

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. Seatrains 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, 346U.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,

and respect for, military operations that informed” the analysis in Mindes, Winck v. England, 327 F.3d at 1404. Here the United States submits that this court should first consider whether it should abstain from reviewing this matter before deciding whether or not it has subject matter jurisdiction. Id. at 1299-1300.

1. There has been no exhaustion of military remedies

First, petitioner’s challenge to the convening of his court-martial by the Commander, United States Division-Center and First Armored Division is frivolous. Clearly, in accordance with Article 22 of the Uniform Code of Military Justice, Major General Wolff is authorized under military law to convene any further court martial proceedings against Specialist Hall. See Ltr Dated January 22, 2010, Acceptance of the Transfer of U.S. v. Hall by the Commander, United States Division Center and 1st Armored Division. Thus, petitioner’s contention that the above referenced transfer is in violation of Army regulations is without merit. More importantly, the application of military statutes, like Article 22, and their accompanying regulations is exactly the type of review best suited for military courts. The government can point to very few other military decisions that are better suited to military courts than decisions like this one: the appropriate convening authority for the court-martial of a military member.

In the instant case, the court-martial process has not been undertaken.

Petitioner has not been arraigned. He has not yet been afforded the opportunity through a preliminary hearing under Article 39(a) of the Uniform Code of Military Justice, prior to arraignment, to raise all claims of a constitutional violation even his claims of deprivation of the right to counsel, with a military judge. Petitioner's cynicism that such efforts would not yield him appropriate relief, if warranted, through the military justice system is speculative at this juncture.

Next, the potential for injury to the petitioner is neither ripe for review nor substantial if he is ordered to Iraq for trial by court-martial. Petitioner's bare conclusory allegations that he will not have the support of family and friends if ordered to deploy, are just that: allegations. Moreover, petitioner has not afforded the Army the opportunity to address his concerns that any civilian counsel hired by him for a court-martial, not yet referred or convened, would be hampered by the conduct of this trial in Iraq or in any other military theater outside of the continental United States. The United States submits that the Army has a compelling interest in requiring soldiers to deploy with their units. As the Supreme Court has said "it is obvious and unarguable that no governmental interest is more compelling than the security of the nation." Haig v. Agee, 453 U.S. 280, 307 (1981) (internal citations omitted). Moreover, "to accomplish its mission, the military must foster instinctive obedience, unit, commitment and

esprit de corps.” Goldman v. Weinberger, 475 U.S. 503, 507 (1986).

The United States submits that if petitioner’s pending deployment to Iraq, for the purpose of trial by court-martial, is enjoined by this court there will be a significant interference on the military function. Essentially, the military commander in Iraq, is willing to accept court martial convening authority over Specialist Hall, even while the unit must conduct its basic military mission.

The United States submits that the military personnel needed to support the government’s criminal case against Specialist Hall, and presumably those persons needed by him to defend himself, are in Iraq. Specialist Hall has not identified, with specificity, any military or even civilian witnesses whom he might call when, and if, this matter proceeds to trial in Iraq. The military commander’s decision regarding the negative impact on good order and discipline that Hall’s alleged criminal conduct has had upon unit morale is a significant factor that this court should consider when evaluating the impact that an injunction, of any kind, would have upon good order and discipline of the unit morale.

Finally, the United States submits that this case involves the kind of military expertise in the military justice system that underscores the government’s contentions that this court should, respectfully, abstain from reviewing this case. The petitioner challenges the applicability of an Army regulation on the issue of

whether or not is attached to the unit that now seeks to court martial him. See Court Docket Entry No. 3, page 20. The petitioner asks this court determine whether he can “deploy” with his unit, which is in effect a request for this court to decide whether Major General Wolff has the authority under Article 22 of the Uniform Code of Military Justice to assume court-martial jurisdiction over the petitioner. See Court Docket Entry No. 3, page 21.

In this case, the Commander’s decision to transport Hall to Iraq, in order to commence court martial proceedings, is the type of military decision that requires an interpretation and applicability of military law. The United States submits that this type of decision should be addressed within the military justice system in the first instance.

B. In the absence of exhaustion of available military remedies this court has no Jurisdiction

This Court does not have jurisdiction to intervene in a pending court-martial except in limited circumstances which are not applicable to this case. The Supreme Court has held that both subject matter jurisdiction and “equitable jurisdiction” constrain the reach of Article III courts. Councilman, 420 U.S. at 754. Equitable jurisdiction is concerned with “whether consistently with the principles governing equitable relief, the court may exercise its remedial powers.”

