

EXHIBIT 6

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

SPECIALIST MARC HALL ,)
)
 Petitioner,)
)
 v.) Case No. 4:10-CV-30 (WTM)
)
 THE HONORABLE JOHN M. McHUGH)
 Secretary of the Army, et al.,)
)
 Respondents.)
 _____)

BRIEF OF THE UNITED STATES OF AMERICA
IN OPPOSITION TO MOTION FOR
TEMPORARY RESTRAINING ORDER

COMES NOW the United States of America by and through the United States Attorney for the Southern District of Georgia and the undersigned Assistant United States Attorneys and respectfully submits this its opposition to the Petitioner’s Motion for a Temporary Restraining Order showing the court as follows:

I. INTRODUCTION

_____ The petitioner in this case is Specialist Marc Hall, “hereinafter petitioner or Specialist Hall”, an enlisted member of the United States Army, on active duty, assigned to Fort Stewart, Georgia. See Court Docket Entry No. 1, Habeas Corpus

Petition, page 1. Currently, the petitioner is pending a court-martial for communicating threats against members of his chain of command. See Govt Exhibits 1& 2, Military Charge Sheets. As a member of the Army, the petitioner is subject to the Uniform Code of Military Justice (“UCMJ”), codified at 10 U.S.C. § 801, et seq.¹

On December 11, 2009, Specialist Hall was placed into pre-trial confinement for communicating a threat on multiple occasions to his peers and his chain of command. See Govt Exhibit 3. On December 17, 2009, and again on February 4, 2010, Specialist Hall was notified that court-martial charges were preferred against him for communicating threats to other soldiers that he would shoot his commanding officers and enlisted military supervisors in his unit and “go Fort Hood” if he were required to deploy.² See Govt Exhibits 1 & 2.

According to military criminal charges preferred against Specialist Hall, not only

¹ Article II, § 2 of the Constitution provides that the President is the Commander in Chief of the armed forces. Article I, § 8 of the Constitution provides that Congress has the power to raise and support armies and make rules for the government and regulation of the armed forces. Under these Constitutional provisions, Congress has enacted 10 U.S.C. Chapter 47, the Uniform Code of Military Justice, which provides the rules and procedures of military law.

² Specialist Hall’s threat is a reference to the November 5, 2009, tragedy at the Fort Hood, Texas military base where a military officer allegedly shot and killed 13 soldiers and wounded approximately 30 others at a military deployment processing center.

has he allegedly threatened his fellow soldiers and superiors on diverse occasions, but he has also allegedly done so over a six month period of time, from July 2009 through December 2009. See Govt Exhibits 1 & 2.

Specialist Hall now comes before this Court seeking a temporary restraining in order to prevent his court-martial. See Court Docket Entries 2 & 3. However, for the reasons that follow below, this petition should be denied because Specialist Hall has failed to exhaust the administrative remedies available to him and has not availed himself of the judicial remedies available to him under the military justice system. Accordingly, his petition for habeas corpus relief, an extraordinary remedy is not warranted here.

Moreover, Specialist Hall has failed to meet his burden for obtaining injunctive relief in the form of a temporary restraining order. First, he has no likelihood of success on the merits because his claims are not ripe and are non-reviewable where the claims would require review by this Court of nonjusticiable military decisions about where to conduct a court-martial. Specialist Hall fails to demonstrate that he will suffer irreparable harm from complying with his deployment orders, and even concedes that he is amenable to court-martial if it occurs in the United States. However, Specialist Hall, as with every other service member, voluntarily joined the military service with full knowledge that he may be

required to deploy overseas multiple times beyond a specific period of active-duty. As such, he cannot demonstrate that service in Iraq subjects him to irreparable harm simply because his service will primarily consist of pre-trial confinement and court-martial. Moreover, the harm to the Army from the precedential effect of such an injunction far outweighs any speculative injury Specialist Hall may suffer. Finally, the public interest does not lie with excusing Specialist Hall from his obligation to comply with military orders where the military courts can provide full review of his claims. As such, his request for injunctive relief should be denied.

