

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School, U.S. Army

The following notes advise attorneys of current developments in the law and in policies. Judge advocates may adopt them for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. The faculty of The Judge Advocate General's School, U.S. Army, welcomes articles and notes for inclusion in this portion of *The Army Lawyer*; send submissions to The Judge Advocate General's School, ATTN: JAGS-DDL, Charlottesville, Virginia 22903-1781.

Family Law Note

Marine Corps Changes Family Support Rules

The Marine Corps recently rewrote the family support guidelines which apply to Marines. Previously, all support guideline provisions for the Marine Corps were contained in 32 C.F.R. Parts 733 and 734. Now, in addition to the Code of Federal Regulations, the *Legal Administration Manual* has a separate chapter which specifies the Marine Corps policy on support, paternity, and garnishment actions involving Marines' pay.¹

Chapter 8 of the *Legal Administration Manual* is a significant expansion of the policy and guidelines for the Marine Corps. Perhaps the most significant change is that the

Marine Corps now joins the Army in making its support obligation punitive.² A violation of Chapter 8 is now punishable under Article 92 of the Uniform Code of Military Justice. In addition to making the obligation punitive, the Marine Corps changed the basic support formula used to determine a Marine's support obligation.³

Although the new Marine regulation is modeled after *Army Regulation 608-99*,⁴ it is not identical. The Marine Corps regulation, like the Army regulation, sets up a priority for establishing and enforcing support obligations. All Marines must comply with a court order of support or a written support agreement signed by the parties.⁵ In the absence of either a court order or a written agreement, Chapter 8 sets out interim support requirements.⁶

The general rule for the interim support requirement is that the Marine owes the greater of \$200 per month per supported family member or the entire Basic Allowance for Housing (BAH),⁷ up to a maximum of one-third of the Marine's gross pay.⁸ For a single family living in government quarters, the interim support will be \$200 per supported family member, up to a maximum of one-third of the Marine's *base pay*.⁹

When a Marine is married to another service member, there are special rules for the support obligation.¹⁰ The Marine has no support obligation for the other service member.¹¹ If there

1. LEGAL ADMINISTRATION MANUAL, ch. 8 [hereinafter LEG. ADMIN. MAN.].

2. *Id.* para. 8001.8.

3. Previous Marine Corps guidelines were based on a specified percentage of base pay, depending on the number of family members a Marine supported. Support included a percentage of base pay, basic allowance for quarters (BAQ), and variable housing allowance (VHA). Under the old guidelines, a Marine with only a spouse owed BAQ, VHA, and 20% of base pay; if there were a spouse and one child, the Marine owed BAQ, VHA, and 25% of base pay; for a spouse and two or more children, the Marine owed BAQ, VHA, and 30% of base pay. If there were only children and no spouse, the figures were: one child, one-sixth of base pay; two children, one-quarter of base pay; and three or more children, one-third of base pay. These were expressly guidelines only. There was a tremendous disparity in the enforcement of the guidelines throughout the various Marine commands.

4. U.S. DEP'T OF ARMY, REG. 608-99, FAMILY SUPPORT, CHILD CUSTODY, AND PATERNITY (1 Nov. 1994) [hereinafter AR 608-99].

5. LEG. ADMIN. MAN., *supra* note 1, para. 8001.7.

6. *Id.* para. 8002.1.

7. Basic allowance for housing (BAH) is the new designation for housing allowances paid to all service members. As of 1 January 1998, leave and earning statements will not designate BAQ and VHA. The BAH is a combined figure, taking into account the BAQ and VHA authorized for the service member for that locale.

8. LEG. ADMIN. MAN., *supra* note 1, para. 8001.7. Gross pay is defined as basic pay and BAH, but it does not include hazardous duty pay, incentive pay, or basic allowance for subsistence. *Id.*

9. *Id.* para. 8002.2.

10. *Id.* para. 8002.4.