Id. Comity is a doctrine holding that “one court should defer action on causes

properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.” Rhines v. Weber, 544 U.S. 269, 273-74 (2005)(quoting Darr v. Burford, 339 U.S. 200, 204 (1950)). Although the Supreme Court has noted that concerns of federalism, which drive the doctrine of comity, are absent from court-martial proceedings, it also recognized that comity concerns are at least as compelling in the military context. Councilman, 420 U.S. at 757.

The military court system is an integrated system created by Congress to carry out its mandate to make rules for the government and regulation of the armed forces. U.S. Const., Art. I, § 8. The Article III courts have rightfully been reluctant to entertain claims challenging military court decisions.

Councilman indicates that there are two principal reasons why considerations of comity normally preclude a federal court from intervening in a pending court-martial proceeding. First, the military justice system must remain free from undue interference, because “the military is a ‘specialized society separate from civilian society’ with ‘laws and traditions of its own developed during its long history.’” *** Second, Congress sought to balance the competing interests in military preparedness and fairness to service members charged with military offenses, by “creating an integrated system of military courts and review procedures.” *** “It must be assumed that the military court system will vindicate servicemen’s constitutional rights.” *** Thus as suggested in Parisi [v. Davidson], 405 U.S. 34 (1972)], the doctrine of comity aids the military judiciary in its task of maintaining good order and discipline in the armed services, eliminates needless

friction between federal civilian and military judicial systems, and gives due respect to the autonomous military judicial system created by Congress.

New, 129 F.3d at 643 (internal citations omitted).

In this case, there are no special circumstances because Specialist Hall has not even been arraigned nor submitted any motions for relief or review within the military court system. Indeed, the United States submits, the military convening authority has not yet determined the court martial forum to which Specialist Hall will be subjected. Specialist Hall does not challenge the Army's ability to exercise jurisdiction over him, and even if he did such a challenge would not amount to an "extraordinary situation" as envisioned by the All Writs Act nor would it warrant the drastic remedy now being sought by the Petitioner. A jurisdictional issue does not make the claim extraordinary. *See* Councilman, 420 U.S. at 758; United States v. Hart, 66 M.J. 274 (C.A.A.F. May 14, 2008)(denying a defense petition for extraordinary relief alleging defective jurisdiction to wait and decide the issue on direct review under Articles 66 and 67 of the UCMJ).

Specialist Hall will be entitled to raise all of the matters asserted in his request for injunctive relief within the normal military justice process. For example, as it relates to his potential claim of denial of the right to counsel, the military courts can readily resolve this issue if it is meritorious. The accused in a

criminal proceeding has the right to “the Assistance of Counsel for his defense.” U.S. Const. amend. VI. Likewise, under the UCMJ, an accused has the right to representation by military counsel provided at no expense to the accused. Article 38(b)(3), UCMJ, 10 U.S.C. § 838(b)(3). The accused may be represented by civilian counsel. See Article 38(b)(2), (b)(4), UCMJ. The right to counsel of choice under the Sixth Amendment, as well as under the UCMJ, is not absolute. Wheat v. United States, 486 U.S. 153, 159 (1988); United States v. Beckley, 55 M.J. 15, 23-24 (C.A.A.F. 2001). The ““need for fair, efficient, and orderly administration of justice”” may outweigh the interest of the accused in being represented by counsel of choice. United States v. Campbell, 491 F.3d 1306, 1310 (11th Cir. 2007) (quoting United States v. Ross, 33 F.3d 1507, 1523 (11th Cir. 1994)); *see also* United States v. MacCulloch, 40 M.J. 236, 238-39 (C.M.A. 1994). Hence, the federal legal principles that guide this Court, are the same which guide the military courts and any preemptive review by this Court disrupts the comity and deference due to the military.

Specialist Hall will be entitled to raise all of the matters asserted in his request for injunctive relief within the normal military justice process. Until Specialist Hall completely develops his claims at the trial level through the course of the court-martial, and raises the issue on appeal for consideration by ACCA and

CAAF, the military will not have had the opportunity to fully and fairly consider the issue. It would be premature for this Court to examine the issue at this time when it may never need resolution by this Court.

