IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MICHAEL G. NEW,	)	
	)	
Petitioner/Plaintiff,	)	
	)	
v.	)	Civil Action No.: 96-0033 (PLF)
	)	
DONALD H. RUMSFELD, SECRETARY OF DEFENSE, AND THOMAS E. WHITE, SECRETARY OF THE ARMY,	)	
	)	
Respondents/Defendants.	)	

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT

INTRODUCTION

Defendants have filed a motion to dismiss Plaintiff's Second Amended Complaint for failure to state a claim upon which relief can be granted. By their motion, Defendants seek to block the door to the federal courthouse to a soldier court-martialed for challenging a blatantly illegal and unconstitutional order. In their zeal to deny Plaintiff his day in court, Defendants have ignored both the standard of review properly applicable to motions filed pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure ("FRCivP"), and the standard of review applicable to collateral attacks on courts-martial convictions in Article III courts. According to both standards — as articulated in Kowal v. MCI Communications Corp., 16 F.3d 1271 (D.C. Cir. 1994), and in Kauffman v. Secretary of the Air Force, 415 F.2d 991 (D.C. Cir. 1969) — the Defendants' Motion to Dismiss should be denied because, as a matter of fact and law, Plaintiff has, in each of the four Counts of his Second Amended Complaint ("2d Am. Compl."), stated a claim upon

which judicial relief may be granted.

ARGUMENT

I. Defendants' Motion to Dismiss Fails to Meet the Test for Dismissal Under Rule 12(b)(6), FRCivP.

A. Defendants' Motion is Not Limited to the Facts Alleged in Plaintiff's Complaint and the Inferences that May Be Derived Therefrom.

According to the rule governing Rule 12(b)(6) motions to dismiss in this Circuit, "all statement[s] of material fact [in the complaint] must be accepted as true," and no facts may be "draw[n] upon from outside the pleadings." Taylor v. Federal Deposit Insurance Corp., 132 F.3d 753, 762 (D.C. Cir. 1997). Indeed, "the complaint is [to be] construed liberally in the plaintiff['s] favor, ... grant[ing] plaintiff[] the benefit of all inferences that can be derived from the facts alleged." Kowal v. MCI Communications Corp., 16 F.3d at 1276 . Thus, a complaint should never be dismissed for failure to state a claim upon which relief may be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). To that end, a complaint "must [be] accorded ... the spacious interpretation prescribed by the Federal Rules." Schuler v. United States, 617 F.2d 605, 608 (D.C. Cir. 1979).

Defendants' Motion to Dismiss asks this Court to violate all of these precepts. In disregard of FRCivP. 12(b)(6) and LCvR 7.1(a), Defendants make absolutely no effort to provide a "concise statement of facts" limited to, or even consistent with, the factual allegations and legal claims in Plaintiff's Second Amended Complaint. Instead, they have crafted a "Background" statement which is based largely upon their interpretation of "prior filings and published

opinions" of the two military appellate courts, **not** upon the allegations contained in Plaintiff's complaint. *See* Memorandum in Support of Defendants' Motion to Dismiss ("Dfs. Memo"), pp. 1-4.

By apparent design, Defendants have virtually ignored Plaintiff's detailed factual account of events at his court-martial, and his careful statement of the issues presented to, and their resolutions by, the military appellate courts. *See* 2d Am. Compl., ¶¶ 8-31. Having failed to address the specific facts alleged in Plaintiff's Second Amended Complaint, Defendants have presented Plaintiff's legal contentions divorced from the factual account of what transpired in the military courts, as alleged in the complaint. *See* Dfs. Memo, pp. 3-4. Additionally, by ignoring the factual allegations and their relationship to each of the four counts of the complaint, Defendants have lumped all four of Plaintiff's counts together in an attempt to misuse the political question doctrine as a procedural blunderbuss to shoot down each count (*see id.*, pp. 5-9) when, upon a fair reading of the complaint, the political question doctrine could apply only to Count II which, alone, challenges the legality and constitutionality of the Macedonian deployment. *Compare* 2d Am. Compl. ¶¶ 39-41, 45-56 *with* ¶¶ 42-44. Even with respect to Count II, Defendants' political question argument completely misses the mark, resting upon factual and legal assumptions that are not part of Plaintiff's complaint.

B. There is no Factual Basis for Defendants' Political Question Argument Contesting Counts I, III, and IV of the Complaint.

In their opening argument, Defendants broadly assert that because Plaintiff's complaint, as a whole, "seeks review of a nonjusticiable issue" — the illegality and unconstitutionality of the Macedonian deployment — "this Court is faced with no other alternative but to deny Plaintiff

the relief he seeks." *See* Dfs. Memo, 8-9. Defendants' argument assumes that each and every count of Plaintiff's complaint turns ultimately on "policy and political considerations" fit for resolution only by the legislative and executive branches of the government, not upon legal obligations suitable for resolution by the judicial process. *See* Dfs. Memo, pp. 5-.7.

According to Defendants' view of Plaintiff's court-martial, Plaintiff had a **legal** duty to obey the October 2 and 4, 1995 order to wear the "prescribed uniform for the deployment to Macedonia" (*see* 2d Am. Compl. ¶ 8), but the Army had no **legal** obligation to make sure that the deployment for which the uniform had been ordered was a **lawful** one — even though the statutory offense, upon which the court-martial charge was based, specifies that a violation requires proof of a knowing failure to obey a "lawful" order.[1] Rather, Defendants contend, the lawfulness of the Macedonian deployment is determined solely by "political and policy considerations" outside the jurisdiction of the military courts. *See* Dfs. Memo, pp. 7-8.

While these contentions are simply mistaken as applied to Count II of Plaintiff's complaint — wherein Plaintiff does challenge the legality and constitutionality of the Macedonian deployment (*see* Part I. C. below) — they are entirely misplaced as applied to Counts I, III, and IV, none of which requires this Court to make any inquiry into "policy and political considerations" underlying the Macedonian deployment.

Count I of Plaintiff's Complaint in no way turns on the legality or constitutionality of the Macedonian deployment. Rather, in that count Plaintiff contends that, because the court-martial

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[1] 10 U.S.C. Section 892(2) reads as follows: "Any person subject to this chapter [10 U.S.C. Section 801 et seq] who — (2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order ... shall be punished as a court-martial may direct."

charge specifies that he knowingly violated a "lawful" order, as required by 10 U.S.C. Section 892(2), the lawfulness of the order to wear the U.N. patches and cap is an element of the offense charged (*see* 2d Am. Compl. ¶ 8), and that element — like any other element of an offense under the Uniform Code of Military Justice (or other criminal code) — must, as a matter of due process, be proved beyond a reasonable doubt to the military jury. *See* 2d Am. Compl. ¶ 19. Determining whether the legality of the order to wear the U.N. patches and cap is an element of the offense charged does not necessarily require this Court to rule on the legality or constitutionality of the Macedonian deployment, as Defendants would have this Court assume. Here, the issue of lawfulness of the order could turn on the lawfulness and constitutionality of the uniform, as such, not on the lawfulness of the specified purpose of the uniform, namely, the legality and constitutionality of the "deployment to Macedonia." *See* 2d Am. Compl. ¶¶ 8, 11, 14-15, 17-23, and 39-41.