11. *Id.* para. 8002.4(a).

are children of the marriage who are entitled to support, however, the regulation sets up some rules. If the children are in the custody of one service member, the noncustodial Marine owes the greater of \$200 per supported family member or BAH, up to a maximum of one-third of the Marine's gross pay.¹² If the children are split between the service couple, there is no support obligation.¹³

Under the new interim support requirement, support payments will be paid for up to twelve months or until a court order or written agreement is obtained, whichever occurs first.¹⁴ Unlike the Army regulation, in-kind payment of financial support is authorized, at the discretion of the Marine commander, for expenses other than nongovernmental housing expenses, such as automobile loans or charge accounts.¹⁵

Chapter 8 sets out specific reasons for releasing a Marine from his obligation to pay support. A Marine's commander¹⁶ may release a Marine under one of the following circumstances: if the Marine cannot determine the whereabouts and welfare of the child(ren) concerned;¹⁷ if it is apparent that the person requesting support for the child(ren) does not have physical custody of the child(ren);¹⁸ if the Marine is the victim of a substantiated instance of physical abuse by a spouse who is requesting support;¹⁹ or if the family member is in jail.²⁰ In addition to these specified reasons, the regulation allows release from *spousal* support under the interim standards if the spouse who is requesting support has engaged in marital

misconduct.²¹ The General Court-Martial Convening Authority is the approval authority for such a request.²²

The enforcement mechanism for this regulation is the Marine commander. A commander has five working days to respond to a complaint of nonsupport against a Marine in his command.²³ When a commander receives a nonsupport complaint, the commander must interview the Marine about whom the complaint is made and must inform the Marine of his Article 31 rights.²⁴

Marine commanders must address paternity claims against Marines under this regulation as well. While the regulation states a preference for civil court resolution of the paternity issue, if a Marine admits paternity of a child, the regulatory requirements of support apply to that child, regardless of whether a court order of support exists.²⁵

Army legal assistance attorneys must be familiar with the support requirements of the other services. The Army legal assistance program does not restrict access to just soldiers or their family members. It is, therefore, not uncommon for an Army attorney to have a client from a sister service. It is particularly noteworthy that the regulation now establishes a mandatory support obligation. There will undoubtedly be a period of adjustment while the Marines and commanders learn the new rules. Hopefully, this new regulation will increase

12. *Id.* para. 8002.4(b).

13. *Id.* para. 8002.4(c).

14. *Id.* para. 8002.5. The 12 month limitation means 12 consecutive months. If a Marine pays the required support for a few months, then stops paying and a complaint is received, the 12 month period starts again.

15. *Id.* para. 8002.6(2). *Army Regulation 608-99* limits in-kind payments of interim support to nongovernmental housing costs when there is a written agreement by the supported spouse to accept such in-kind payments in lieu of the interim support payment. AR 608-99, *supra* note 4. The new Marine regulation gives commanders more leeway in determining whether a Marine satisfies the regulatory support requirement by means other than cash payments.

16. The regulation refers to "commander" throughout without limiting the level of command. The proponent of the new regulation, the Legal Assistance Policy Branch, Headquarters, Marine Corps, indicates that battalion level command is the appropriate level. Drafters, however, did not want to restrict interpretation of the term; thus, the regulation allows for flexibility in the diverse missions of the Corps.

17. LEG. ADMIN. MAN., *supra* note 1, para. 8003.5(a).

18. *Id.* para. 8003.5(b).

19. *Id.* para. 8003.5(c).

20. *Id.* para. 8003.5(d).

21. *Id.* para. 8004.4.

22. *Id.* para. 8004.6.

23. *Id.* para. 8004.1.

24. *Id.* para. 8004.2.