The relief requested is in effect asking this Court to enjoin the military from proceeding with Specialist Hall's court-martial and therefore is more properly a request for a preliminary injunction. However, Supreme Court precedents preclude this Court from entertaining the interlocutory appeal, instituting an injunction. *See Councilman*, 420 U.S. 738; *see also Dooley v. Ploger*, 491 F.2d 608 (4th Cir. 1974). Therefore, the Court should abstain from exerting jurisdiction over Petitioner's habeas claim until his court-martial proceeding is complete and all avenues of military appellate review have been undertaken. 420 U.S. at 758.

In *Dooley v. Ploger*, the Fourth Circuit deemed it inappropriate to intervene to determine the military's jurisdiction prior to the completion of the court-martial. 491 F.2d at 613. The Fourth Circuit held that the soldiers were not entitled to have their courts-martial enjoined to determine the jurisdictional issues. *Id.* at 613 (stating that "there is no general exception to the exhaustion requirement for jurisdictional challenges"). The Court explained, "here, as in cases where the challenge may not be termed 'jurisdictional,' it is important to respect the orderly processes of the military court system, to avoid needless friction, and to have the

facts developed and the law interpreted by the expert adjudicatory tribunals charged in the first instance with the responsibility for offenses of members of the armed services.” Id. As a result, the Fourth Circuit held that the soldiers were not entitled to resort to civilian courts until the military tribunal had been given the opportunity to find facts concerning jurisdiction, as well as the soldier’s guilt or innocence. Id.

A year later, the Supreme Court held that it was inappropriate to issue an injunction to stay court-martial proceedings in a case where the petitioner challenged the jurisdiction, when the only harm he would face would be sitting through the court-martial. Councilman, 420 U.S. at 758. The Supreme Court held, “[w]hen a serviceman charged with crimes by military authorities can show no harm other than that attendant to resolution of his case in the military court system, the federal district courts must refrain from intervention, by way of injunction or otherwise.” Id. Equitable intervention is precluded “unless the harm sought to be averted is ‘both great and immediate,’ of a kind that ‘cannot be eliminated by . . . defense against a single criminal prosecution.’” Id. at 756. Like the instant case, Councilmen filed a petition for writ of habeas corpus prior to his court-martial, challenging the military’s jurisdiction over a crime which was committed off-post. Councilman, 420 U.S. at 740-744. The Supreme Court found

that the District Court improperly intervened in a pending court-martial proceeding because the only harm the serviceman could show was attendant to resolution of his case in the military court system. Id. at 758. Like the Fourth Circuit, the Supreme Court reasoned that “[i]n the circumstances disclosed here, we discern nothing that outweighs the strong considerations favoring exhaustion of remedies or that warrants intruding on the integrity of military court processes.” Id. at 756.

The only harm Specialist Hall alleges in the instant case is that he will have to face a court-martial. He has not alleged that the military trial judge who may hear his case or motions has committed any error or refused to hear his claims. Instead, he challenges the court-martial location, and raises potential claims of denial of witnesses and counsel. However, these claims do not merit intervention or injunction by this Court. *See, e.g.,* Schlesinger v. Councilman.

C. Specialist Hall Has No Likelihood of Success on the Merits

_____ Review of Specialist Hall’s claims would require this Court to make determinations that are committed to the political branches of government, they are nonjusticiable under the political question doctrine as well. *See, e.g.,* Gilligan v. Morgan, 413 U.S. 1, 10 (1973) (ordering dismissal of a suit seeking judicial oversight of rules governing domestic deployment of National Guard troops

because "decisions as to the composition, training, equipping, and control of a military force" present non-justiciable political questions); Sarnoff v. Connally, 457 F.2d 809, 809-10 (9th Cir. 1972) (per curiam) (affirming dismissal as nonjusticiable a challenge involving war powers: "[t]he conduct of foreign affairs is within the exclusive province of Congress and the Executive"). That doctrine, the roots of which go back as far as Marbury v. Madison, 1 Cranch (5 U.S.) 137, 165-66 (1803), counsels courts to abstain from passing on questions more properly reserved to the political branches of government.

The Supreme Court has identified the following factors for determining whether an issue constitutes a political question:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. at 217. A court should dismiss a case as nonjusticiable if any of these factors is "'inextricable from the case.'" Alperin v. Vatican Bank, 242 F. Supp.2d 686, 689 (N.D. Ca. 2003) (quoting Baker, 369 U.S. at 217).