Defendants' contention that the political question doctrine applies to Count I is novel, and inconsistent with the court-martial record and the opinions of both the Army Court of Criminal Appeals ("ACCA") and the Court of Appeals for the Armed Forces ("CAAF"). None of those courts ever stated that Plaintiff's claim that the lawfulness of the order was an element of the offense depended upon any "political or policy consideration" underpinning the Macedonian deployment. To the contrary, the military judge addressed the matter as a legal issue, ruling on the merits against Plaintiff's contention that the issue of unlawfulness was for the military jury, not the military judge. *See* 2d Am. Compl. ¶¶ 18-24. ACCA agreed, affirming on the merits the military judge's ruling that lawfulness was not an element of the offense to be proved beyond a reasonable doubt to the military jury. *See* 2d Am. Compl. ¶ 26. Although CAAF divided, three

to two, on the issue of whether lawfulness of an order is an element of the offense described in 10 U.S.C. Section 892(2), it did not disagree that the issue was a legal one to be resolved on the merits, not a nonjusticiable political question. *Compare* 2d Am. Compl. ¶ 28 *with* ¶ 27. The opinions of the CAAF judges on both sides of this issue made it very clear that the issue whether lawfulness was an element of that offense did **not** implicate any "political and policy considerations" concerning the Macedonian deployment, but only the court-martial process by which charges of disobedience of a lawful order are to be tried. *See* 2d Am. Compl. ¶¶ 29-30.

Counts III and IV, likewise, rest upon facts and legal argument that are unrelated to any "political and policy considerations" concerning the Macedonian deployment. At his court-martial, Plaintiff filed a motion to dismiss based upon his contention that the order to wear the U.N. patches and cap — standing alone — violated federal law and regulation governing Army uniforms, and the "foreign emoluments and office" clause of Article I, Section 9 of the U.S. Constitution. *See* 2d Am. Compl. ¶ 11. That motion was completely separate from an earlier motion to dismiss on the grounds that the Macedonian deployment was contrary to the United Nations Participation Act ("UNPA") and certain clauses of Article I, and the Commander-in-Chief and Appointments Clauses of Article II, Section 2, of the U.S. Constitution. *See* 2d Am. Compl. ¶ 9.

On their face, then, the two motions to dismiss the court-martial raised completely different issues. To be sure, Plaintiff's first motion to dismiss was based upon the ground that the purpose of the order — the Macedonian deployment — was illegal and unconstitutional, and thus, turned upon the application of Sections 6 and 7 of the UNPA, and the specified clauses of Article I and Article II of the U.S. Constitution. *See* 2d Am. Compl. ¶ 9. Plaintiff's second

motion, however, was based upon the claim that the order to wear the U.N. patches and cap violated regulatory, statutory and constitutional standards governing Army uniforms generally, and thus turned primarily upon the application of a Stipulation of Fact and the Army's argument that, under AR 670-1, the patches and cap were justified as "safety" measures in a "maneuver" area. *See* 2d Am. Compl. ¶¶ 11, 14-15. Indeed. the military judge issued separate rulings against Plaintiff on each of these two motions to dismiss. *See* 2d Am. Compl. ¶¶ 16 and 17.

Moreover, each of these two issues — the legality and constitutionality of the Macedonian deployment and the legality and constitutionality of the uniform — were addressed and resolved separately on appeal. As to the legality and constitutionality of the Macedonian deployment, ACCA affirmed the military judge's ruling on the ground that it was either irrelevant to the court-martial charge or, in the alternative, that it was a nonjusticiable political question. *See* 2d Am. Compl. ¶ 26. CAAF ruled simply that, insofar as the legality of the order depended upon the legality of the Macedonian deployment, the lawfulness of the order was a nonjusticiable political question. *See* 2d Am. Compl. ¶ 27.

With respect to the issue whether the U.N. patches and cap were justified as a lawful Army uniform, however, both appellate courts ruled on the merits. ACCA affirmed outright the military judge's ruling that, as a matter of law, the order to wear the U.N. patches and cap was a lawful "safety" measure in a "maneuver" area. *See* 2d Am. Compl. ¶ 26. A majority of CAAF judges agreed, holding that the military judge had properly ruled, as a matter of law, that the order to wear the U.N. patches and cap was a lawful one. *See* 2d Am. Compl. ¶¶ 28-29. Although two CAAF judges disagreed that the issue of lawfulness was solely one for the military judge, they concurred with the majority on the ground that there was no evidence in the record

that the uniform was unauthorized. *See* 2d Am. Compl. ¶ 30.

There is, therefore, no factual basis whatsoever for Defendants' contention that Counts I, III, and IV should be dismissed on the ground that those counts implicate "political and policy considerations" concerning the legality and constitutionality of the Macedonian deployment. Rather, each of those Counts contains claims that Plaintiff was denied his liberty and property without due process of law either by depriving him of right to contest the prosecution's claims that the U.N. patches and cap were, as a matter of fact and law, ordered as a "safety" measure in a "maneuver" area, or by denying to Plaintiff a full and fair opportunity to contest the legality and constitutionality of the U.N. uniform under statutes, regulations and constitutional provisions governing the office of an American soldier.

C. Defendants' Political Question Argument Against Count II of the Complaint Rests Upon an Incorrect Factual and Legal Basis.

In contrast to Counts I, III and IV, Count II of Plaintiff's complaint does rest upon the allegation that the order to wear the U.N. patches and cap is unlawful because the Macedonian deployment was unlawful and unconstitutional. 2d Am. Compl. ¶¶ 42-44. Nevertheless, Defendants' contention — that Plaintiff's claim in Count II rests upon a nonjusticiable political question — is unsupported by the factual claims within the four corners of Plaintiff's complaint and, when evaluated upon those factual claims, is unsupported as a matter of law.

1. Defendants Have Misstated the Factual Basis For Count II.

Defendants insist that there is no factual basis for Plaintiff's claim that the Macedonian deployment was unlawful and unconstitutional because "the order Plaintiff violated and was convicted for was not one to deploy, but rather to wear a certain uniform." *See* Dfs. Memo, p. 8.

While conceding that the order to wear the U.N. patches and cap was "given in anticipation of a future deployment," Defendants maintain that Plaintiff's challenge to that deployment was "simply [an] effort to frame a Constitutional issue" that has nothing to do with the court-martial charge. *Id.* Thus, Defendants contend that "the issue of deployment need never be addressed by [this] Court." *Id.*

This is not the first time that such a contention has been made. At the court-martial, the military judge ruled that Plaintiff's claims that the Macedonian deployment violated the UNPA and the Commander-in-Chief and Appointments Clauses of Article II, Section 2, of the U.S. Constitution were "irrelevant." *See* 2d Am. Compl. ¶ 16. That ruling was affirmed on appeal by ACCA. *See* 2d Am. Compl. ¶ 26. CAAF, however, ruled otherwise, upholding the military judge's ruling on the Macedonian deployment on the **sole** ground that Plaintiff's claim that the Macedonian deployment was unlawful and unconstitutional was a nonjusticiable political question. *See* 2d Am. Compl. ¶ 27.

While CAAF mistakenly ruled that Plaintiff's claim that the Macedonian deployment was nonjusticiable, it was certainly correct that the order to wear the U.N. patches and cap could not be divorced from the Macedonian deployment, as the military judge and ACCA had done. *Compare* 2d Am. Compl. ¶ 27 *with* 2d Am. Compl. ¶ 26. Indeed, the court-martial charge of disobedience to a lawful order specified that the order to wear the U.N. patches and cap was an order "**to wear the prescribed uniform for the deployment to Macedonia**." *See* 2d Am. Compl. ¶ 8 (emphasis added). Having made the "deployment to Macedonia" the centerpiece of its court-martial charge, the prosecution indicated that the deployment was the order's *raison d'etre*, *i.e.*, but for the Macedonian deployment, there would be no order to wear the U.N.

patches and cap.