II. BACKGROUND & STATEMENT OF THE FACTS

A. The Military Justice System

Given the importance of maintaining good order and discipline in the armed forces, Congress has empowered commanders with the authority to implement the military justice system. Service members are tried for alleged crimes by courts-martial which begins with the preferral of charges against the soldier. If the convening authority, the officer authorized to conduct a court-martial, finds that there are reasonable grounds to believe that the accused committed an offense triable by a court-martial, and that the specification alleges an offense, the convening authority may refer it to trial. The trial is conducted by a military judge

who is empowered and, indeed, obligated to hear and rule on all trial and pretrial motions, to include challenges to the conduct of the court-martial such as production of witnesses and alleged denial of the right to counsel.

_____ In the armed forces, the right to appeal a court-martial finding or sentence is statutorily created by the UCMJ. The findings and sentence approved may be appealed to the service Court of Criminal Appeals, the intermediate appellate courts which fulfill functions similar to a United States Circuit Court of Appeals. 10 U.S.C. § 866. Further, pursuant to 10 U.S.C. § 867, appeal may be made to the Court of Appeals for the Armed Forces (“CAAF”), and, possibly to the United States Supreme Court. 10 U.S.C. § 867a; 28 U.S.C. § 1259.

In exceptional circumstances, servicemembers can petition ACCA and CAAF for extraordinary relief as an interlocutory appeal. ACCA and CAAF have the discretion to entertain extraordinary writs pursuant to the All Writs Act. 28 U.S.C. § 1651 (1992). However, the Petitioner has an “extremely heavy burden” to justify the granting of writ. Dew v. United States, 48 M.J. 639, 648 (Army Ct. Crim. App. 1997) (“because of their extraordinary nature, writs are issued sparingly, and a Petitioner bears an extremely heavy burden to establish a clear and indisputable entitlement to extraordinary relief.”); see also McKinney v. Powell, 46 M.J. 870 (Army Ct. Crim. App. 1997). As a result, ACCA or CAAF

may deny the petition for extraordinary relief without prejudice and review the matter within the normal appellate process afforded by 10 U.S.C. §§ 866, 867.

B. Procedural History

____ Specialist Hall enlisted on August 16, 2006, for a period of eight years in the Army Reserves, with an active duty service period of three years and 28 weeks. See Govt Exhibit 4, Enlistment Contract at block B. Specialist Hall was deployed to Iraq from October 24, 2007 to December 5, 2008. See Govt Exhibit 5, Enlisted Records Brief, at Section I. Specialist Hall's unit was notified in June 2009 of a pending deployment to Iraq. Pursuant to Army policies, members of that unit would be retained until the completion of the deployment. Specialist Hall was notified of the deployment and engaged in pre-deployment training as required by his unit.

On December 11, 2009, Specialist Hall was placed into pre-trial confinement for communicating threats on multiple occasions to his peers and his chain of command. See Govt Exhibit 3. On December 17, 2009, Specialist Hall was notified that court-martial charges had been preferred against him for communicating threats to other soldiers that he would engage in violence or go on a rampage against members of his chain of command if he were required to deploy. See Govt Exhibits 1 & 2. On February 4, 2010, Specialist Hall was

notified that additional court-martial charges were preferred against him for communicating threats to other soldiers that he would shoot his commanding officers and enlisted military supervisors in his unit and “go Fort Hood” if he were required to deploy. See Govt Exhibit 2. As of the filing of this paper, Specialist Hall has not made a demand for a speedy trial nor has he retained civilian counsel to represent him in his court-martial. See Court Docket Entry No. 2, TRO, Declaration of David Gespass, Esq.

On February 3, 2010, Specialist Hall was advised by the Army that he would be transferred to Iraq for court-martial. See Govt Exhibit 6, Military Transfer of Jurisdiction. Subsequently, Specialist Hall was advised that he is pending movement by military aircraft to Iraq, which is presently scheduled for February 18, 2010. See Govt Exhibit 7, Military Travel Orders.