Evaluating these factors in the context of Specialist Hall's claims leads to the inescapable conclusion that his case is nonjusticiable under the political question doctrine. See Massachusetts v. Laird, 451 F.2d 26, 30-34 (1st Cir. 1971) (dismissing as nonjusticiable a challenge to the Executive's continued commitment of troops to Vietnam); United States v. Helm, 712 F.Supp. 1423, 1428 (E.D. Ca. 1989) (determining that Presidential designations on munitions and commodities lists "are the very product of a national security analysis," and thus "all of the enumerated Baker factors would, in some way, be affected by judicial review"); Ange v. Bush, 752 F. Supp. 509, 512 (D.D.C. 1990) (finding nonjusticiable a challenge to President's deployment orders and activities in Persian Gulf).

To review Specialist Hall's claims would be to countermand Executive and Legislative decision-making related to military composition and need with respect to the war in Iraq, a setting in which "the respect due coordinate branches of government" and the "need for unquestioning adherence" to political decisions, Baker, 369 U.S. at 217, are at their highest. Decisions about how to use the military are "committed expressly to the political branches of government," and the Constitution manifestly leaves those decisions "to the political branches directly responsible – as the Judicial Branch is not – to the electoral process."

Gilligan, 413 U.S. at 10. Specialist Hall raises quintessentially political questions with respect to the composition and necessity of the military. See Tiffany v. United States, 931 F.2d 271, 277 (4th Cir. 1991) ("With regard to decisions to employ military troops, 'it is not the function of the Judiciary to entertain private litigation . . . which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region.'") (quoting Johnson v. Eisentrager, 339 U.S. 763, 789 (1950)). Review is inappropriate; therefore, Specialist Hall has no chance of success on the merits. Injunctive relief should, therefore, be denied, and his complaint should be dismissed.

D. Specialist Hall's Claims Require Review of Nonjusticiable Military Decisions

It is well established that uniformed military personnel may not bring suit against the armed forces or military superiors for incidents arising out of or in the course of their military service. Chappell v. Wallace, 462 U.S. 296, 301 (1983). In Chappell, the Supreme Court expanded the doctrine of intramilitary immunity established by Feres v. United States, 340 U.S. 135, 146 (1950). The "Feres doctrine," a by-product of that case, stands for the rule that Congress has not

waived the sovereign immunity of the United States for suits brought by members of the military against their superiors. In Chappell, the Supreme Court extended its holding in Feres to bar federal and state law constitutional claims of military members when the injury complained occurred when the service member was on full-time active duty and was incident to their military service. Id. A few years later, the Supreme Court again expanded upon the doctrine of intramilitary immunity in United States v. Stanley, 483 U.S. 669, 683-84 (1987). The Supreme Court concluded that its holding in Chappell should apply to all activities performed incident to service “rather than merely to activities performed within the officer/subordinate sphere.” Stanley, 483 U.S. at 680-81.

Because Specialist Hall seeks review of nonjusticiable military decisions, he has no likelihood of success on the merits and his application for injunctive relief should be denied. Likewise, because his claims are barred, his complaint should also be dismissed.

E. Specialist Hall Cannot Demonstrate that He Will Suffer Irreparable Injury.

Even if the Court were to find that it had jurisdiction over Specialist Hall’s complaint, he cannot demonstrate that he will suffer irreparable injury in the absence of an injunction. Specialist Hall maintains that he has no objection to military jurisdiction—as long as it is exercised in the United States. Specialist Hall,

as with every other service member in today's military, voluntarily entered military service with full knowledge that he may be required to deploy overseas. His service, whether it occurs in Iraq or at Fort Stewart, Georgia, is the same. Thus, given that Specialist Hall has no objection to military service in general, he cannot demonstrate that he will suffer irreparable harm from serving in Iraq as opposed to the continental United States.

Moreover, while Specialist Hall cannot demonstrate irreparable harm under the ordinary, albeit stringent standards, for an injunction, he certainly cannot demonstrate irreparable injury under the heightened standard applied to government personnel issues, and military cases in particular. See Sampson, 415 U.S. at 84; Guerra v. Scruggs, 942 F.2d 270, 274 (4th Cir. 1991). Specialist Hall is requesting that this Court interfere with internal military decision-making, therefore he must establish that he will suffer irreparable harm consistent with the extraordinary request he is making of this Court. "The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." Sampson, 415 U.S. at 90.

