

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

1LT. EHREN K. WATADA,

Petitioner,

v.

LT. COL. JOHN HEAD, Military Judge,  
Army Trial Judiciary, Fourth Judicial  
District; LT. GEN. CHARLES JACOBY,  
Convening Authority, Ft. Lewis, Washington

Respondents.

CASE NO. C07-5549BHS

ORDER ISSUING  
PRELIMINARY INJUNCTION  
OVER COURT MARTIAL  
PROCEEDING PENDING  
OUTCOME OF HABEAS  
CORPUS PETITION

This matter comes before the Court on Petitioner’s Emergency Motion for a Stay of Court-Martial Proceedings (Dkt. 2). Previously, the Court granted a temporary stay over the court martial proceeding referred by Respondent Jacoby and requested additional briefing. The Court has considered the pleadings filed in support of and in opposition to the motion and the oral arguments of counsel, and hereby grants the motion for the reasons stated herein.

**I. FACTUAL AND PROCEDURAL HISTORY**

Petitioner filed for a writ of habeas corpus under 28 U.S.C. § 2241 on October 3, 2007. Dkt. 1. Petitioner requests to be released from all restraints imposed by his pending court martial charges, the court martial proceeding originally set to begin on October 9, 2007, on the basis that the proceeding violates the Double Jeopardy Clause of the Fifth Amendment. *Id.* On October 3, 2007, Petitioner also filed his Emergency Motion for a Stay of Court Martial Proceedings. Dkt. 2. After hearing oral argument from Petitioner and Respondents on October 4, 2007 and receiving additional briefing on the issue of jurisdiction, this Court entered an order temporarily

1 staying Petitioner's court martial in order to allow the parties to brief the Motion for Stay. Dkt.  
2 9. Once Petitioner's motion had been fully briefed, the Court extended the preliminary stay until  
3 November 9, 2007 in order to allow sufficient time to weigh the significant legal issues raised by  
4 the motion and to review the portions of the underlying record submitted by the parties. Dkt. 17.

5 Petitioner was charged with violating Articles 87 and 133 of the Uniform Code of  
6 Military Justice for allegedly refusing to deploy to Iraq on June 22, 2006 and making public  
7 statements, between May and August of 2006, expressing his views about the illegality of the  
8 war in Iraq. Dkt. 13 at 50. Petitioner wanted to present a defense to the charge of missing  
9 movement that concerned his intent:

10 [T]he question here is, whether or not that was his intent—his specific intent,  
11 because it's not just the general intent. It's a specific intent offense. That's what  
12 the Manual says. In this case, we will argue, as we've argued before, that his  
13 specific intent was to fail to participate in something, which he believed was  
14 unlawful and that therefore, would involve him [in] the commission of war  
15 crimes. And that is the intent element that exists here.

16 Dkt. 12 at 4. Petitioner argued that each soldier's subjective beliefs would determine whether  
17 that soldier should follow the order to deploy to Iraq.

18 That doesn't mean that's [sic] people who don't realize, or don't know  
19 what they are doing, have an obligation to refuse to go. But certainly, if one  
20 person is conscious, and knows, and full well understands the implications of  
21 what he or she is being ordered to do, and reaches the conclusion that that is  
22 unlawful, then that person is without an excuse or justification if he or she does it  
23 anyway.

24 *Id.* at 6. Before the court martial began, "the military judge ruled that, as a matter of law, the  
25 order to deploy was lawful, and that Petitioner was not allowed to present evidence on the  
26 legality of the war in Iraq or his motive for missing movement." Dkt. 11 at 4; Dkt. 12 at 32. The  
27 court martial was held on February 5-7, 2007. Dkt. 12 at 6. During the proceeding, Petitioner  
28 entered a plea of not guilty to all the charges and specifications. *Id.* at 7.