On February 15, 2010, Specialist Hall filed the instant suit seeking injunctive and habeas corpus relief.³ Petitioner asserts that court-martial in Iraq

³Specialist Hall also asserts that the Army will be in violation of its regulations by deploying him to Iraq after he submitted a conscientious objector (“CO”) application. However, the governing regulation permits his deployment because his application was not submitted until after his unit received orders and actually deployed to Iraq. :

c: Guidelines for soldiers submitting an application for conscientious objection is as follows:

(1) a soldier assigned or attached to a unit deploying to a new duty station (new duty location is the final destination of the deploying unit) may submit an

will result in the irreparable injury of being in confinement, that he will be deprived of a public trial, that the public will be deprived of the right to follow the proceedings, and he alleges denial of the right to call witnesses and to have counsel of his choice. The instant lawsuit follows the Army's denial of Hall's request for an administrative discharge, under other than honorable conditions, in lieu of trial by court-martial.

III. STANDARD OF REVIEW

A. Legal Standard for Granting a Temporary Restraining Order and Preliminary Injunction

_____The four factors to be considered in determining whether a temporary restraining order or preliminary injunction is to be granted are whether the movant has established: “(1) a substantial likelihood of success on the merits; (2) that irreparable injury will be will be suffered if the relief is not granted; (3) that the threatened injury outweighs the harm the relief would inflict on the nonmovant; and (4) that the entry of the relief would serve the public interest.” Schiavo ex rel.

application for conscientious objection status. *The soldier's submission of a conscientious objector application will not preclude the soldier from deploying with is or her unit.*(emphasis added). The unit will process the application as operational mission requirements permit. Army Regulation 600-43, Conscientious Objection, dtd August 21, 2006. Para. 2-10c. Available at http://www.apd.army.mil/pdffiles/r600_43.pdf. Hence, respondent will not address this meritless claim.

Schindler v. Schiavo, 403 F.3d 1223, 1225-26 (11th Cir. 2005). “Controlling precedent is clear that injunctive relief may not be granted unless the plaintiff establishes the substantial likelihood of success criterion.” *Id.*

The Eleventh Circuit Court of Appeals has held that “[i]n this Circuit, a preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly established the ‘burden of persuasion’ as to the four prerequisites.” McDonald’s Corp. v. Robertson, 147 F.3d 1301, 1306 (11th Cir. 1998) (citations omitted); Texas v. Seatrain Int’l, S.A., 518 F.2d 175, 179 (5th Cir. 1975) (recognizing that because a preliminary injunction is “an extraordinary and drastic remedy,” its grant is the exception rather than the rule, and plaintiff must clearly carry the burden of persuasion). “The chief function of a preliminary injunction is to preserve the status quo until the merits of the controversy can be fully and fairly adjudicated.” Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1268 (11th Cir. 2001) (citations omitted). Thus, the harm considered by the district court is necessarily confined to that which might occur in the interval between ruling on the preliminary injunction and trial on the merits. *Id.*

Respondents submit that when government personnel issues are involved, the standard for showing irreparable harm is even greater. In Sampson v. Murray, 415 U.S. 61 (1974), the United States Supreme Court held that “Government has

traditionally been granted the widest latitude in the ‘dispatch of its own internal affairs’ [therefore plaintiff must] make a showing of irreparable injury sufficient in kind and degree to override these factors cutting against the general availability of preliminary injunctions in Government personnel cases.” 415 U.S. at 84.

B. Federal Court Review of Court-Marital Proceedings is very Narrow and Exhaustion is Required

The United States district courts are authorized to grant a writ of habeas corpus to a prisoner “in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2241(c)(3) (2005); *see also* Clinton v. Goldsmith, 526 U.S. 529 (1999). The narrow scope of habeas review and the longstanding preference by federal civil courts to avoid interfering with military affairs requires dismissal for failure to exhaust. Chappell v. Wallace, 462 U.S. 296 (1983); *see also* Orloff v. Willoughby, 345 U.S. 83, 93 (1953)(noting that civilian judges are not given the task of running the military); Parker v. Levy, 417 U.S. 733 (1974)(stating that the need for a separate jurisprudence for the military is necessary to promote the purposes of the armed forces). It must be recognized that military law is a “jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment.” Burns v. Wilson, 346 U.S. 137, 140 (1974). In Burns, the Supreme Court held that federal courts have

jurisdiction over applications for habeas corpus by persons incarcerated by the military courts, although “in military habeas corpus the inquiry, the scope of matters open to review, has always been more narrow than in civil cases.” 346 U.S. at 139.