There is, then, absolutely no factual basis for Defendants' charge that Plaintiff thrust the legality and unconstitutionality of the Macedonian deployment into the court-martial proceeding in an "effort to frame a Constitutional issue," as Defendants have insisted. *See* Dfs. Memo, p. 8. If the order issued on October 2 and 4, 1995, was simply one to "wear a certain uniform ... in anticipation of a future deployment," as Defendants have contended (*id.* at 8), then surely the court-martial charge would **not** have identified the patches and cap as the "**prescribed** uniform for **the** deployment to Macedonia." *See* 2d Am. Compl. ¶ 8 (emphasis added). It was, therefore, not the Plaintiff who introduced the Macedonian deployment into his court-martial, it was the Army prosecutors. And it is not only unbecoming for Defendants to attempt now to sanitize the record in an effort to erase the reference to the Macedonian deployment from the court-martial charge; it is inconsistent with the Rule 12(b)(6) requirement that the facts be stated as they appear in the complaint, not as Defendants would like for them to have appeared.

2. Defendants Have Misstated the Legal Basis for Count II.

Not only have Defendants misstated the **factual relationship** between the order to wear the U.N. patches and cap and the Macedonian deployment, but they have misstated the **legal basis** upon which Plaintiff challenged that deployment. In fact, Defendants have denigrated Plaintiff's claim that the Macedonian deployment violated specific provisions of the UNPA and the U.S. Constitution by their citation of United States v. Huet-Vaughn, 43 M.J. 105 (CAAF 1995), by which they have strongly implied that Plaintiff's opposition to the Macedonian deployment was no more than a "personal opinion[]." *See* Dfs. Memo, p. 6, n.6.

As clearly articulated in his complaint, Plaintiff's motion to dismiss the court-martial

charge on the grounds that the Macedonian deployment was unlawful was **not** rooted in Plaintiff's mere "personal opinion" about that deployment, but rather in Sections 6 and 7 of the UNPA and the Commander-in-Chief and Appointments Clauses of Article II, Section 2 of the U.S. Constitution.[2] *See* 2d Am. Compl. ¶ 9. Additionally, Plaintiff buttressed these legal claims with evidence through the sworn testimony of a qualified expert as to the combatant nature of the Macedonian deployment, to which the Army prosecutors responded with the unsworn opinion of the President. *Compare* 2d Am. Compl. ¶ 12 *with* 2d Am. Compl. ¶ 13.

At no point in their supporting memorandum have Defendants acknowledged Plaintiff's specific contentions and supporting evidence. To the contrary, Defendants' legal arguments and case citations seek to create the misimpression that Plaintiff's claim that the Macedonian deployment was illegal and unconstitutional rested **solely** upon the constitutional allocation of the war powers between Congress and the President. As noted above, that was one of Plaintiff's constitutional claims (*see* 2d Am. Compl. ¶ 9(b)), but only one of four, the others resting upon the UNPA and Article II, Section 2, of the U.S. Constitution. *See* 2d Am. Compl. ¶ 9(a), (c) and (d). In their supporting memorandum, Defendants have cited various cases in which courts have invoked the political question doctrine to deflect a constitutional challenge to a presidential decision to deploy American armed forces. Dfs. Memo, pp. 6-7. But Plaintiff's constitutional claims, in this collateral attack, are not directed at the provisions in the U.S. Constitution that allocate war power between Congress and the President, as the Defendants would have this Court

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[2] Indeed, Plaintiff New made these claims in his original habeas corpus petition filed with this Court which, in turn, took them "seriously," as "important issues," not merely expressions of Plaintiff's "personal opinions." *See* United States ex rel New v. Perry, 919 F. Supp. 491, 499-500 (D.D.C. 1996).

believe. *See* Dfs. Memo, 6-8. Rather, as stated in his complaint, Plaintiff is placing before this Court a collateral attack on the military courts' failure to adjudicate Plaintiff's constitutional contentions that the Macedonian deployment violated the Commander-in-Chief and Appointment Clauses of Article II, Section 2 of, and the Thirteenth Amendment to, the U.S. Constitution. *See* 2d Am. Compl. ¶¶ 9, 10, and 43. The United States Supreme Court has addressed, on the merits, claims of violation of the Appointments Clause (*e.g.*, Weiss v. United States, 510 U.S. 163 (1994))[3], of unconstitutional delegation of executive power (*e.g.*, Printz v. United States, 521 U.S. 898, 936 (1997))[4], and of the Thirteenth Amendment (*e.g.,* Bailey v. Alabama, 219 U.S. 219 (1911)). Not a single case cited by Defendants applies the political question doctrine to any such issue. Resolution of such questions does not, as the government has argued, require "'the courts to delve into and evaluate those areas where the court lacks the expertise, resources, and authority to explore.'" *See* Dfs. Memo, p. 7.

Nor have Defendants cited a single case wherein a court has invoked the political

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[3] By the order to deploy as a member of UNPREDEP, Plaintiff was placed under the command and control of a foreign military officer who had not been appointed in accordance with the procedural provisions of Article II, Section 2 of the U.S. Constitution. The Supreme Court has addressed, on the merits, a variety of claims of such violations of the Appointments Clause. *See, e.g.,* Shoemaker v. United States, 147 U.S. 282 (1893); Buckley v. Valeo, 424 U.S. 1, 124-41 (1976); Morrison v. Olson, 487 U.S. 654 (1988); Freytag v. Commissioner, 510 U.S. 163 (1991).

[4] With respect to the President's constitutional powers as commander-in-chief over American armed forces, Chief Justice Taney wrote over 150 years ago that the very heart of the role of commander-in-chief is "to direct the movements of the naval and military forces placed in his command, and to employ them in the manner that he may deem most effectual...." Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1850). Turning American soldiers over to UN "operational control" of foreign officers who neither report to, nor take orders from, the President — however "limited" and "temporary" the situation may be (*Record of Trial*, App. Exh. IV) — "shatter[s]" both the "vigor and accountability" that the constitutionally-prescribed "unity in the Federal Executive" was designed to preserve. *See* Printz, 521 U.S. at 936.

question doctrine to deflect a challenge to the President's authority to deploy American troops under the U.N. Charter, as governed by the UNPA. To the contrary, the cases relied upon by Defendants relate to challenges to Presidential authority to deploy based upon either a statutory or constitutional provision containing a general allocation of the war powers between Congress and the President. Indeed, Defendants place primary reliance upon Ange v. Bush, 753 F. Supp. 509, 513 (D.D.C. 1990), wherein a district court declined "'to intrude into the realm of foreign affairs where the Constitution grants operational control to only two political branches and where decisions are made based upon political and policy considerations.'" *See* Dfs. Memo, p. 6.

As is evident from a reading of Count II of his Complaint, Plaintiff is not, as Defendants have contended (Dfs. Memo, p. 6 and n.6), seeking a ruling from this Court on "political and policy considerations" that govern the allocation of war powers between Congress and the President, as was arguably the case in Ange. Rather, Plaintiff is seeking to vindicate his legal rights under the rules that both Congress and the President — **after** careful review of the political and policy considerations — have laid down in the UNPA. If the Macedonian deployment is established as one undertaken under Chapter 7 of the U.N. Charter, then Plaintiff contends that Section 6 of the UNPA explicitly requires the President to obtain Congressional approval of such U.N. operation "by appropriate Act or joint resolution, providing for the numbers and types of armed forces, their degree of readiness and general location, and the nature of the facilities and assistance, including rights of passage." *See* 22 U.S.C. Section 287d. If, on the other hand, it is established that the Macedonian deployment was undertaken pursuant to Chapter VI of the U.N. Charter, then Plaintiff maintains that Section 7 of the UNPA limits such U.N. deployments, in the aggregate "at any one time" to no more than "one thousand personnel of the armed forces of

the United States to serve as observers, guards, or in any noncombatant capacity." 22 U.S.C. Section 287d-1. Such issues as the construction and operation of a treaty, and the interpretation and application of a statute, go to the very essence of the exercise of judicial power to say what the law is. *See* Japan Whaling Ass'n v. American Cetacean Society, 478 U.S. 221, 229-30 (1986). The exercise of judicial power and duty to resolve such issues cannot be denied by Defendants' invocation of the political question doctrine.