25. *Id.* para. 8005.3. This is significantly different from the Army approach. Under AR 608-99, a male soldier cannot be ordered to provide support to a child based on a paternity claim unless there is a court order of paternity and support. AR 608-99, *supra* note 4. A soldier who admits paternity can be encouraged to provide monetary support for the child, but he cannot be found in violation of the punitive paragraphs of AR 608-99 for failure to do so. *Id.*

response to complaints of nonsupport when the service member is a Marine. Major Fenton.

Consumer Law Note

The Seventh Circuit Continues to Give FDCPA Guidance

The United States Court of Appeals for the Seventh Circuit continues to be at the forefront of resolving Federal Fair Debt Collection Practices Act (FDCPA)²⁶ issues. A practice note in a recent edition of *The Army Lawyer* concerned a Seventh Circuit decision which helped to resolve the debate about what constitutes a debt under the FDCPA.²⁷ Two recent decisions help with other FDCPA issues.

In *Jang v. A.M. Miller & Associates*,²⁸ the court considered the issue of verification of debts²⁹ under the FDCPA in the context of dunning letters from a collection agency. *Jang* was a class action law suit in which the consumers claimed that dunning letters sent by two firms collecting for Discover Card “were misleading because the collection agencies never intended to fully comply with the statutory notices set forth in the letters.”³⁰ The letters said, in relevant part:

Unless you notify this office within 30 days after receiving this notice that you dispute the validity of this debt or any portion thereof, this office will assume this debt is valid. If you notify this office in writing within 30 days from receiving this notice, this office will obtain verification of the debt or obtain a copy of a judgment and mail you a copy of such judgment or verification. If you request

this office in writing within 30 days after receiving this notice, this office will provide you with the name and address of the original creditor, if different from the current creditor.³¹

The consumers questioned the validity of the debt, but never received any response from the collection agencies. Instead, the agencies ceased all debt collection activities, and the accounts were returned to Discover Card, allegedly pursuant to either a policy of the collection agencies or an agreement between Discover Card and the agencies.³² The consumers filed suit, and the district court found no FDCPA violation.³³ On appeal, the consumers argued that:

[T]he promise to provide validation when the [a]gencies knew that they would instead return the accounts to Discover Card constitutes a false, misleading, and deceptive practice under the FDCPA. They also contend[ed] that the ‘false promise’ [to provide verification of the debt] violates the FDCPA provisions against unfair collection practices because it undermines the protections and purpose of the validation requirement.³⁴

The consumers did not convince the court. With regard to verification of debts, the court stated that the FDCPA “gives debt collectors two options when they receive requests for validation. They may provide the requested validations and continue their debt collecting activities, or they may cease all collection activities.”³⁵ In the case at hand, the collection agencies ceased all debt collection activities and, therefore,

26. 15 U.S.C.A. §§ 1692-92o (West 1997).

27. See Consumer L. Note, *Seventh and Ninth Circuits Hold That Bad Checks Are Debts Under the FDCPA*, ARMY LAWYER, Feb. 1998, at 29.

28. 122 F.3d 480 (1997).

29. See 15 U.S.C.A. § 1692g. The statute provides:

[I]f the consumer notifies the debt collector in writing within the thirty-day period . . . that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt . . . and a copy of such verification . . . is mailed to the consumer by the debt collector.

Id. This requirement is often referred to as “validation” of the debt since that word is used in the title of the statutory section.

30. *Jang*, 122 F.3d at 481.

31. *Id.* at 482.

32. *Id.* The court made no finding of fact as to whether these policies actually existed. They stated that “[a]t this stage of the proceedings, we accept as true all well-pleaded facts contained in the complaints, and we construe all reasonable inferences in favor of the plaintiffs.” *Id.* at 483. Thus, the court accepted as true the plaintiffs’ allegations regarding the policies of returning debts once verification was requested.

33. *Id.* at 482.