This Court’s review is limited because “the military has its own independent criminal justice system governed by the Uniform Code of Military Justice.” Lips v. Commandant, USDB, 997 F.2d 808, 810 (10th Cir. 1993).⁴ This military code, the UCMJ, is “all-inclusive and provides, *inter alia*, for a court-martial, appellate review, and limited certiorari review by the United States Supreme Court.” Id. Furthermore, as the Supreme Court stated, “Congress has taken great care both to define the rights of those subject to military law . . . [and to] provide a complete system of review within the military system to secure those rights.” Burns, 346 U.S. at 140. In Burns, the Supreme Court was reviewing the denial of habeas relief to a group of soldiers facing a death sentence rendered under the pre-UCMJ

⁴ The Tenth Circuit has the most developed jurisprudence in military prisoner habeas corpus matters due to the location of the United States Disciplinary Barracks at Fort Leavenworth, Kansas. Davis v. Lansing, 202 F. Supp. 2d 1245, 1249, n.3 (D. Kan. 2002), *aff’d*, 65 Fed. Appx. 197 (10th Cir. 2003).

system, the Articles of War.⁵ Id. Because the Burns decision is the foundation for federal habeas review of a court-martial, it is important to review the issues as presented to the Supreme Court:

Petitioners' applications, as has been noted, *set forth serious charges* -- allegations which, in their cumulative effect, *were sufficient to depict fundamental unfairness* in the process whereby their guilt was determined and their death sentences rendered. Had the military courts *manifestly refused to consider those claims*, the District Court was empowered to review them de novo. For the constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers -- as well as civilians -- from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as the civil courts.

Burns, 346 U.S. at 143 (emphasis added). In this brief passage, the Supreme Court makes it clear that there is no distinction in the level or amount of federal habeas corpus review based on the sentence adjudged or based on the allegations raised, the prerequisite to de novo review is only met when the military courts "manifestly refuse to consider those claims." Id.

⁵ The petitioners in Burns were tried and convicted at a court-martial under the Articles of War. Burns, 346 U.S. at 137. Because the UCMJ was enacted in 1950, its appellate review provisions were applied to the petitioners' post-trial appeals, and reviewed and upheld by the Supreme Court. Id.

In effect, once the military prisoner receives full and fair consideration of his claims, the issues are resolved and cannot be disturbed by a federal civilian court. Horn v. Schlesinger, 514 F.2d 549, 553 (8th Cir. 1975)(applying Burns, 346 U.S. 137). Thus, not all constitutional claims and challenges, even if raised before military courts, are appropriate for review by federal civil courts.

Likewise, it is well settled that a party seeking corrective or habeas relief from allegedly improper courts-martial and military discharges, must exhaust all adequate and available military remedies before seeking relief in federal court. *See e.g.*, Noyd v. Bond, 395 U.S. 683, 693 (1969); Angle v. Laird, 429 F.2d 892, 894 (10th Cir. 1974). The Supreme Court in Gusik v. Schilder, 340 U.S. 128 (1950), established the general rule that habeas corpus petitions from military prisoners should not be entertained by federal civilian courts until all available remedies within the military court system have been exhausted. Generally, complete exhaustion of available administrative remedies is required before granting the writ. Williams v. O'Brien, 792 F.2d 986, 987 (10th Cir. 1986). Specifically, federal courts are not to entertain habeas petitions by military prisoners until all available military remedies have been exhausted. Schlesinger v. Councilman, 420 U.S. 738, 758 (1975) (courts must respect congressional judgment that military courts can adequately and responsibly address constitutional claims, and respect

congressional scheme requiring full exhaustion of all available military remedies prior to federal collateral review of a military judgment); *see also* Clinton, 526 U.S. at 538 n.1 (military prisoner entitled to bring a habeas corpus petition after full exhaustion of military remedies); Kehrli v. Sprinkle, 524 F.2d 328, 334 (10th Cir. 1975).