29 Petitioner and the Government entered into a pretrial agreement wherein the Government  
30 agreed to dismiss "Specifications 2 and 3 of Charge II without prejudice to ripen into prejudice  
31 upon completion of trial proceedings" in exchange for Petitioner entering into a Stipulation of  
32 Fact. Dkt. 14 at 9. The pretrial agreement allowed the nullification of the agreement upon the

1 occurrence of three enumerated events, the third being “the refusal of the military judge to accept  
2 the Stipulation of Fact.” *Id.* at 10. Completion of the trial proceedings was explained as either  
3 Petitioner being found not guilty or the imposition or announcement of sentence. This definition  
4 was accepted by Petitioner. Dkt. 12 at 24.

5 The Stipulation of Fact admitted certain enumerated facts as true and contained  
6 reproduced written versions of the public statements Petitioner made expressing his beliefs about  
7 the illegality of the war. Dkt. 14 at 11-22. In the stipulation, Petitioner admitted as fact that “At  
8 approximately 1000 hours on 22 June 2006, 1LT Watada intentionally missed the movement of  
9 his flight to Iraq.” *Id.* at 17. It further stated that “1LT Watada intentionally did not board the  
10 aircraft and as a result, missed the movement of Flight Number BMYA91111173.” *Id.* The  
11 stipulation also stated, “With this stipulation, however, the defense does not waive any future  
12 claim with regard to the motions and objections previously litigated.” *Id.*

13 Before accepting the Stipulation of Fact, the military judge conducted an inquiry, asking  
14 Petitioner questions in order to discern his understanding. Dkt. 12 at 8. During this inquiry, the  
15 military judge stated as follows:

16 Lieutenant Watada, the government has the burden of proving beyond a  
17 reasonable doubt every element of the offenses to which you’ve been charged. By  
18 stipulating to the material elements of one of the offenses, as you are doing here,  
19 you alleviate that burden; that means, based upon the stipulation alone and without  
20 receiving any other evidence the court can find you guilty of the offenses to which  
21 the stipulation relates.

22 Do you understand?

23 *Id.* at 9. Petitioner responded that he did understand. *Id.* Petitioner, his counsel, and counsel for  
24 the Government agreed to the use of the stipulation. *Id.* at 9-10. The military judge then inquired  
25 into the factual basis for the Stipulation of Fact. With regard to Petitioner’s intent to miss a  
26 movement, the military judge specifically asked, “What was your intent regarding the  
27 deployment of that aircraft?” *Id.* at 17. Petitioner responded as follows:

28 Sir, my intent, as I stated in public statements and as I stated to my chain of  
command numerous times, was that the order to deploy to Iraq to support combat  
operations in OIF was to me, as I believed in the facts and evidence that I saw,  
was an illegal order. And that the war itself was illegal, and any participation of

1 mine would be contrary to my oath, and therefore I would have no other choice  
2 but to refuse. So my intent was to refuse the order, sir.

3 *Id.* The military judge replied: “Okay. Did you intend not to get on that aircraft?” *Id.* Petitioner  
4 responded: “Yes, sir.” *Id.* After some further questioning, the military judge asked if any further  
5 inquiry into the factual basis for the Stipulation of Fact was required. *Id.* at 22. The parties  
6 answered that the inquiry was sufficient. *Id.* After a discussion of the pretrial agreement, the  
7 military judge accepted the stipulation and entered it into evidence. *Id.* at 26.

8 The court martial then continued forward and preliminary instructions were given, voir  
9 dire occurred, and a panel (the military equivalent of a jury), was empaneled. *Id.* The  
10 Government proceeded with its case, presented evidence, the Stipulation of Fact was published  
11 and read to the panel. The panel then watched two videos attached to the Stipulation of Fact that  
12 showed Petitioner making the public statements reproduced in the stipulation. Dkt. 11 at 4-5.  
13 The military judge also instructed the panel members that, as a matter of law, “the order to  
14 deploy, if given, is lawful.” *Id.* at 5. The Government then closed its case at 1546 on February 6,  
15 2007. Dkt. 12 at 47.