34. *Id.*

were in compliance with the FDCPA. With regard to the dunning letters, the court found that those sent were not misleading or deceptive. Key to this decision was the fact that the letters mirrored the required statutory notices under the FDCPA almost verbatim.³⁶ The court held that:

When a debt collector provides the language required by the statute, and only the language required by the statute, we hold that a collection letter cannot be false, misleading, or deceptive merely because the collection agency always chooses one statutorily allowed path (ceasing all collection activity) over the other (providing debt verification).³⁷

The decision is important in several respects. First, it highlights a loophole in the FDCPA that is potentially damaging to consumers. The consumers in *Jang* argued that the court's approval of the practice of returning accounts to the creditor upon request for verification would defeat the purpose of notification.

[This practice] would allow creditors to thwart the purpose of the verification notice. [The plaintiffs] contend that when a creditor receives a file back from a collection agency because the debtor has requested verification, the creditor can simply assign the file to another collection agency which

can again initiate collection activities. After the file has been reassigned a few times, the debtor may become frustrated, they contend, and may pay the debt without ever obtaining verification of the debt.³⁸

The court was not persuaded by this argument because this scenario had not occurred in the case at hand.³⁹ The court did comment, however, that "it is for Congress, and not the courts, to close this alleged loophole in the FDCPA."⁴⁰ While we can hope that Congress will recognize this problem and act upon it, legal assistance practitioners should be alert to this technique as a possible course of action for creditors who seek to "wear down" a consumer.

This opinion is also important because it highlights the value of requesting verification.⁴¹ Verification ensures that the debt is legitimate and also gains the consumer valuable time to deal with the debt. In addition, if the request actually causes the return of the file to the creditor, it may be easier for a legal assistance attorney to negotiate a favorable disposition of the dispute for the client.

Jang also demonstrates that not all inconsistencies in dunning letters will be actionable. Thus, while consumer legislation seeks to protect the least sophisticated consumer,⁴² the interpretation of those letters must be reasonable. Not every individual interpretation will cause courts to view the letter as misleading. Legal assistance attorneys should, therefore,

35. *Id.* at 483.

36. See 15 U.S.C.A. § 1692g(a) (West 1997). The FDCPA mandates the notice that debt collectors must provide. It requires:

Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing—

- (1) the amount of the debt;
- (2) the name of the creditor to whom the debt is owed;
- (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
- (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
- (5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

Id.

37. *Jang*, 122 F.3d at 484.

38. *Id.*

39. *Id.*

40. *Id.*

41. See *supra* note 29.

42. The least sophisticated consumer is used as a standard for many aspects of consumer law. It is especially prevalent, however, in considering the effect of dunning letters in debt collection. See generally *Jang*, 122 F.3d at 483-84; *Bartlett v. Heibl*, 128 F.3d 497, 500 (7th Cir. 1997). An excellent explanation of the least sophisticated consumer standard and its history can be found in *Clomon v. Jackson*, 988 F.2d 1314 (2d Cir. 1993).

emphasize in their preventive law efforts that consumers should read collection letters carefully and consult with their legal assistance office when they have questions.

In another dunning letter case, the Seventh Circuit issued some good news for consumers—even if they do not heed the advice to read the letters. *Bartlett v. Heibl*⁴³ involved an attorney who sent dunning letters to a consumer on behalf of a credit card company. Attorney Heibl’s letter stated that if Mr. Bartlett wished to resolve the dispute prior to the commencement of a law suit, he had to “do one of two things within one week of the date of [the] letter”⁴⁴ Bartlett’s two choices were to pay \$316 toward the debt or contact the credit card company to make arrangements for repayment.⁴⁵ Under the attorney’s signature block, however, was a nearly literal paraphrase of the statutorily required notice,⁴⁶ which allows Mr. Bartlett “thirty days within which to dispute the debt. At the end of the paraphrase, Heibl add[ed]: ‘suit may be commenced at any time before the expiration of this thirty (30) days.’”⁴⁷ The main issue in the case was whether these contradictory notices as to the timing of a law suit were misleading, in violation of the case law interpreting the FDCPA.⁴⁸ The court found that they were.⁴⁹ The court went on to provide a “safe harbor” letter that, if complied with, would protect debt collectors from claims that they misled consumers, at least in the Seventh Circuit.⁵⁰