The military has its own independent criminal justice system governed by the UCMJ, 10 U.S.C. §§ 801-940, and the MCM, which is all-inclusive and provides, *inter alia*, for a court-martial, post-trial clemency, appellate review, and under some circumstances, review by the United States Supreme Court by writ of certiorari. Lips, 997 F.2d at 810. As the Burns plurality explained, the UCMJ contains significant due process that safeguards servicemembers “from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as the civil courts.” 346 U.S. at 142-43. Because of the independence of the military courts, special considerations are involved when federal district courts collaterally review court-martial convictions. Id. These special considerations are based “upon the appropriate demands of comity between two separate judicial systems.” New v. Cohen, 129 F.3d 639, 643 (D.C.

Cir. 1997) (Congress has created an autonomous military judicial system with its own integrated system of courts and review procedures which has been designed to meet the special needs of good order and discipline in the armed forces).

“Because congressional judgment must be respected and it must be assumed that the military court system will vindicate a serviceperson’s constitutional rights, civilian court jurisdiction only arises after all available military remedies have been exhausted.” Allen v. USAF, 2008 U.S. Dist. LEXIS 73795, 16-17 (D.N.D. Sept. 25, 2008) (citing Councilman, 420 U.S. at 758). “A failure to exhaust the remedies available within the [military] service itself will inevitably upset the balance, carefully struck, between military authority and the power of the federal courts.” Horn, 514 F.2d at 553-554.

IV. ARGUMENT

A. This Court should abstain from interfering with an internal military personnel decision

Petitioner seeks to have this court declare a deployment order issued by the Army unenforceable and to direct the Army to retain him in the United States pending trial by court martial. See Court Docket Entry No. 2, Motion for a Temporary Restraining Order. Despite petitioner’s contentions to the contrary, it is well settled that judicial interference in internal military affairs is disfavored. As the Supreme Court has explained:

[J]udges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.

See Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953), quoted with approval, Winck v. England, 327 F.3d 1296, 1302-03 (11th Cir. 2003). The limitation on judicial review in internal, military affairs is not without exception. However, “a court should not review these military decisions in the absence of “(a) an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of a constitutional right, or an allegation that the military has acted in violation of its own regulations and (b) exhaustion of administrative remedies. Winck, 327 F.3d at 1303, quoting Mindes v. Seaman, 453 F.2d 197, 201 (5th Cir. 1971)). Moreover, mere allegations of a constitutional violation unsupported by reasonable factual information are not enough to warrant judicial review. The government submits that the Army’s entire chain of command would be subject to disruption, ineffectiveness and national security in the form of combat readiness would be jeopardized if military members could resort to federal court first, instead of following the appropriate military avenues

of redressing grievances and other legal remedies.

First, under the Mindes analysis, a district court must decide if intra-service administrative remedies have been exhausted. Here defendants contend that Specialist Hall has not exhausted his available remedies both administrative and judicial. There are procedures in place, through the military justice system, for petitioner to adjudicate his claims of alleged violations of his constitutional rights to a public trial and to counsel.

Next, however, even if petitioner had exhausted his intraservice administrative remedies, the government submits that this court should not review these military decisions if doing so would be an inappropriate intrusion into the internal military decision making process . In determining whether judicial review of a military decision should lie, these factors must be considered:

the substance of the allegations in light of the policy reasons behind non review of military matters, balancing four factors (1) the nature and strength of the plaintiff's challenge to the military determination; (2) the potential for injury to the plaintiff if review is refused; (3) the type and degree of interference with the military function; (4) the extent to which the exercise of military expertise or discretion is involved."

Winck, 327 F.3d at 1303, n.4 (quoting Mindes v. Seaman, 453 F.2d at 201. In

Winck, the Eleventh Circuit has reaffirmed the holding in Mindes finding

“unflagging strength of the principles of comity and judicial non-interference with,

