence' in reviewing the files of other government entities to determine whether such files contain discoverable information." Williams, 50 M.J. at 441. CAAF has failed to exercise this kind of leadership here.

Engraved on the front of the Supreme Court building is the phrase, "Equal Justice Under Law." In the administration of the extraordinary writ of coram nobis there is no room for "respect of persons,"[24] the law governing such writs should be applied the same to Michael G. New, Medical Specialist, United States Army, as it was to Jacob Denedo, Mess Management Specialist, Second Class, United States Navy. Perfunctory dismissal of New's petition falls inexcusably short of this principle of equal and impartial justice. Because CAAF's summary denial conflicts with this Court's decision in Denedo II, New's petition for a writ of certiorari should be granted.

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[24] *See, e.g.,* Deuteronomy 1:16-17 ("And I charged your judges ... Ye shall not respect persons in judgment; but ye shall hear the small as well as the great; ye shall not be afraid of the face of man....")

II. SUBJECT MATTER JURISDICTION OF THIS WRIT UNDER 28 U.S.C. SECTION 1259(3) IS AN IMPORTANT FEDERAL QUESTION THAT HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

Had CAAF granted New coram nobis relief, as it did in Denedo II, the Government would have had access to this Court by writ of certiorari under 28 U.S.C. Section 1259(4) to seek reversal of CAAF's decision. *See* Denedo II, 556 U.S. at 909. By its plain language, however, Section 1259(4) does not extend this Court's certiorari jurisdiction to the CAAF decision denying New coram nobis relief.

A. Jurisdiction of Writ-Appeal Petitions is Not Limited To CAAF Decisions Granting Relief Under 28 U.S.C. Section 1259(4).

Because 28 U.S.C. Section 1259(4) does not, on its face, confer certiorari jurisdiction upon this Court of CAAF decisions "denying relief," it has been commonly assumed that there is no jurisdiction under 28 U.S.C. Section 1259 for this Court to review a CAAF decision denying extraordinary relief by a writ of certiorari. *See, e.g.,* J. Elsea, "Supreme Court Review of Decisions of the U.S. Court of Appeals for the Armed Forces Under Writs of Certiorari," p. 4 (Cong. Res. Serv., Feb. 27, 2006). Indeed, this common understanding is so entrenched and widespread that the American Bar Association issued a report in August 2006 recommending that 28 U.S.C. Sections 1259(3) and (4) be amended "to permit discretionary review by the Supreme Court ... of decisions rendered by the United

States Court of Appeals for the Armed Forces that ... deny extraordinary relief." ABA Standing Committee on Federal Judicial Improvements Report to the House of Delegates (Aug. 2006). This recommendation, in turn, has prompted a number of legislators in both the United States Senate and House of Representatives to introduce legislation authorizing such Supreme Court review on the ground that military service members ought to have equal access to certiorari review in this Court. *See, e.g.,* Press Release, "Feinstein and Davis Introduce 'Equal Justice for Our Military Act'" (Oct. 6, 2011).[25]

There is no need for such legislation. While Section 1259(4) does not confer certiorari jurisdiction to cases where CAAF has denied a petition for extraordinary relief, neither the language of 28 U.S.C. Section 1259(3) nor 10 U.S.C. Section 867(a)(3) precludes this Court from exercising jurisdiction over writs of certiorari directed to CAAF in those petitions for extraordinary relief where CAAF has denied "relief." Rather, as stated in 10 U.S.C. Section 867a(a), "[t]he Supreme Court may not review by a writ of certiorari ... any action by [CAAF] in **refusing** to **grant a petition for review**." (Emphasis added.) It is one thing for CAAF to refuse to review a CCA denial of a petition for extraordinary relief; it is quite another for CAAF to actually review that petition and deny relief. Both 28 U.S.C. Section 1259(3) and 10 U.S.C. Section 867(a)(3) condition the certiorari jurisdiction of this Court on whether CAAF "granted a review." Only if

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[25] http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=7267ebdf-de2f-48fl-a3ec-bfb93003961a.

CAAF denied review of a writ-appeal petition would this Court be deprived of subject matter jurisdiction of New's petition for extraordinary relief.

B. CAAF Did Not Refuse to Review New's Writ-Appeal Petition, But Rather It Reviewed the Petition and Denied Relief.

This is a petition for a writ of certiorari to CAAF under 28 U.S.C. Section 1259(3) in a case where CAAF, after "consideration of [New's] writ-appeal petition," issued an order denying New's petition for extraordinary relief in the nature of a writ of coram nobis. CAAF decisions "are subject to review by the Supreme Court by writ of certiorari as provided in section 1259 [in] cases reviewed by [CAAF]." 22 Moore's Federal Practice - Civil, C. 407, § 407.01[b]. As the U.S. Court of Appeals for the Federal Circuit observed, "those plaintiffs whose cases are reviewed by the CMA [now CAAF] can seek review by petition to the Supreme Court." Matias v. United States, 923 F.2d 821, 824 (Fed. Cir. 1990). Only in those cases where CAAF "denie[s] review" are they **not** subject to this Court's certiorari jurisdiction under 28 U.S.C. Section 1259(3). Davis v. Marsh, 876 F.2d 1446, 1448 n. 3 (9th Cir. 1989).