Nor should this Court be distracted by the litany of political question cases cited by Defendants in their attempt to invoke the political question doctrine to deny to Plaintiff his defense against the lawfulness of the order to wear the prescribed uniform for the Macedonian deployment. Half of the cases cited were filed by members of Congress who sought to enjoin presidential-initiated use of armed force after they had failed to muster the necessary votes in Congress. *See* Lowrey v. Reagan, 676 F. Supp. 333, 337 (D.D.C. 1987); Conyers v. Reagan, 578 F. Supp. 324, 326 (D.D.C. 1984); Sanchez-Espinoza, v. Reagan, 568 F. Supp. 596, 597-98 (D.D.C. 1983); and Croquet v. Reagan, 558 F. Supp. 893, 896, 898 (D.D.C. 1982), affd, 720 F.2d 1355 (D.C. Cir. 1983), cert. denied, 487 U.S. 1251 (1984). Not surprisingly, the courts in those cases invoked the political question doctrine, refusing to become embroiled in an essentially political dispute between the legislative and executive branches over the operation of the War Powers Act and the constitutional allocation of power over the armed forces between the President and Congress.

The case here is not, however, a political dispute between members of two co-equal branches of the federal government; rather, it is a court-martial — a criminal trial — the outcome of which has been the imposition of a bad conduct discharge, adversely impacting the liberty and

property interests of Plaintiff. *See* 2d Am. Compl. ¶¶ 3, 33 and 34. Thus, Plaintiff's claim is even very different from the one waged by the National Guard sergeant in Ange v. Bush, 752 F. Supp. 509 (D.D.C. 1990), upon which the government has principally relied. In Ange, the plaintiff sought an injunction against an order deploying him to the Persian Gulf on the ground that the "Gulf War" violated the War Powers Clause of the U.S. Constitution and the War Powers Resolution. Because the plaintiff had, nonetheless, obeyed the order, having sought to be excused only on the ground that he was not "medically fit" (*see id.* at 510-11, 517-18), the district court treated Ange's complaint as essentially an attempt to litigate a political dispute — "the Constitution's allocation of war powers among the executive and legislative branches" — not a criminal trial where Ange's liberty and property were put at risk. *See id.* at 512-13.

Unlike the plaintiff in Ange, Plaintiff acted according to his convictions, refusing to wear "the prescribed uniform for the deployment to Macedonia" and, thereby, challenging the lawfulness of the order to don the U.N. patches and cap, in part, on the ground that the order, having been "generated" by an earlier unlawful order was, itself, unlawful. Unlike the plaintiff in Ange, Plaintiff here is not seeking an injunction, or otherwise attempting to preserve a safe harbor in the event that his challenge to the lawfulness of the order did not prevail.[5] Rather, the Army initiated a court-martial proceeding with the specific charge that Plaintiff had disobeyed an order to wear the uniform "prescribed ... for the deployment to Macedonia." 2d Am. Compl. ¶ 8.

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[5] Plaintiff's court-martial is especially dissimilar to the one in United States v. Huet-Vaughn, 43 M.J. 105 (1995). Contrary to Defendants' assertion, CAAF did **not**, in that case, "reaffirm[] the idea that personal belief that an order is unlawful cannot be a defense to a disobedience charge"(*see* Dfs. Memo, p. 6, n.6), for the simple reason that Huet-Vaughn was not even charged with disobedience of an unlawful order, but with "desertion with intent to avoid hazardous duty and shirk important service...." *Id*. at 115.

Having placed the issue of the "deployment to Macedonia" into the court-martial charge — a criminal charge — Defendants should not now, under the guise of the political question doctrine, be permitted to take the Macedonian deployment out of play, just in case Plaintiff might prevail on his defense that the "prescribed" uniform was ordered for an unlawful and unconstitutional deployment.

Defendants' effort to deny Plaintiff his "Macedonian deployment" defense is especially insulting in light of the fact that the prosecution was free at the court-martial to rely upon the Macedonian deployment to argue that the U.N. patches and cap were authorized additions to Plaintiff's Army uniform. Thus, in his argument to the military judge, the prosecutor contended that the uniform was necessary as a "safety" item in Macedonia, a "maneuver" area and, at the same time, the prosecution argued that the U.N. operation in Macedonia was a noncombatant one authorized by Section 7 of the UNPA. *See* 2d Am. Compl. ¶¶ 13 and 15. And the military judge so ruled, concluding his opinion that the U.N. patches and cap were an authorized uniform because they "had a function specifically to enhance safety of United States armed forces in Macedonia." *See* 2d Am. Compl. ¶¶ 16 and 17.

By dismissing the issue of the illegality and unconstitutionality of the Macedonian deployment as either irrelevant or a nonjusticiable political question, the military appellate courts misused the political question doctrine to apply a double standard, ignoring, on the one hand, Plaintiff's substantive legal and constitutional claims about the Macedonian deployment, while embracing, on the other, the prosecution's claims that the uniform was authorized as a "safety" measure in a "maneuver" area, that is, Macedonia. *Compare* 2d Am. Compl. ¶¶ 12-15 *with* 2d Am. Compl. ¶¶ 17, 26 and 27-31. Having afforded the prosecution the privilege of defending the

legality of the order in reliance upon the Macedonian deployment, the military appellate courts must not be permitted to deny to Plaintiff any opportunity to contest the legality and constitutionality of the very deployment upon which the prosecution depended to prove that the "prescribed" uniform for that deployment was authorized. *See* 2d Am. Compl. ¶¶ 26 and 27. To deny Plaintiff a right to be heard on the issue at the heart of the charge against him clearly raises a due process claim upon which relief can be granted. *See* Simmons v. South Carolina, 521 U.S. 154, 175 (1994) (O'Connor, J., concurring) ("[O]ne of the hallmarks of due process in our adversary system is the defendant's ability to meet the State's case against him.")

D. In Each of the Four Counts of his Complaint, Plaintiff Has Stated a Claim Upon which Judicial Relief May Be Granted.

The factual foundation undergirding the Plaintiff's complaint places before this Court Plaintiff's claims that the court-martial proceedings, and the appellate rulings affirming those proceedings, were conducted in such as way as to violate Supreme Court's articulated standards of constitutionality, and to deny to Plaintiff a full and fair opportunity to present a defense to the charge brought against him. Plaintiff is waging a collateral attack on his court-martial conviction and sentence to a bad conduct discharge for having been found guilty of violating Article 92(2) of the Uniform Code of Military Justice (10 U.S.C. Section 892(2)) by knowingly failing to obey a "lawful order issued by LTC Stephen R. Layfield on 2 OCT 95 and CPT Roger H. Palmateer on 4 OCT 95, to wear the prescribed uniform for the deployment to Macedonia, i.e., U.N. Patches and cap." 2d Am. Compl. ¶ 8. That conviction and sentence, in turn, were affirmed on appeal by both ACCA and by CAAF contrary to United States Supreme Court due process standards, while failing to afford Plaintiff a full and fair opportunity to present his constitutional

defense based upon the "foreign emolument and office" clause of Article I, Section 9 of the United States Constitution. 2d Am. Compl. ¶¶ 2, 26-31, 37, 38. None of Plaintiff's claims raises a nonjusticiable political question; rather, each claim rests upon the statutory and constitutional obligations which are "emphatically [within] the province and duty of the judicial department to say what the law is." *Cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

II. Defendants' Motion to Dismiss Fails to Apply the Rule Governing Collateral Attacks on Court-Martial Convictions in this Circuit.