What makes the case interesting from the consumer’s perspective, however, was the fact that, while Mr. Bartlett received the dunning letter involved in the case, he never read it.⁵¹ Attorney Heibl argued on appeal that this fact defeated Bartlett’s claim for damages under the FDCPA. The court disagreed, saying that the fact that Bartlett had not read the letter:

would be a telling point if Bartlett were seeking actual damages, for example as a consequence of being misled by the letter into surrendering a legal defense against the credit card company. He can’t have suffered

such damages as a result of the statutory violation, because he didn’t read the letter. But he is not seeking actual damages. He is seeking only statutory damages, a penalty that does not depend on proof that the recipient of the letter was misled All that is required is proof that the statute was violated⁵²

Thus, if a dunning letter is confusing or misleading, it does not matter whether the consumer is actually misled or whether he read the letter at all. This may be important in a legal assistance case. A client may not read all of the mail he gets from a collection agency before he comes to the legal assistance office. In fact, his visit to the legal assistance office may be prompted by a phone call after receipt of several letters that remain unopened. In negotiations with the debt collector, violations of the law (particularly those that have statutory damages) may be important in convincing the debt collector to be reasonable in dealing with the client. *Bartlett* emphasizes that dunning letter violations are always useful, even if the client was not actually misled by the letters or if he did not even read the letters.

Debt collection is a common consumer problem for which service members seek legal assistance. These two decisions provide important guidance to practitioners in using federal law to protect their clients’ interests when faced with dunning letters. Attorneys are reminded that it is also important to check state laws, which may provide even greater protections than the federal statute in debt collection cases. Major Lescault.

International and Operational Law Note

Appeals Court Denies Michael New’s Petition for Habeas Corpus

43. 128 F.3d at 497.

44. *Id.* at 499.

45. *Id.*

46. *See supra* note 36 (noting the statutory provision which mandates the notice requirement).

47. *Bartlett*, 128 F.3d at 499.

48. *Id.* at 500. The court noted that “the implied duty to avoid confusing the unsophisticated consumer can be violated by contradicting or ‘overshadowing’ the required notice.” *Id.*

49. *Id.* at 501.

50. *Id.*

51. *Id.* at 499.

52. *Id.* (citations omitted).

On 25 November 1997, the United States Court of Appeals for the D.C. Circuit denied Michael New's petition for a writ of habeas corpus.⁵³ Specialist Michael New refused to wear a United Nations badge, patch, and headgear prior to his deployment to participate in the United Nations preventive deployment to Macedonia (UNPREDEP). On 17 October 1995, the commander preferred charges against Specialist New for disobeying a lawful order, in violation of Article 92 of the Uniform Code of Military Justice.⁵⁴ Prior to his court-martial, Specialist New unsuccessfully petitioned the federal court for an emergency stay of the court-martial and a ruling to remove him from military jurisdiction.⁵⁵ On review, the circuit court held that the district court was "fully justified in dismissing New's habeas petition on grounds of comity for lack of exhaustion."⁵⁶ The opinion enhances military discipline because soldiers who emulate New's disobedience cannot anticipate "premature federal intervention in the affairs of the military."⁵⁷

Background

Specialist Michael New was a medic assigned to Headquarters and Headquarters Company, 1st Battalion, 15th Infantry, 3rd Infantry Division. On 21 August 1995, his chain of command informed him that his unit would deploy to Macedonia to participate in the ongoing UNPREDEP.⁵⁸ As part of the deployment, his unit would wear a United Nations badge, patch, and the blue UN Beret. In addition, the United States contingent to UNPREDEP (termed Task Force Able Sentry) was under the operational control of a Finnish Brigadier General.⁵⁹ Specialist New believed that an order to deploy and to wear UN insignia was unlawful. He informed his chain of command that he would refuse to wear the UN uniform items

until the chain of command provided him with constitutional authority for the order.⁶⁰