On its face, the CAAF order denying New's writ-appeal petition was a denial of relief after "consideration" of New's writ-appeal petition, the Government Answer, and New's Reply — not a denial of review. As the Government has stated in its Answer, CAAF "**reviews** decisions of a service court on a petition for extraordinary relief as a writ-appeal,

under Rules 4(b)(2) and 18(a)(4)." Ans. (App. 69a) (emphasis added). In this context, "consideration" connotes review by deliberation or thoughtful examination, not a refusal to review. A fair reading of CAAF's order is that CAAF granted review of the writ-appeal petition and, after review of that petition, the Government's Answer, and New's Reply, then denied New any of the relief requested.

To be sure, CAAF did not expressly state that it "granted a review" (as stated in 10 U.S.C. Section 867(a)(3)), nor was New's petition a formal "petition for [such] review" (as stated in 28 U.S.C. Section 1259(3). But as this Court observed in Denedo II, the words in Section 1259(3) ought not be subjected to "parsimonious construction." *Id.*, 556 U.S. at 909. To construe "review" in 28 U.S.C. 1259(3) and 10 U.S.C. Sections 867(a)(3) and 867a(a) as requiring a formal, preliminary step, before consideration on the merits, would exalt form over substance. Indeed, CAAF Rules 4(b)(2) and 18(a)(4) do not require a writ-appeal petition for extraordinary relief to formally request a "grant of review," as Rules 4(a)(3) and 18(a)(1) do for direct appeals from a court-martial conviction. *See* CAAF Rules (App. 29a-31a).

After examining New's writ-appeal petition, it was wholly within CAAF's discretion to issue an order refusing to review that petition. CAAF Rule 4(b) provides that the "Court may, in its discretion, entertain a writ-appeal petition...." (App. 30a). In short, CAAF was not obliged to entertain New's writ-appeal petition. It could have refused to do so, and to state accordingly in an order dismissing the writ-

appeal petition. Instead, by its plain language CAAF exercised its discretion to receive New's writ-appeal petition and give "consideration" to its merits.

Because, under its current rules, CAAF could have declined to give any such consideration, adoption of a common-sense meaning of "review" would not take from CAAF "the key that allows access to the Supreme Court," and therefore, would not undermine 28 U.S.C. Section 1259(3)'s design to have a "mitigating effect on the caseload of the Supreme Court." *See* Matias, 923 F.2d at 824. All CAAF need do is to specify that it was denying review, which it did not do in this case.

C. Whether this Court has Jurisdiction of this Writ of Certiorari is an Important Federal Question that Can Only Be Decided by this Court.

Although Congress designed Section 1259 to provide only limited "direct review" of final judgments of the military courts,[26] it is an important federal question that those limitations be based upon a correct interpretation of the language of each subsection of that provision, as well as each subsection of the related sections 867(a)(3) and 867a(a) of Title 10. Only a decision of this Court can bring its certiorari authority under 28 U.S.C. 1259(3) into harmony with the relevant statutory provisions. Until this question is settled by this Court, petitioners like New will be denied all opportunity for direct review of CAAF's

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[26] *See* 22 Moore's Federal Practice Civil, C. 407, § 407.01 [2][c].

denial of their writ-appeal petitions in habeas corpus, coram nobis, and other claims for extraordinary relief. Additionally, in light of the widely adopted view that 28 U.S.C. Section 1259 does not allow for certiorari review of CAAF's decisions to deny writ-appeal petitions, many will continue to forego seeking certiorari review on the mistaken assumption that such review is not available.

III. CAAF WRONGFULLY DENIED NEW CORAM NOBIS RELIEF FROM A FUNDAMENTALLY FLAWED COURT-MARTIAL BY ITS FAILURE TO ADDRESS THE GOVERNMENT'S MISAPPLICATION OF THIS COURT'S POLITICAL QUESTION DOCTRINE.

In its Answer to New's writ-appeal petition, the Government claimed that neither classified PDD 25 nor classified PRD 13 was discoverable "under *Brady*, Article 46, or R.C.M. 701," and even if they were discoverable, "the nondisclosure of such documents in this case was harmless beyond a reasonable doubt." Ans. (App. 84a). Both contentions rest upon the same premise that, because the two documents "relate solely to [New's] attempted defense ... that the underlying deployment was unlawful," they were irrelevant and immaterial, "the lawfulness of the deployment [being] a nonjusticiable, political question." *Id.* (App. 84a).