16 The military court reconvened the next day. *Id.* Before counsel for Petitioner presented  
17 any evidence, Petitioner submitted a proposed jury instruction that contained the following  
18 language: “The evidence has raised the issue of mistake on the part of the accused concerning his  
19 belief that he had a legal and moral obligation to refuse to participate in the war in Iraq relating  
20 to the offenses of missing movement.” Dkt. 11 at 5. The military judge expressed concern that  
21 this proposed instruction conflicted with the Stipulation of Fact and decided to reopen the  
22 inquiry into his acceptance of the stipulation. Dkt. 12 at 47. The military judge began by  
23 inquiring into the basis for the defense of mistake of fact and what element it went to. *Id.* at 48.  
24 Petitioner’s counsel answered as follows:

25 It goes to the intent element; purely to the intent element. With respect to  
26 the missing movement charge, it has always been Lieutenant Watada’s position  
27 that he intended not merely to miss movement, but to avoid participating in a war  
28 that he considered to be illegal, and that the orders to compel him to go to Iraq, in  
essence, were compelling him to put himself in a position where he would be  
supporting and engaging in war crimes.

1           So his specific intent, which is required by the offense, was not the mere  
2 intent to miss a movement. His intent, his state of mind, was of a different  
3 character, altogether. And, we have argued that repeatedly. We have also, as you  
4 know, in the stipulation, if you look at the last paragraph – sorry, the last sentence  
of the first paragraph, it says it there, and you approved this language, “With this  
stipulation; however, the defense does not waive any future claim with regard to  
the motions and objections previously litigated.”

5 *Id.* Petitioner’s counsel further stated, “We did not plead guilty because there is a dispute in this  
6 case over the intent element, and that is what the instruction goes to.” Dkt. 16-2 at 1. Upon  
7 further discussion, Petitioner’s counsel contended that the instruction did not conflict in any way  
8 with the stipulation. *Id.* The Government agreed:

9           Government tends to agree that there is no contradiction in the stipulation.  
10 We just absolutely disagree that this should even be an issue at this point. The  
11 court has previously ruled that the order [to deploy] was lawful, and the accused  
12 clearly intended to miss movement.

13 *Id.* The military judge still believed that there was a problem with Petitioner’s understanding  
14 “and whether he believes that there is a defense because he has stipulated to all of the elements.”

15 *Id.* at 2. Petitioner’s counsel answered:

16           He does believe there is a defense. We tried to raise that defense by  
17 motions, and you rejected those motions. And my assumption is, consistent with  
18 your rejection of those motions, that you will reject this instruction. But we are  
19 offering it consistent with the prior motions we raised, because his state of mind  
20 was of a different nature than what the government contends is adequate for the  
21 purposes of this charge. And that’s the only disagreement we have.

22           There is no disagreement with any of the language contained in Paragraph  
23 4. We agreed to stipulate to that so that it would make the government’s case  
24 easier in terms of not having to bring people and introduce documents, as they’ve  
25 done at prior proceedings to show that he didn’t get on the plane; that he received  
26 the order, and that he knew what he was doing when he didn’t get on the plane.

27 *Id.* The military judge then informed the parties that he was entertaining the idea of throwing out  
28 the stipulation and declaring a mistrial. Counsel for Petitioner then warned the military judge as  
follows:

          Colonel, let me just say, I would assume that if that were to happen, you  
would allow us sufficient time to appeal from that order because jeopardy has  
attached, and it may very well be that the retrial is impermissible. If that’s the  
case, then we need to discuss this and make some decisions.

*Id.* at 4.

1 At 1057 on February 7, 2007, the military judge then allowed a recess for Petitioner to  
2 discuss whether he would answer further questions inquiring into his understanding of the  
3 stipulation. Dkt. 12 at 49. The military court reconvened at 1224 on the same day and the  
4 military judge began to question Petitioner. *Id.* The military judge again asked Petitioner, “What  
5 does it mean that you intentionally did not aboard the aircraft?” *Id.* at 50. Petitioner responded:

6 Your Honor, in that sentence, Paragraph 4, what I was saying is that I  
7 intentionally missed the movement because I believed my participation in the war  
8 in Iraq would contribute to war crimes, and it would be contributing to what I  
9 believed an illegal war.