A. Defendants Have Misapplied an Inapplicable Standard of Review to Plaintiff's Complaint.

According to Defendants, the standard of review governing Plaintiff's collateral attack on his court-martial conviction requires this Court to give "[e]xtreme deference [to] the judgments of the military judicial system." Dfs. Memo, p.11. Thus, Defendants contend that "civilian courts are limited to consideration of issues raising serious constitutional questions, or invalidating a court-martial that is constitutionally unfair." *Id.* Citing United States v. Augenblick, 393 U.S. 348 (1969), Defendants assert that "[a]llegations of constitutional violations are not alone sufficient" (Dfs. Memo, p.12, emphasis original), and, quoting from Augenblick, they maintain that a collateral attack on a court-martial conviction must show that the court-martial "'proceeding is more a spectacle ... or trial by ordeal ... than a disciplined contest.'" Dfs. Memo, pp. 11, 12.

Defendants' reliance upon Augenblick is misplaced. In that case, the Supreme Court rejected a collateral attack on a court-martial conviction based upon a claim of violations of "statutory rules of evidence," not upon a claim of violations of "express constitutional mandates." *See* Augenblick, 393 U.S. 348, 351-56. In this case, however, Plaintiff relies upon

specific constitutional mandates. In Count I of his Second Amended Complaint, Plaintiff has expressly relied upon the due process standards set forth by the Supreme Court in Gaudin v. United States, 515 U.S. 506 (1995), and Jackson v. United States, 443 U.S. 307 (1979). 2d Am. Compl. ¶¶ 40-41. In Count II, Plaintiff has relied not only upon the Supreme Court's due process standards as set forth in Crane v. Kentucky, 476 U.S. 683 (1986), and Simmons v. South Carolina, 521 U.S. 154 (1994), but also upon Supreme Court precedents governing the application of the political question doctrine to Plaintiff's claims that the Macedonian deployment violated the UNPA and Article II, Section 2, of the U.S. Constitution. *See* 2d Am. Compl. ¶¶ 43-44. In Counts III and IV, Plaintiff has cited the express constitutional mandate against "foreign emoluments or offices" contained in Article I, Section 9, of the U.S. Constitution, the alleged violation of which produced the unconstitutional court-martial conviction and sentence which are the subject of this collateral attack. *See* 2d Am. Compl. ¶¶ 46-49, 51-56. In light of these "express constitutional mandates" relied upon by Plaintiff, this Court's review of Plaintiff's collateral attack is **not** constrained by Augenblick, as Defendants contend.

Nor is this Court's review limited, as Defendants further contend, to the question whether "the military courts have fully litigated the issues" raised in Plaintiff's complaint. *See* Dfs. Memo, pp. 10, 12. In support of this contention, Defendants have purportedly relied upon Burns v. Wilson, 346 U.S. 137 (1953), which states, in pertinent part, that "when a military decision has dealt fully and fairly with an allegation raised in that application [for a writ of habeas corpus], it is not open to a federal court to grant the writ simply to reevaluate the evidence." *Id.* at 142. Defendants' reliance upon Burns v. Wilson, like their reliance upon Augenblick, is misplaced,

for at least two reasons.

First, by his collateral attack on his court-martial conviction, Plaintiff's complaint does not constitute a request for this Court to "reevaluate the evidence," as Defendants have implied. *See* Dfs. Memo, p. 10, 11-12. To the contrary, Plaintiff has alleged in each Count of his complaint a constitutional legal claim, not an evidentiary one. Count I alleges that, contrary to the due process standards in Gaudin v. United States, 515 U.S. 506 (1995), and in Jackson v. Virginia, 443 U.S. 307 (1979), the military courts ruled that "unlawfulness was not an element of the offense" of which Plaintiff was convicted. 2d Am. Compl. ¶¶ 8, 18-20, 22, 24, 26, 28-29, 39-41. Count II alleges that, contrary to the due process standards in Crane v. Kentucky, 476 U.S. 683 (1986), and in Simmons v. South Carolina, 521 U.S. 154 (1994), the military courts ruled that, insofar as the lawfulness of the order to wear the U.N. patches and cap turned on the lawfulness of the Macedonian deployment, Plaintiff's defense to the court-martial charge presented a "political question," wholly outside the jurisdiction of the military courts. 2d Am. Compl. ¶¶ 9, 12-13, 16, 26 and 27. Counts III and IV, likewise, allege that Plaintiff was denied his liberty and property without due process of law, because the military courts "failed fully and fairly" to adjudicate Plaintiff's claim that the order to wear the U.N. patches and cap violated military regulations, congressional statutes and the "foreign emoluments and offices" provision of Article I, Section 9 of the U.S. Constitution. 2d Am. Compl. ¶¶ 11, 14-15, 17, 23-24, 26, 30-31, 45-49, and 50-56. In none of these Counts has Plaintiff requested that this Court "retry the facts" or "reweigh ... the evidence," as Defendants have suggested. *See* Dfs. Memo, p. 12, nn. 8 and 9.

Second, Defendants have misstated the Burns v. Wilson standard of review as applied to

Plaintiff's constitutional claims. Defendants have asserted that, according to Burns, this "Court does not have jurisdiction" over any constitutional claim alleged in Plaintiff's complaint because "the military courts previously litigated the constitutional issues raised fully and fairly." *See* Dfs. Memo, p. 12. Indeed, Defendants have taken Burns even further, stating that "[if] the military courts have given issues full and fair consideration, civilian courts must accept the result." *See* Dfs. Memo, p. 12, n. 9.

With respect to Counts III and IV of Plaintiff's complaint, Defendants' reliance upon Burns is inapposite. In both counts, Plaintiff has alleged that his claim — that the order to wear the U.N. patches and cap violated Article I, Section 9 of the U.S. Constitution — was **not** fully and fairly adjudicated in the military courts. 2d Am. Compl. ¶¶ 48 - 49, 55-56. Thus, even under Defendants' narrow reading of Burns, Plaintiff has stated in each of Counts III and IV a claim upon which relief may be granted.

Admittedly, Plaintiff has also alleged, in Counts I and II of his complaint, that the military courts failed to conform to Supreme Court standards of due process of law, without regard to whether those courts have afforded Plaintiff a full and fair opportunity to litigate his claim that lawfulness was an element of the court-martial offense and that the Macedonian deployment was illegal and unconstitutional. *See* 2d Am. Compl. ¶¶ 39-44. According to Kauffman v. Secretary of the Air Force, 415 F. 2d 991 (D.D.C. Cir. 1969), Burns v. Wilson does not deprive this Court of jurisdiction over those claims. To the contrary, the Court of Appeals for this Circuit has authoritatively ruled that the test of "fairness" enunciated in Burns:

> requires that military rulings on constitutional issues conform to Supreme Court standards, unless it is shown that conditions peculiar to military life require a different rule. [Kauffman, 415 F.2d at 997].

Accordingly, the Court of Appeals in Kauffman ruled that it was "error" for the district court to have concluded "that since the Court of Military Appeals (now CAAF) gave thorough consideration to appellant's constitutional claims, its consideration was full and fair." *Id.* Defendants would have this Court commit the same error.