Remarkably, the Government's Answer does not address New's claim of unlawfulness of the order as set forth in his petition before ACCA and his writ-appeal petition before CAAF. In those documents,

New has not claimed that the Macedonian deployment for which the U.N. uniform was prescribed was generally unlawful. To the contrary, he has claimed that the deployment violated a specific statute, the UNPA. *See, e.g.,* Writ-Pet. (App. 43a-44a, 46a-48a, 53a, and 58a). So the question put to ACCA and/CAAF by New's coram nobis and writ-appeal petitions was whether the classified versions of PDD 25 and PRD 13 were relevant and material to New's defense that the deployment violated the limitations on the deployment of American armed forces spelled out in 22 U.S.C. sections 287d and 287d-1, statutes duly enacted by Congress. *See* Writ-Pet. (App. 19a-22a).

Contrary to the Government's Answer asserting that "[e]very court ... has ... ruled that the lawfulness of the deployment was a nonjusticiable, political question,"[27] CAAF, on direct appeal from New's court-martial conviction and sentence, limited its reliance on the political question doctrine to affirm the military judge's decision to "decline[] to rule on the **constitutionality** of the President's decision to deploy the Armed Forces ...." United States v. New, 55 M.J. 95, 109 (CAAF 2001), *cert. den.*, 534 U.S. 955 (2001). Thus, CAAF did not ignore the merits of New's argument 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 [UNPA]." *Id.*, 55 M.J. at 107. In short, until the Government filed its Answer in this case, New's claim that the

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[27] Ans. (App. 83a-84a).

deployment order violated the UNPA has been addressed on the merits, not dismissed as a nonjusticiable political question outside the jurisdiction of the military courts. And for good reason. New's UNPA defense simply does not raise a political question.

As this Court has stated, "[i]n determining whether a question falls within [the political question] category, the appropriateness under our system of government attributing finality to the action of the political department and also the lack of satisfactory criteria for judicial determination are dominant considerations." Baker v. Carr, 369 U.S. 186, 210 (1962). With respect to New's claim that the Macedonian deployment violated the UNPA, neither section 6 nor section 7 "lack[ed] judicially discoverable and manageable standards for resolving" each claim. Section 6 provides that the President may commit American Armed Forces to a UN combatant peace enforcement operation pursuant to Chapter VII of the U.N. Charter only after securing "by Appropriate Act or joint resolution" Congressional approval of an agreement between the President and the U.N. *See* 22 U.S.C. Section 287d (App. 19a). Section 7 provides that "the President ... may authorize, in support of such activities of the United Nations as are specifically directed to the peaceable settlement of disputes and **not** involving the employment of armed forces contemplated by chapter VII of the United Nations Charter ... to serve as observers, guards, or in any noncombatant capacity, but in no event shall more than a total of one thousand of such personnel be so

detailed at any one time." 22 U.S.C. Section 287d-1(a)(1) (emphasis added) (App. 19a-22a).

According to these specific rules, the threshold question at New's court-martial was whether the U.N. peace operation in Macedonia was undertaken under Chapter VII of the U.N. Charter. If it was such a combatant operation, then the question was whether Congress had, by an appropriate act or joint resolution, specifically authorized the President to deploy American armed forces to that operation, as required by Section 6 of the UNPA. If the Macedonian deployment was a noncombatant peace keeping operation under Chapter VI, then the question was whether at that time there were no more than a total of 1,000 members of American armed forces deployed in noncombatant roles in service of the U.N. These are **not** nonjusticiable political questions. As this Court has observed:

> [T]he courts have authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts. [Japan Whaling Ass'n. v. American Cetacean Society, 478 U.S. 221, 22-30 (1986).]

As the Government has conceded in its Answer, PDD 25 and PRD 13 "would have given further facts to point to their argument that the deployment was unlawful." Ans. (App. 85a). Indeed, the UNPA makes a sharp distinction between U.N. combatant peace enforcement operations under Chapter VII of the UN

Charter, requiring advance approval from Congress, and U.N. noncombatant peace keeping operations under Chapter VI, limiting the total number of American armed forces to 1,000 in noncombatant roles. *Compare* 22 U.S.C. Section 287d *with* 22 U.S.C. Section 287d-1(a) (App. 19a-20a). PDD 25 does not make that distinction, rhetorically crushing the difference between noncombatant peace keeping and combatant peace enforcement actions, mashing them the into a single category of "peace operations,"[28] to be governed by the same factors, unless the U.S. involvement in a combatant operation is "significant." PDD 25, Annex II (App. 138a-139a). Nowhere in any set of factors is there any mention of either the UNPA Section 6 Congressional approval requirement or the UNPA Section 7 1,000 noncombatant limit. *See id.*, Annex I (App. 136a-137a).