10 *Id.* The military judge further inquired, “So when you talk about you intentionally missed this  
11 movement, did you believe you had a duty to make that movement?” *Id.* at 51. Petitioner  
12 responded, “Your Honor, no. I did not feel I had that duty, because I was being ordered to do  
13 something I felt was illegal.” *Id.* Petitioner continued as follows:

14 Your Honor, I have always believed, especially at this point in time, that I  
15 had a legal and moral defense. I realize that the government has made arguments  
16 contrary to that, and you’ve also made rulings contrary to that. It still does not  
17 negate my belief that I still have a defense.

18 *Id.* The military judge then read his statements from the initial inquiry into the stipulation,  
19 expressing his belief that Petitioner had stipulated to every element of the charge of missing  
20 movement that was required to find him guilty. *Id.* He asked Petitioner, “What does that mean to  
21 you because you stipulated to every element of the offense of missing movement by design?” *Id.*  
22 Petitioner answered, “Sir, yes, I do understand that I stipulated, and I believe—I understand the  
23 arguments that the prosecution was making. But I also understand that there is additional  
24 evidence that could go to my defense.” *Id.*

25 After the military judge had this exchange with Petitioner, he then asked counsel for the  
26 Government and Petitioner whether they believed the stipulation was a “confessional  
27 stipulation” under Rule for Court Martial 811. *Id.* The Government responded:

28 We did, Your Honor. Further, we would just like to point out that he has –  
the accused has admitted to every element of the offense. His subjective beliefs  
in the legality of the order are irrelevant and his motives for missing the  
movement are absolutely irrelevant, as provided in your previous ruling, and he  
would have – so, at this point, I guess I’m just at a loss.

1 *Id.* at 53. Counsel for Petitioner answered as follows:

2 As far as it goes, it is a stipulation of fact, which was intended to relieve  
3 the government of proving certain facts; however, it has always been our position  
4 that Lieutenant Watada has a defense based upon the motions that we raised  
5 earlier, which you have precluded us from raising at trial, and we are not altering  
6 our position in that respect, nor did we alter it in this stipulation, as I pointed out  
7 to you in the preparatory paragraph in the last sentence which says that this  
8 stipulation is being made subject to prior arguments and without waiving those  
9 arguments.

10 \* \* \*

11 I believe that you and the government could interpret it as [a confessional  
12 stipulation] . . . and that the government could argue, based upon this stipulation,  
13 that they don't have to prove anything further based upon their theory of the case.  
14 Our theory of the case is somewhat different.

15 *Id.* The military judge continued to press the issue and again raised the question to the  
16 Government asking whether they believed there was any material fact not admitted by the  
17 stipulation. *Id.* at 54. The Government responded:

18 Your Honor, we believe that Paragraph 4 provides evidence of every  
19 material fact in Article 87. In other words, we have evidence to prove every  
20 element in Article 87. We understand the defense's position that they believe  
21 they have defense. Obviously, we disagree.

22 *Id.* The military judge then expressed his belief that there was a problem with the parties holding  
23 differing viewpoints on whether Petitioner had a defense to the charge of missing movement and  
24 whether the Stipulation of Fact was confessional or not. *Id.* He asked the parties whether they  
25 believed there was a problem because he felt these issues indicated that there had not been "a  
26 meeting of the minds." *Id.* The Government stated:

27 In terms of the four corners of this agreement, I think there is a meeting of  
28 the minds. I think both parties agreed to the contents of Paragraph 4 of the  
Stipulation of Fact. That goes to the "what" of the offense.

The defense would want to raise the issue of "why" as a defense, and we  
would object to that. But in terms of what's contained in [the] agreement, I think  
– obviously, let the defense chime in, but [we] believe there was a meeting of the  
minds.

*Id.* at 54-55. Then the following exchange took place:

[MILITARY JUDGE]: Did he not – has he not set up matters inconsistent  
with – he believes he has a defense to what he has stipulated to in a confessional  
stipulation. Whether it's a valid defense or not, government, isn't the point.