As Specialist Hall cannot demonstrate that he will suffer irreparable injury if required to comply with his deployment orders, he has failed to establish the

second criterion for the award of injunctive relief.

F. The Harm to the Army Would Outweigh Any Speculative Injury to Specialist Hall.

The Court must consider the likelihood of irreparable harm to the nonmoving party if the injunction is granted. In evaluating the harm to the Army, the Court must not focus narrowly on this single case. Rather, the court must consider the precedential effect that improperly granting the injunction would have on the military as a whole. Guerra, 942 F.2d at 275; Qualls v. Rumsfeld, 357 F. Supp. 2d 274, 286-287 (D.D.C. 2005). Any determination that the harm to the Army is minimal in a case challenging a call to active duty could establish a disruptive precedent. Parrish v. Brownlee, 335 F. Supp. 2d 661, 669 (D.N.C. 2004). As the court noted in Irby v. United States:

Without looking at the total effect of such cases, courts might consistently find that the harm tipped decidedly in favor of the petitioners. As a result, there would be few occasions when a preliminary injunction would not issue. Any plaintiff could allege the weakest claims and temporarily forestall an order to active duty or other disagreeable military decision.

Irby v. United States, 245 F. Supp. 2d 792, 798 (E.D. Va. 2003). An injunction in this case could open the floodgates for litigation by soldiers seeking to stay military action. If the Court were to grant an injunction to Specialist Hall, soldiers would routinely seek out injunctions to prevent the execution of valid military

orders until they could seek review of those decisions through the judicial process. Moreover, at this time when the nation is at war, the service of every soldier is vital.

The harm to the Army in this case, both from losing the services of commanders and enlisted supervisors to travel back to the United States for trial and from the precedential effect of such an injunction, far outweighs any speculative harm that Specialist Hall might suffer from being required to fulfill his obligation to serve.

G. An Injunction Would Not Serve the Public Interest.

A stay must be denied whenever the movant fails to carry the burden of establishing that it will not be harmful to the public interest. Hamlin Testing Laboratories Inc. v. Atomic Energy Commission, 337 F.2d 221, 222 (6th Cir. 1964). Specialist Hall cannot meet his burden of establishing that an injunction will serve the public interest in this case. The public has an interest in seeing that the Army's discretionary decision making with respect to personnel decisions is effectuated with minimal interference. The intrusion of an injunction "would be a disruptive force as to affairs peculiarly within the jurisdiction of the military authorities." Orloff v. Willoughby, 345 U.S. at 94-95; Guerra, 942 F.2d at 275; Kries v. Sec'y of the Air Force, 866 F.2d 1508, 1513-14 (D.C. Cir., 1989); Dilley

v. Alexander, 603 F.2d 914, 920 (D.C. Cir., 1979). These and other cases establish that an injunction that interferes with the proper functioning of our military forces has the potential for substantially harming the Army and cannot be said to be in the public interest.

As Specialist Hall has not established that the public interest would be served by the issuance of an injunction, his request for a temporary restraining order and preliminary injunction must be denied. This petition should be dismissed.

V. CONCLUSION

As Petitioner has failed to establish any of the factors required for injunctive relief, Respondent respectfully requests that the Court deny his application for a temporary restraining order and preliminary injunction.

Respectfully submitted,

EDWARD J. TARVER
UNITED STATES ATTORNEY

s/s Delora L. Kennebrew
Assistant United States Attorney
Georgia Bar No. 414320

s/s James L. Coursey
Assistant United States Attorney
Georgia Bar No. 19602

P.O. Box 8970
Savannah, Georgia 31412
(912) 652-4422/ext. 512
email: delora.kennebrew@usdoj.gov
James.coursey@usdoj.gov

OF COUNSEL:
Major Joshua M. Torman, United States Army
U.S. Army Litigation Division
Military Personnel Branch
Arlington, Virginia
(703) 696-1627
joshua.m.toman@usarmy.mil

CERTIFICATE OF SERVICE

This is to certify that I have on this 17th day of February 2010, served all of the parties in this case in accordance with the notice of electronic filing (“NEF”) which was generated as a result of the electronic filing in this Court.

This 17th day of February 2010.

s/s Delora L. Kennebrew
Assistant United States Attorney
Post Office Box 8970
Savannah, GA 31412
(912) 652-4422/ext. 512