While Defendants appear to acknowledge that Kauffman "concluded that the fully and fairly litigated standard enunciated in Burns v. Wilson had to comply with Supreme Court standards," they maintain that Kauffman nevertheless requires this Court to defer to the constitutional judgments of the Article I military courts, having only "slightly" expanded the scope of review whether the military courts have given fair consideration to Plaintiff's constitutional claims. *See* Dfs. Memo, p. 13. Thus, Defendants insist that, under Kauffman, this Court is not permitted to conduct "an in-depth inquiry into the trial record" of this case. *See* Dfs. Memo, p. 14. Rather, according to Defendants, this Court "need only refer to the two lengthy, detailed and published opinions provided by the military appellate courts on the exact issues for [*sic*] which Plaintiff complains," and decline Plaintiff's invitation to independently "relitigate issues fully and fairly considered in compliance with Supreme Court standards, and resolved." *See* Dfs. Memo, p. 14.

Defendants' reading of Kauffman is seriously flawed. Not only did the Kauffman court expressly reject the proposition that civilian courts must defer to military judgment on constitutional issues fully and fairly considered, but it embraced the view that "[t]he benefits of collateral review of military judgments [would be] lost if civilian courts apply a vague and watered-down standard of full and fair consideration that fails ... to protect the rights of servicemen." Kauffman, 415 F.2d at 997. The Kauffman standard, then, is designed to vindicate

"Congress' concern that the system of military justice afford ... maximum protection to the rights of servicemen," including access to collateral review by civilian courts. *See id.* at 996. Hence, Kauffman rejected the government's attempt to obtain "wholesale exclusion of constitutional errors from civilian review and the perfunctory review of servicemen's [other] claims" on the ground that such "limitations [have] no rational relation to the military circumstances which may qualify constitutional requirements." *Id.* at 997.

In sum, the Kauffman standard requires this Court independently to review Plaintiff's constitutional claims to determine not only if the military courts, especially CAAF, gave full and fair consideration to Plaintiff's constitutional claims, but also whether those courts resolved Plaintiff's constitutional claims in accordance with applicable Supreme Court standards, unless the government affirmatively shows that "conditions peculiar to military life require a different rule." *See id.* at 997, 997-1000. In their Memorandum in Support of their Motion to Dismiss, Defendants have utterly failed to demonstrate that, on the face of the Second Amended Complaint, the Kauffman standard has not been met.

B. Under Kauffman, Count I of Plaintiff's Complaint States a Claim Upon Which Relief May be Granted.

At his court-martial, Plaintiff was charged with having disobeyed a "lawful" order "to wear the prescribed uniform for the deployment to Macedonia, *i.e.*, U.N. patches and cap," in violation of "Article 92(2) of the Uniform Code of Military Justice." 2d Am. Compl. ¶ 8. The offense charged was defined by 10 U.S.C. Section 892(2), a criminal statute enacted by Congress which reads, in pertinent part, as follows: "Any person ... who having knowledge of any ... lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey

the order ... shall be punished as a court-martial may direct."

Initially, Plaintiff sought to dismiss the charge on the ground that, as a matter of law, the order was unlawful. 2d Am. Compl. ¶¶ 9-11. After introducing evidence in support of his claims through sworn testimony and a stipulation of fact, Plaintiff argued that the order violated various regulations, statutes and constitutional provisions. *See* 2d Am. Compl. ¶¶ 12 and 14. Without introducing any admissible evidence, the prosecution argued to the contrary. 2d Am. Compl. ¶¶ 13 and 15. Agreeing with the prosecution's arguments, the military judge ruled against Plaintiff's motions to dismiss. 2d Am. Compl. ¶¶ 16 and 17.

After ruling against Plaintiff's motions, the military judge informed Plaintiff that he intended to rule as a matter of law that the issue of the lawfulness of the order was an "issue[] to be resolved wholly by the military judge, not the military jury." 2d Am. Compl. ¶ 19. In response, Plaintiff objected, asserting that "the lawfulness of an order is an 'element of the offense which the government must prove beyond a reasonable doubt,' and that, by taking the lawfulness issue from the military jury, the military judge has 'effectively taken away ... the due process guaranteed to Specialist New under the 5th Amendment, by which the government must, beyond a reasonable doubt, prove each and every element of the offense in order to convict.'" 2d Am. Compl. ¶ 19.

The prosecution countered this claim, asserting that there were no "factual" issues for the military jury to resolve. 2d Am. Compl. ¶ 20. In reply, Plaintiff listed several factual issues, including whether the Macedonian deployment had been undertaken as a combatant or noncombatant one, whether the Macedonian area to which Plaintiff would be deployed was a "maneuver" area, and, if so, whether the U.N. patches and cap to be worn in that deployment

constituted a "safety" measure. 2d Am. Compl. ¶ 21. Notwithstanding this proffer, the military judge ruled that the issue of lawfulness was solely an "interlocutory" one to be decided only by the military judge. 2d Am. Compl. ¶ 22. Consequently, no evidence was allowed to be introduced on the issue of the lawfulness of the order, and the military judge instructed the military jury that, as a matter of law, the order was lawful. 2d Am. Compl. ¶¶ 23 and 24.

ACCA unanimously affirmed this ruling of the military judge. 2d Am. Compl. ¶ 26. But CAAF divided over the issue. Three CAAF judges concluded that the "lawfulness of an order 'is not a discrete element of an offense under Article 92' of the Uniform Code of Military Justice" (2d Am. Compl. ¶ 29), whereas two CAAF judges agreed with Plaintiff. One CAAF judge insisted "that there was no question that 'lawfulness ... was an element of the charged offense, and accordingly under Article 51(c) [of the Uniform Code of Military Justice] and United States v. Gaudin, 515 U.S. 506, 522-23 ... should have been presented to the 'military jury.'" 2d Am. Compl. ¶ 30.

In Count I of his Complaint, Plaintiff contends that the CAAF majority's ruling — that the lawfulness of an order is not an element of the offense defined by 10 U.S.C. Section 892(2) — denied Plaintiff his liberty and property without due process of law in violation of the due process standards set forth in the Gaudin case, cited by one of the two CAAF judges who dissented from the majority's conclusion. *See* 2d Am. Compl. ¶ 41. Defendants, however, maintain that Plaintiff's Count I claim is "simply a procedural rule dictated by the Manual for Courts-Martial and is not a Constitutional issue," and that, because "Plaintiff was provided a full and fair opportunity to litigate whether the lawfulness of an order is an element of the charged offense," Count I fails to state a claim upon which this Court may grant relief. *See* Dfs. Memo,

p. 15. Defendants are mistaken.

First, Plaintiff has not based his claim in Count I upon any procedural rule in the Manual for Courts-Martial.[6] To the contrary, Plaintiff has expressly relied upon three Supreme Court decisions, two of which address an issue of statutory construction, the resolution of which determines the procedure by which an issue is to be resolved. *See* United States v. Gaudin, 515 U.S. 506, 511-19 (1995), and Neder v. United States, 527 U.S. 1, 13 (1999). In essence, Plaintiff contends in Count I that, because CAAF and the other military judges erred in construing 10 U.S.C. Section 892(2) in such a way that the lawfulness of an order is not an element of the offense with which Plaintiff was charged, Plaintiff was denied that process that he would otherwise be due, namely, the prosecution's burden to prove every element of an offense beyond a reasonable doubt to the military jury. That matter is decidedly not a court-martial "procedural issue," as Defendants contend, but an issue of constitutional dimension subject to independent and *de novo* review by this Court.

Defendants, however, contend otherwise, asserting that the CAAF majority's treatment of Gaudin is determinative on this Court. *See* Dfs. Memo, pp. 18-19. Quite simply, Defendants are again mistaken. The question before this Court is not whether CAAF considered Plaintiff's Gaudin argument, but whether the CAAF majority correctly applied Gaudin in its construction of 10 U.S.C. Section 892(2). Two CAAF judges disagreed with the majority, charging the majority's ruling that "lawfulness" was not an element of the offense of disobeying a "lawful order" to be "a radical departure from our political, legal and military tradition." *See* 2d Am.