[GOVERNMENT]: Your Honor, I don't see it. I mean, the subjective beliefs  
of the accused and that he has a defense are not relevant.

1 [MILITARY JUDGE]: Counsel, it's just like if he pled not guilty, but as to  
2 this offense, you have to treat it essentially like a guilty plea, because he admits to  
3 all the facts surrounding the offense. That's what *Bertelson* is about. That's what  
4 all that case law is about. It's so you don't shortcut the system.

5 [GOVERNMENT]: Your Honor, I don't see how this is short cutting the  
6 system. In another case, the accused can plead to the elements of the crime and  
7 then still get up and say, "But I have a reason." He has pled not guilty to the  
8 offense.

9 [MILITARY JUDGE]: Thank you. Defense, do you wish to be heard?

10 [COUNSEL FOR PETITIONER]: Just briefly. This is a stipulation; it's not a  
11 guilty plea. It's a stipulation of facts. That is to be judged differently. The  
12 impact or the effect of the stipulation, the parties can disagree about. And we  
13 apparently do disagree, but Lieutenant Watada's pleading not guilty. He's always  
14 made that clear. And yet, he is willing to plead to the facts which he understood  
15 could be sufficient on which to find him guilty, as you instructed. He knows that  
16 based upon the legal rulings and determinations the court makes. But he still  
17 maintains notwithstanding those rulings that he is entitled to plead not guilty for  
18 the reasons that he has stated to you.

19 [MILITARY JUDGE]: What does "uncontradicted" mean? What  
20 uncontradicted material facts? He's essentially pled guilty to missing movement  
21 by design by admitting to every fact necessary.

22 [COUNSEL FOR PETITIONER]: That's a legal conclusion, which you're  
23 drawing, and which you may be entitled to draw, subject to whatever legal rulings  
24 you make. It's not a legal ruling which we agree with and it's not a conclusion  
25 that we will draw no matter how much you argue to us about it we will not draw  
26 that conclusion, and we will also appeal it, if necessary.

27 [MILITARY JUDGE]: I'm just trying to understand how his subjective belief  
28 fits into this because he's raising that he doesn't believe he intentionally missed  
the movement.

[COUNSEL FOR PETITIONER]: What he's said to you in his answers to your  
questions is that the act of not getting on the plane was not a mistake. He did that  
deliberately. But he did it for a specific reason out of a specific intent with which  
the government does not agree and which the government deems to be irrelevant,  
and which you have ruled is not relevant. That's all he's saying. And he's made  
that argument from the beginning, long before he actually failed to get on the  
plane. That's simply our position.

[MILITARY JUDGE]: I understand your position, but I just go back to when  
I advised the accused – and he agreed. Stipulated to the material elements; he  
stipulated to the material elements of this offense. And now you're saying that  
he's not stipulated to the material elements of the offense.

[COUNSEL FOR PETITIONER]: Well, he's saying what he's saying, which is  
essentially that he's stipulating as far as he's able and willing to go with the  
understanding that the facts to which he's stipulating might be sufficient to  
dispose of that charge against him based upon the rulings of the court. And that's  
as far as we can go. And he understands that.

1 *Id.* at 55-57.

2 The Government then requested a fifteen-minute recess, and the military judge asked  
3 whether the Government understood his problem. *Id.* at 57. The Government retorted, “Frankly  
4 your Honor, no.” *Id.* The Government expressed its belief that the military judge had already  
5 disposed of these issues through his ruling on pretrial motions. *Id.* The military judge reiterated  
6 his concerns:

7 It’s the intent element and it’s the – government, it’s 1245. I’ll give you  
8 until 1300. You said you needed 15 minutes; I’ll give you 15 minutes. I don’t  
9 see where there is a meeting of the minds here. I see that there is an inconsistency  
in the stipulation of fact. I don’t know how I can continue to accept Prosecution  
Exhibit 4, as Prosecution Exhibit 4, as we stand here now.

10 At this point I’m thinking we’re going to have to reset a new trial date and  
11 those other charges will come back. Why don’t we take 15 minutes. We’ll let  
12 you come back, and if you’ve got something more you want to present I’ll be glad  
to listen to it, but right now that’s my thought. And, when we come back, I’ll  
make my ruling.