The failure to include either UNPA limit is especially telling in light of the fact that PRD 13 called for a review of the question whether "the UN Participation Act need be modified" PRD 13 (App. 115a, 117a) and PDD 25, in turn, adopted a strategic goal — at some future appropriate time — to "[a]mend Section 7 of the UN Participation Act first to **remove** the limitations detailing personnel to the UN Chapter 6 operations and then, to the extent it is politically feasible, to **delete** the prohibition against using that section as authority to support Chapter VII operations." PDD 25 (App. 131a).

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[28] PDD 25, Annex VII (App. 140a-141a).

Classified PDD 25 and PRD 13, had they been made available to New at his court-martial, provided exculpatory information counterbalancing any attempt by the prosecution to demonstrate either that the Macedonian deployment complied with UNPA, or that the question of UNPA compliance raised a nonjusticiable political question. Indeed, any claim, such as New's, "that [the President] acted in excess of powers granted him by Congress" is entitled to "judicial relief," even when it involves the military. *See* Harmon v. Brucker, 355 U.S. 579, 581-82 (1958).

This point is especially applicable here. New was court-martialed on a charge of disobedience of a "lawful" order. While the military order, like all such orders, is presumed to be lawful, it is well-established that a defendant may rebut that presumption by evidence and argument that the order was unlawful. This is so because the Article 92(2), UCMJ "reflects the traditional Anglo-American view that only disobedience of 'lawful' orders is prohibited." *See* United States v. New, 55 M.J. at 115 (Sullivan, J., concurring). As CAAF Judge Sullivan observed, in New's direct appeal to CAAF, "[a]s a cadet at West Point, 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' could either validate or reject your decision to disobey." *Id.*, 55 M.J. at 117.

Although the CAAF majority rejected Judge Sullivan's view that the military jury should be the

ultimate decider of the legality of an order in an Article 92(2) prosecution, the Government has offered no authority supporting the quite different proposition that the political question doctrine should bar New from rebutting the presumption of lawfulness of the order to deploy New and his unit to Macedonia, on the ground that the lawfulness of a military deployment under the UNPA was "outside the scope of the [military] court's purview as a political question." *See* Ans. (App. 85a). Indeed, if New's UNPA defense is a nonjusticiable "political" claim, not a justiciable legal one, it would only be fair to presume that the President's deployment order was equally a nonjusticiable political order, not one imposing a legally-enforceable duty punishable, if breached, by court-martial. To permit the Government to politicize the process, by denying New a defense based upon a clearly applicable statute, would be contrary to "the law of the land" and, therefore, would deny New his property and liberty without due process of law.

Additionally, as New emphasized in his Reply below, if the political question doctrine trumps New's effort to prove that the deployment order was unlawful, the application of that doctrine "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." Reply (App. 104a). This is the very antithesis of the rule of law, reminiscent of Richard M. Nixon's claim of presidential prerogative,[29] rather than John Marshall's

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[29] *See* Interview with David Frost (May 20, 1997) ("When the President does it, that means it is not illegal.")

admonition that ours is a "government of laws, and not of men [and] it will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

If the military courts are allowed to sidestep the question whether the President of the United States has violated his oath to "preserve, protect and defend the Constitution of the United States on the ground that the UNPA rules are nonjusticiable because an decision adverse to the Commander-in-Chief would evince a "lack of respect due" to that high office, or a "potential embarrassment" to its occupent, it would turn the separation of powers principle on its head. *See* United States v. Munoz-Flores, 495 U.S. 385, 390-92 (1990). As this Court has observed, "'the Constitution diffuses power the better to secure liberty,'"[30] it does not concentrate power in one man or one branch of government as the Government's careless application of the political question doctrine would do.

As this Court has also observed, "'[t]he Framers of the Constitution ... viewed the principle of separation of powers as the absolutely central guarantee of a just Government.'" *Id.*, 495 U.S. at 394. Even though CAAF is an Article I court, Congress established it as a civilian court that "would be 'completely removed from all military influence of persuasion.'" *See* "About

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http://www.youtube.com/watch?v=ejvyDn1TPr8.

[30] *See id.*, 495 U.S. at 394.

the Court," The United States Court of Appeals for the Armed Forces.[31] Application of the political question doctrine in any court-martial on a charge of disobedience of a military order undermines this congressional purpose. By its failure to reject the Government's insistence that the lawfulness of the order to deploy New must be set aside as a nonjusticiable political question, CAAF has fallen short of its duty to exercise independent judgment, allowing a rank and file soldier to be deprived of full access to all exculpatory evidence and to all legal and constitutional defenses in violation of military legal and constitutional guarantees.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[31] http://www.armfor.uscourts.gov/newcaaf/about.htm.