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[6] The Manual for Courts-Martial, a compilation of presidential Executive Orders, contains rules for courts-martial. Obviously, these rules do not supersede the Constitution, or displace the opinions of Article III courts interpreting the Constitution.

Compl. ¶ 30. That observation alone should suffice to deny Defendant's Rule 12(b)(6) motion to dismiss, and to warrant this Court's conducting an independent review of the actual court-martial record, as well as the two military appellate court opinions. Moreover, Kauffman dictates that this Court independently examine the trial record to ascertain whether the military judge correctly concluded that lawfulness is not an element of the offense, and whether that determination, even if erroneous, was "harmless error," as two of the CAAF judges ruled, or whether there was sufficient evidence in the record for the military jury to have found that the order to wear the U.N. patches and cap was unlawful, as three CAAF judges concluded. *See* Kauffman, 415 F.2d at 998-99 and 2d Am. Compl. ¶¶ 30 and 31.

Additionally, Kauffman dictates rejection of Defendants' naked claim that "if lawfulness were treated as an element that must be proved in each case beyond a reasonable doubt, the validity of regulations and orders of critical import to the national security would be subject to unreviewable and potentially inconsistent treatment by different court-martial panels." *See* Dfs. Memo, p. 18. Such conclusory treatment of this important issue is inconsistent with Kauffman's admonition that Defendants must shoulder the burden to affirmatively "**show**[] [that] conditions peculiar to military life require a different rule" (*id.,* 415 F.2d at 997 (emphasis added)) than the one that prevails in civilian life in matters involving the construction of criminal statutes, in light of the congressional policy "that the system of military justice afford maximum protection to the rights of servicemen." *Id.*, 415 F.2d at 996.

C. Under Kauffman, Count II of Plaintiff's Complaint States a Claim Upon Which Relief May Be Granted.

In Count II of his Second Amended Complaint, Plaintiff contends that his liberty and

property were denied — contrary to United States Supreme Court due process standards — by the action of CAAF affirming the military judge's ruling on the lawfulness and constitutionality of the Macedonian deployment on the ground that the legality and constitutionality of that deployment was a nonjusticiable political question. 2d Am. Compl. ¶¶ 42-44. At issue in this collateral attack on Plaintiff's court-martial conviction and sentence, then, is whether the CAAF ruling that the Macedonian deployment was a nonjusticiable political question conformed to Supreme Court standards governing the political question doctrine. As pointed out above, Plaintiff's Second Amended Complaint has stated a claim that CAAF's political question ruling does not conform to Supreme Court standards governing Plaintiff's claims that the Macedonian deployment violated the UNPA, Article II, Section 2 of, and the Thirteenth Amendment to, the U. S. Constitution. *See* Part I.C.2., *supra*, pp. 10-17.

In the substantive portion of their Memorandum, Defendants try to evade having to address the **legal** merits of Plaintiff's claim in Count II by renewing their **factual** argument that Plaintiff's Complaint was motivated by a "personal political agenda," rather than by a *bona fide* legal claim. *See* Dfs. Memo, pp. 19-21. Whatever Plaintiff's motivation, Defendants may not base their motion to dismiss on such a flimsy and unsubstantiated inference. As pointed out above, a Rule 12(b)(6) motion presumes the truth of all of Plaintiff's allegations in his complaint, and requires all reasonable inferences favorable to Plaintiff. *See* Part I.A. and C.1., *supra*, at 2 and 10. Under this standard, it is not for Defendants, or even a court, to disregard the plain language of the complaint, which clearly invokes specific regulations, statutes and constitutional provisions, as the measurement of the legality and constitutionality of the order to wear the U.N. patches and cap, not Plaintiff's "personal judgment," as Defendants have

contended. *Compare* 2d Am. Compl. ¶¶ 39-56 *with* Dfs. Memo, p. 20.

Besides, Defendants have tacitly admitted that Plaintiff's legal and constitutional objections to the Macedonian deployment are genuine, because they have also argued that the military judge rightfully rejected them on the merits. Indeed, Defendants have insisted that the military judge "conclusively determined that the order given Plaintiff was legal," having complied with Section 7 of the UNPA, and that —because the military trial judge's decision was a factual one, and was dealt with fully and fairly — it is not for this Court, pursuant to its collateral attack jurisdiction, to re-evaluate the evidence. *See* Dfs. Memo, pp.21-23.

In making this contention, however, Defendants have conveniently overlooked the fact that neither ACCA nor CAAF affirmed the military judge's findings and conclusions concerning the lawfulness and constitutionality of the Macedonian deployment. *See* 2d Am. Compl. ¶¶ 26 and 27. Even under Defendants' standard of full and fair consideration, the military judge's ruling that the Macedonian deployment was both lawful and constitutional — unreviewed and unaffirmed on the merits by any military appellate court — does not warrant the deference that Defendants have urged upon this Court. Indeed, by labeling the Macedonian deployment irrelevant and nonjusticiable, ACCA refused to give "full" consideration to any of Plaintiff's claims that the Macedonian deployment was illegal and unconstitutional. Likewise, CAAF, by dismissing those claims as nonjusticiable, refused to give any consideration to the merits of those claims. Thus, even under Defendants' erroneously lax standard of review of "full and fair consideration," Defendants have not sustained their burden of establishing that, under no circumstances, can Plaintiff prove that CAAF's treatment of the legality and unconstitutionality of the Macedonian deployment as nonjusticiable denied him of his liberty and property without

due process of law.

The military judge's ruling on the merits of Plaintiff's claims that the Macedonian deployment was unlawful and unconstitutional was, itself, not based upon "full and fair consideration." Plaintiff's claim of unlawfulness was based on noncompliance with Sections 6 and 7 of the United Nations Participation Act.[7] His claims of unconstitutionality were based upon the provisions delegating to Congress certain authority over the armed forces contained in Article I, Section 8 of the U.S. Constitution, and the Commander-in-Chief and Appointments Clauses of Article II, Section 2 of the U.S. Constitution. *See* 2d Am. Compl. ¶ 8. In support of these claims, Plaintiff introduced evidence through the sworn testimony of an expert witness that the Macedonian deployment was a United Nations Chapter VII combatant operation which, under Section 6 of the UNPA, required specific Congressional approval of any presidential decision to deploy any American armed forces and, according to the official records, such Congressional approval had not been obtained. 2d Am. Compl. ¶ 13. In response, the prosecution, declining to introduce any testimony, either by sworn affidavit or by live witness, relied solely upon a letter from the President which stated that the Macedonia deployment was conducted under Chapter VI of the U.N. Charter. 2d Am. Compl. ¶ 13. Solely on the basis of this representation, the military judge denied Plaintiff's motion to dismiss, concluding that the Macedonian deployment not only complied with the UNPA, but with the provisions of both the Commander-in-Chief and Appointments Clauses of Article 2, Section 2 of , and the Thirteenth Amendment to, the U.S. Constitution. *See* 2d Am. Compl. ¶ 16.

Under Kauffman, had the military appellate courts ruled against Plaintiff on the merits,

[7] 22 U.S.C. Sec. 287d and 22 U.S.C. Section 287d-1, respectively.

this Court would have jurisdiction independently to address the merits of both Plaintiff's UNPA claim and his constitutional claims. But neither military appellate court addressed those claims on the merits. The highest military court, CAA, disposed of all of those claims as nonjusticiable political questions. In his collateral attack, Plaintiff claims that the CAA ruling does not conform to Supreme Court standards governing the political question doctrine and due process of law. Plainly, under Kauffman, Plaintiff has stated a claim upon which relief may be granted.