13 *Id.* at 58. After a short recess, the proceedings resumed. The military judge again asked whether  
14 the Stipulation of Fact was a “confessional stipulation.” *Id.* at 59. Both parties agreed, at this  
15 point in the proceedings, that the Stipulation of Fact was not a “confessional stipulation.” *Id.*  
16 The Government stated further:

17 The government’s understanding is that it is a stipulation of fact; the  
18 accused has not pleaded guilty to the offense and if he [has] evidence to present  
19 that would be able to prove that he is not guilty of the offense, then the court  
should hear that evidence.

20 *Id.* at 60. The military judge persisted in his belief that there was a problem with the stipulation  
and the Government responded:

21 Your Honor, I don’t know what else to say other than what’s already been  
22 said. The parties agree that the contents of the stipulation – the parties agree that  
23 it is a stipulation of fact.

24 *Id.* In response, the military judge stated:

25 That’s not the issue. At this point I’m reconsidering Prosecution Exhibit 4  
26 and rejecting the stipulation of fact. It’s now Prosecution Exhibit 4 for  
27 identification, as the government has closed its case. Government, do you wish to  
reopen your case, or do you wish, as we now have a material breach of the pretrial  
28 agreement, do you wish to request a mistrial because at this point we don’t have  
evidence on every element?

1 *Id.*

2 The court then took a forty-minute recess. *Id.* at 61. Upon return, counsel for Petitioner  
3 restated that Petitioner did not want to withdraw from the stipulation and the following exchange  
4 took place:

5 [MILITARY JUDGE]: Government, what's your druthers? At this point, I  
6 certainly entertain a motion for a mistrial and I'll set a new trial date. At this  
7 point, I believe there is a breach of the pretrial agreement, which would allow the  
8 government to resurrect the additional charges that were dismissed because we  
9 have not reach[ed] the determination point, as required, for a dismissal with  
10 prejudice. I believe the government was, at 802, asking about the . . . [intent]  
11 element that's in there. But if you review the entirety of the stipulation of fact,  
12 that I think even a casual reading of the stipulation – every statement in there goes  
13 to the, "I do not intend to deploy." I don't know how we get around that. What  
14 we're left with is I can instruct the members, if the government wishes to go  
15 forward. I know the government does not have all of their witnesses that they  
16 would have called for the other offenses. So, government, what's your choice?

17 [GOVERNMENT]: Your Honor, at this point, the government moves for  
18 mistrial.

19 [MILITARY JUDGE]: Defense, do you want to be heard?

20 [COUNSEL FOR PETITIONER]: Yes. We would oppose the motion.

21 [MILITARY JUDGE]: Counsel, I have the week of 19 March available.

22 [COUNSEL FOR PETITIONER]: Can we first determine, are you declaring a  
23 mistrial?

24 [MILITARY JUDGE]: I'm going to declare a mistrial.

25 *Id.* at 62-63. The court martial was then adjourned and an Article 39(a) session was immediately  
26 called to order wherein the military judge formally granted the motion for mistrial and set a new  
27 trial date for March 19, 2007. *Id.* at 64.

28 Preparations for starting a new trial then began and the charges were re-preferred and  
referred for trial on February 23, 2007. Dkt. 11 at 5. Petitioner filed a Petition for Extraordinary  
Relief in the Nature of a Writ of Prohibition and an Application for Stay of Proceedings with the  
Army Court of Criminal Appeals. Dkt. 14 at 28. Petitioner based the application on his belief  
that a second prosecution of the same charges would violate his Fifth Amendment right to be  
free from double jeopardy. *Id.* On May 18, 2007, the Army Court of Criminal Appeals issued an  
order granting the petition in part by instituting a stay of the second court martial and requiring

1 the Government to respond to the petition and show cause why the petition should not be  
2 granted. *Id.* at 25. On June 29, 2007, the Army Court of Criminal Appeals denied the petition on  
3 the grounds that Petitioner had not first moved to dismiss in the military trial court. *Id.* at 27.