On 23 August 1995, Specialist New received oral orders to do research into the history and objectives of the United Nations. His squad leader suggested that he write a statement concerning his convictions and personal position regarding service in an operation while wearing the UN uniform items. On 6 September 1995, three of his non-commissioned officers (NCOs) discussed the matter with New and informed him that the UN items were necessary to distinguish United States soldiers from warring factions in the Republic of Macedonia. The NCOs also informed him that he would be subject to military discipline if he disobeyed the order to wear the uniform items.⁶¹

On 19 September 1995, Specialist New submitted a two page, single-spaced statement of his personal views regarding the pending deployment.⁶² Specialist New wrote that he could not "understand the legal basis of the Army order to change [his] uniform and thus shift or alter [his] status and allegiance against [his] oath of enlistment, [his] conscience, and against [his] will."⁶³ Specialist New opined that the principles of the United Nations are "diametrically opposed" to his "God-given" inalienable rights enshrined in the U.S. Constitution.⁶⁴ Specialist New concluded his comments with the following challenge:

Without a response from the Army about the justification, it is difficult if not impossible to judge the legality of any orders to become a UN soldier, and in the face of any doubt, I do not intend to surrender my status as an American soldier to wear the uniform of a

53. *New v. Cohen*, 129 F.3d 639 (D.C. Cir. 1997).

54. Robert S. Winner, *SPC Michael New v. William Perry, Secretary of Defense: The Constitutionality of U.S. Forces Serving Under U.N. Command*, 3 DEPAUL DIG. INT'L L. 30 (1997).

55. *United States ex rel. New v. Perry*, 919 F. Supp. 491 (D.D.C. 1996). The district court refused to stay the court-martial. *United States ex rel. New v. Perry*, No. CIV.A.96-0033(PLF), 1996 WL 420175, at *1 (D.D.C. Jan. 16, 1996) (rejecting the argument that "the quality of justice in the military tribunals is inferior to that which might be provided by this [c]ourt. The [c]ourt is confident that the military courts will provide due process of law and consider all relevant arguments.").

56. *New*, 129 F.3d at 644.

57. *Id.* at 645.

58. Winner, *supra* note 54, at 30.

59. *Id.*

60. *New*, 919 F. Supp. at 493.

61. *Id.* at 493.

62. Memorandum, SPC Michael G. New, HHC 1/15 Inf, Medical Platoon, to Chain of Command, subject: Statement of SPC New Concerning Wearing of the UN Uniform (19 Sept. 1995) (copy on file with author).

63. *Id.* para. 4.

64. *Id.* para. 6.

foreign power. If you wish to convene a court martial and send me to jail for standing on my oath as an American soldier and for firmly defending my wearing [of] the American Army uniform, and upholding its historic significance, than [sic] I cannot prevent that action, and I will gladly accept it as a price I am willing to pay rather than submit to an order to obey or [to] render allegiance to a foreign power, the United Nations.⁶⁵

On 2 October 1995, the entire unit attended a briefing on the legal basis for deploying United States troops to the former Yugoslav republic of Macedonia.⁶⁶ The commander ordered all deploying soldiers to appear in formation on 10 October 1995 in the UN accoutrements. The company commander repeated the order at a company formation on 4 October 1995. Specialist New attended the 10 October formation, but he disobeyed the order to wear the prescribed uniform.⁶⁷

The Court-Martial

As noted above, the command charged New with violating a lawful order, in violation of Article 92, on 17 October 1995.⁶⁸ Specialist New was arraigned on 17 November 1995.⁶⁹ The case spawned a firestorm of media coverage and national debate.⁷⁰ One Republican presidential candidate proclaimed, "Michael New is a hero of conscience," and promised to pardon New as his first presidential act.⁷¹ Specialist New's father spoke on over 400 talk shows in defense of his son.⁷²