D. Under Kauffman, Counts III and IV of Plaintiff's Complaint State Claims Upon Which Relief May Be Granted

At his court-martial, Plaintiff moved to dismiss the charge against him on the ground that the order to wear the "U.N. patches and cap" violated the "foreign emolument and office clause" of Article I, Section 9, of the United States Constitution, as well as various statutes and regulations governing the wearing of Army uniforms and insignia. 2d Am. Compl. ¶ 11. In support of that motion, Plaintiff submitted a "Stipulation of Fact," agreed to by the prosecution, attesting that the wearing of the U.N. patches and cap had not been approved by the Director of Heraldry as required and mandated under paragraphs 27-16a and 27-16b of Army Regulation (AR) 670-1, and that the wearing of the U.N. patches and cap had not been approved by either the Department of Defense or the Department of the Army; rather, such patches and cap had been issued only "for the purpose of augmenting [Plaintiff's] U.S. Army B[attle] D[ress] U[niform]." 2d Am. Compl. ¶ 14. Thus, Plaintiff maintained that he had established a prima facie case of violation of the "foreign emoluments and office" provision of Article I, Section 9, of the U.S. Constitution, Congress having failed to authorize the wearing of the U.N. patches and cap. 2d Am. Compl. ¶¶ 48 and 52.

In response to Plaintiff's claim, and without introducing any evidence by sworn affidavit or otherwise, the prosecution contended that the "U.N. patches and cap" were justified under AR 670-1 as "safety" measures in a "maneuver" area. In presenting his argument to the military judge, the prosecutor maintained that the "U.N. patches and cap" constituted a safety measure in a maneuver area because they are "in a hostile environment the best protection one can have in the boundless chaos of warfare." At the same time, the prosecutor inconsistently asserted that "the Government does not concede Macedonia is a hostile environment." Additionally, the prosecution insisted that the Macedonian operation was a "noncombatant" one and, again at the same time, argued that U.N. blue was "recognized internationally as off limits to ... combatants." 2d Am. Compl. ¶ 15.

Notwithstanding the absence of any evidence, and disregarding the prosecutor's contradictory assertions, the military judge denied Plaintiff's motion to dismiss on the ground that " the wearing of [the U.N. patches and cap] in a combat environment or potential combat environment has a practical combat function which may enhance ... safety" and, therefore, "the adding of U.N. military uniform accouterments, had a function specifically to enhance the safety of United States armed forces in Macedonia." 2d Am. Compl. ¶ 17. Having also ruled that the issue of lawfulness of the order was solely a matter of law to be conclusively resolved by the military judge, not the military jury, the military judge left no room for Plaintiff to rebut the presumption of lawfulness of the order to wear the U.N. patches and cap, even though Plaintiff urged that the issue of "safety" and "maneuver" area were factual matters relevant to the existence or nonexistence of an element of the offense. 2d Am. Compl. ¶¶ 18, 21-22. Not surprisingly, the prosecution made no effort to introduce any evidence at trial on the issues of

"safety" and "maneuver" area, since the question of lawfulness had been taken from the military jury by the military judge. 2d Am. Compl. ¶¶ 23-24.

Having preserved both the factual issue of "safety" and "maneuver" area at the court-martial, Plaintiff pressed the failure of the military judge to address the "safety" and "maneuver" properly on appeal. Agreeing with the military judge that the lawfulness of the order was not an element of the offense, ACCA simply affirmed the military judge's ruling that the order to wear the U.N. patch and cap was a lawful "safety" measure in a "maneuver" area. 2d Am. Compl. ¶ 26. Even though it disagreed on whether the lawfulness of the order was an element of the offense, CAA also affirmed the military judge's ruling that the order was lawful. In doing so, CAA did not specifically address the issue of whether the military judge had properly adjudicated the issue of whether the U.N. uniform could be justified as a "safety" measure in a "maneuver" area. *See* 2d Am. Compl. ¶¶ 28-30.

In Count III of his Second Amended Complaint, Plaintiff has claimed that the military judge, ACCA, and CAA, in their haste to affirm that the U.N. patches and cap were justified as a "safety" measure in a "maneuver" area, failed utterly to adjudicate, on the merits, Plaintiff's claim that the order to wear the U.N. patches and cap violated the "foreign emoluments and office" provision of Article I, Section 9, of the U.S. Constitution. 2d Am. Compl. ¶ 49. In the alternative, in Count IV Plaintiff has averred that the military judge, ACCA and CAA, having failed fully and fairly to have adjudicated the "safety" and "maneuver" issues, have consequently failed fully and fairly to adjudicate Plaintiff's claim that the order to wear the U.N. patches and cap violated the "foreign emoluments and office" provision of Article I, Section 9, of the U.S. Constitution. 2d Am. Compl. ¶¶ 51-56. In both counts, Plaintiff seeks to secure his right not to

be deprived of his liberty and property without due process of law. 2d Am. Compl. ¶¶ 49, 56.

Defendants have responded by relying solely upon the military judge's ruling against Plaintiff's motion to dismiss, in which the military judge concluded that, because Macedonia was a "maneuver area," and because the U.N. patches and cap "enhance[d] both the safety and/or tactical effectiveness of combat-equipped soldiers performing [UNPREDEP] tactical operations," the order to modify the Army uniform with the U.N. patches and cap was authorized by AR 670-1. *See* Dfs. Mot. Dism., pp. 21-22. But the military judge's ruling, standing alone, does not constitute "full and fair consideration."

Conspicuously absent from Defendants' supporting memorandum is any reference to the specific factual allegations contained in Paragraph 15 of Plaintiff's Second Amended Complaint which states: "the prosecution argued that the 'U.N. patches and cap' were justified by paragraph 1-18 of AR 670-1 which provided for alterations in the authorized uniform for 'safety' purposes in a 'maneuver' area, **but introduced no sworn testimony in support of this claim."** 2d Am. Compl. ¶ 15 (emphasis added). Equally absent from the Defendants' motion and memorandum is the fact that the military judge based his decision that the U.N. patches and cap were justified as a "safety" measure in a "maneuver" area solely on the prosecutor's mere argument, not on any testimony or affidavit. *See* 2d Am. Compl. ¶¶ 15 and 17. Also missing from Defendants' supporting memorandum is any reference to the inference that the prosecution's argument — that the U.N. patches and cap constituted a necessary "safety" measure in a "hostile environment" — was contradicted by the prosecutor's further argument that "the Government does not concede that Macedonia is a hostile environment." *See* 2d Am. Compl. ¶ 15.

As alleged in Count IV, under Kauffman Plaintiff surely has stated a claim upon which

relief may be granted by the allegations that the military judge's findings on "safety" and "maneuver" area "lack ' fair support' in the record, or in the alternative, constitut[e] an unreasonable determination of the facts in light of the evidence presented in the court-martial proceeding," especially in view of the Stipulation of Fact that the U.N. patches and cap were not otherwise authorized by law or regulation. *See* 2d Am. Compl. ¶¶ 52-53.

Additionally, in both Counts III and IV, Plaintiff has alleged that neither ACCA nor CAA gave "full and fair consideration" to Plaintiff's Article I, Section 9 claim when they failed to review the court-martial record to determine whether the prosecution's claim and the military judge's ruling — that the U.N. patches and cap were justified as a "safety" measure in a "maneuver" area — were supported by any credible evidence in the record. *See* 2d Am. Compl. ¶¶ 14, 15, 17, 21, 38, 45-49 and 50-56.

CONCLUSION

For the reasons stated, Defendants' Motion to Dismiss is ill-founded in fact and in law and should be denied.

Respectfully submitted,

_____
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