As with many courts-martial, the motions in limine were a critical factor in Specialist New's ultimate conviction. The

government asked the military judge to exclude evidence concerning the legality of the deployment orders to the former Yugoslav republic of Macedonia as well as other United States deployments in multilateral operations.⁷³ The government also filed a motion to exclude evidence of New's opinions, motives, personal philosophy, and religious beliefs, on the grounds that such evidence was irrelevant to the duty to obey the lawful order and thus would not constitute a defense to the charged offense.⁷⁴

The defense filed a number of motions to dismiss the charge based upon its interpretation of the illegality of the order to wear the UN items.⁷⁵ The defense motions alleged that the deployment order was unconstitutional and that the order to wear the uniforms was, therefore, illegal. The defense also alleged that the order was illegal because it required Specialist New to engage in an unauthorized alteration of the battle dress uniform. The defense further alleged that the order was unlawful because it forced Specialist New to serve involuntarily as a United Nations soldier, in violation of the Thirteenth Amendment to the U.S. Constitution. Finally, the defense charged that the order was unlawful because it constituted a breach of Specialist New's enlistment contract.

Specialist New forgot his stated intent, as noted above, to "gladly accept his court-martial." His attorney filed an emergency petition to the United States District Court for the District of Columbia, asking for a stay of the court-martial until the federal district court could hear argument on his petition for a writ of habeas corpus. Citing *Shlesinger v Councilman*,⁷⁶ the court refused to halt the pending court-martial because the defense was unable to demonstrate any risk of irreparable harm.⁷⁷ The ruling is important because it reestablished the principle that Article III courts generally cannot preempt resolution of issues properly presented to military courts

65. *Id.* para. 8.

66. *New*, 919 F. Supp. at 493.

67. *Id.* at 494.

68. UCMJ art. 92 (West 1995).

69. *Id.*

70. See, e.g., Rowan Scarborough, *American Poised to Snub U.N. Uniform*, WASH. TIMES, Sept. 1, 1995, at A1; Carla Anne Robbins, *To Some, Soldier is a Hero for Refusing to Obey an Order*, WALL ST. J., Jan. 24, 1996, at A1. The publicity and discussion on talk shows and the internet prompted the lead defense attorney to set up the Michael New Legal Defense Fund, complete with envelopes for mailing in contributions; the envelopes proclaimed, "We're standing with you for the Constitution." The author has one of the envelopes on file.

71. Marc Fisher, *War and Peacekeeping: Battle Rages Over the GI Who Said No to U.N. Insignia*, WASH. POST., Mar. 4, 1996, at D1.

72. *Id.*

73. Government Motion in Limine, filed Dec. 6, 1995, United States v. New, No. 96-00263 (3rd Inf. Div. Jan. 24, 1996) (copy on file with author).

74. *Id.*

75. Unless otherwise noted, all information in this paragraph derives from defense motions in *United States v. New*. Defense Motions, filed Dec. 6, 1995, United States v. New, No. 96-00263 (3rd Inf. Div. Jan. 24, 1996) (copies on file with author).

concerning persons within the jurisdiction of Article 2, Uniform Code of Military Justice. As the district court stated in its ruling on 16 January 1996, “[m]any other members of the U.S. military have been or are likely to be deployed to Macedonia or other venues under UN command.”⁷⁸

Despite the potential implications of the trial, the district court allowed the court-martial to proceed. On 19 January 1996, the military judge denied the defense motions to dismiss the charge and its specification.⁷⁹ The military judge found that issues regarding the service member’s perception of the legality of the military and political decision to deploy forces are irrelevant to a subsequent Article 92 prosecution.⁸⁰ Announcing his findings, the judge stated that:

[While] every citizen has the right to have an opinion regarding the manner in which the President chooses to conduct foreign policy on behalf of the people of this nation, and, in an appropriate time, place, and manner, to make that opinion known or manifest, in regards to a soldier, that freedom does not extend to taking that politic [sic] expression to the point of disobeying a lawful order of his appointed military commanders.⁸¹

On 24 January 1996, the court-martial panel found Specialist New guilty as charged and deliberated less than twenty minutes before sentencing him to a bad conduct discharge.⁸²

Post Conviction Efforts in the Federal Courts

Following his conviction, Specialist New renewed his petition for a writ of habeas corpus on the grounds that the illegal order changed his status into that of a civilian. According to Specialist New’s logic, the court-martial did not have jurisdiction to prosecute him because the “illegal” order voided his enlistment contract. For the first time, Specialist New stated that instead of ordering him to be reassigned to another unit, the court should order him discharged with an honorable discharge.⁸³ Specialist New told the district court that the trial proceedings were a “badge of infamy” likely to cause him to be scorned.⁸⁴ The court refused to grant New’s petition on the grounds of comity because the military courts have jurisdiction over the case and are competent to consider the constitutional and statutory issues raised.⁸⁵

As noted above, the court of appeals upheld the lower court’s decision. The circuit court opinion restates the precedent that service members who are subject to military discipline must exhaust their military remedies before seeking collateral review in the federal courts.⁸⁶ The exhaustion principle prevents needless friction between federal and military courts. The circuit court opinion obliges Specialist New and his attorneys to use the military appellate process to argue that the order was unlawful and that the illegality absolved him of any remaining service obligations. Any contrary rule would allow “service members to circumvent the exhaustion requirement merely by contending . . . that an action

76. 420 U.S. 738, 740 (1974) (holding that “when a service member charged with crimes by military authorities can show no harm other than that attendant to resolution of the case in the military court system, the federal district courts must refrain from intervention, by way of injunction or otherwise”). See also *Orloff v. Willoughby*, 345 U.S. 83, 93 (1953) (holding that the judiciary must be scrupulous not to intervene in legitimate military matters); *McDonough v. Widnall*, 891 F. Supp. 1439 (D. Colo. 1995) (declining to intervene in military cases without clear statutory authority from Congress).

77. *United States ex rel. New v. Perry*, 919 F. Supp. 491, 494 (D.D.C. 1996).

78. *United States ex rel. New v. Perry*, No. CIV.A.96-0033(PLF), 1996 WL 420175, at *3 (D.D.C. Jan. 16, 1996).

79. *United States v. New*, No. 96-00263 (3rd Inf. Div. Jan. 24, 1996).

80. *Id.*

81. *Id.*

82. Winner, *supra* note 54, at 30. See also Carla Anne Robbins, *Army Specialist Michael New Won’t Wear U.N. Blue; Father Runs for Congress*, WALL ST. J., Jan. 24, 1996, at A1.

83. *United States ex rel. New v. Perry*, 919 F. Supp. 491, 499 (D.D.C. 1996).

84. *Id.*

85. *Id.* (citing *Darr v. Burford*, 339 U.S. 200 (1950)).

86. *New v. Cohen*, 129 F.3d 639, 640 (D.C. Cir. 1997). Judge advocates who are preparing to deploy should be aware of the narrow exception to the general rule (requiring exhaustion of military processes) arising from *Parisi v. Davidson*, 405 U.S. 34 (1972). The service member in *Parisi* had initiated an application for conscientious objector status prior to refusing to board an airplane for deployment to Vietnam. After his conviction, the Army made a final decision to deny the conscientious objector claim. The Supreme Court determined that the habeas corpus petition filed in federal court was based on the conscientious objector petition, which “antedated and was independent of the military proceedings.” *Parisi*, 405 U.S. at 42. Because the court-martial appeal could not award the service member the desired honorable discharge, the doctrine of comity did not preclude the petition in federal court. *Id.*

by the military 'released' them from further service."⁸⁷ Major Newton.

87. *New*, 129 F.3d at 645.