4 Petitioner next filed a motion to dismiss on double jeopardy grounds in the military trial  
5 court on July 2, 2007. Dkt. 13 at 67. The Government filed an opposition brief on July 5, 2007,  
6 and both parties presented evidence and argued their positions to the military court on July 6,  
7 2007. Dkt. 13. The military judge issued an order denying the motion to dismiss, together with  
8 findings of fact and conclusions of law, on July 11, 2007. Dkt. 14-2 at 107-119.

9 On July 27, 2007, Petitioner again sought relief from the Army Court of Criminal  
10 Appeals by way of a Renewed Petition For Extraordinary Relief and once more made an  
11 application for a stay of the court martial proceedings. Dkt. 14 at 62. The Government was  
12 ordered to provide an authenticated copy of the post mistrial proceedings. Dkt. 11 at 6. The  
13 Government was also allowed to file a brief in opposition. Dkt. 14-2 at 96. On August 27, 2007,  
14 Petitioner filed a motion to expedite the ruling on his application for a stay. Dkt. 11 at 6. On  
15 August 28, 2007, the Army Court of Criminal Appeals denied Petitioner's application and denied  
16 the petition on the basis that the "military judge did not abuse his discretion by granting the  
17 mistrial." Dkt. 7 at 6. The order provided a brief, one-paragraph explanation of the reasoning for  
18 the denial and made no new conclusions or findings. *Id.*

19 Finally, on September 17, 2007, Petitioner sought relief from the United States Court of  
20 Appeals for the Armed Forces by way of a Petition for a Writ of Prohibition and an Application  
21 for Immediate Stay of Trial Proceedings. Dkt. 11 at 6. On October 5, 2007, in a one-page order,  
22 the United States Court of Appeals for the Armed Forces denied the petition and application for  
23 stay but made no findings of fact or conclusions of law. Dkt. 7 at 4.

## 24 **II. JURISDICTION**

25 Petitioner has filed his petition for a writ of habeas corpus under 28 U.S.C. § 2241, which  
26 provides in part as follows:  
27  
28

1 (a) Writs of habeas corpus may be granted by the Supreme Court, any  
2 justice thereof, the district courts and any circuit judge within their respective  
3 jurisdictions. The order of a circuit judge shall be entered in the records of the  
4 district court of the district wherein the restraint complained of is had.

5 \* \* \*

6 (c) The writ of habeas corpus shall not extend to a prisoner unless –

7 (1) He is in custody under or by color of the authority of the United  
8 States or is committed for trial before some court thereof; or

9 (2) He is in custody for an act done or omitted in pursuance of an Act of  
10 Congress, or an order, process, judgment or decree of a court or judge of the  
11 United States; or

12 (3) He is in custody in violation of the Constitution or laws or treaties of  
13 the United States; or

14 (4) He, being a citizen of a foreign state and domiciled therein is in  
15 custody for an act done or omitted under any alleged right, title, authority,  
16 privilege, protection, or exemption claimed under the commission, order or  
17 sanction of any foreign state, or under color thereof, the validity and effect of  
18 which depend upon the law of nations; or

19 (5) It is necessary to bring him into court to testify or for trial.

20 28 U.S.C. § 2241. Section 2241 is the proper avenue for petitioners who are not in custody  
21 pursuant to a judgment or sentence. *See Stow v. Murashige*, 389 F.3d 880, 885 (9th Cir. 2004).  
22 Petitioners proceeding under 28 U.S.C. § 2241 are not subject to the one-year statute of  
23 limitations, deferential review of state court decisions, limitation on successive petitions, or state  
24 court exhaustion requirements of the 1996 Anti-Terrorism and Effective Death Penalty Act  
25 (“AEDPA”), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended at, in relevant part, 28  
26 U.S.C. § 2254(d)). *White v. Lambert*, 370 F.3d 1002, 1009 (9th Cir. 2004).

27 “[T]he writ of habeas corpus occupies a position unique in our jurisprudence, the  
28 consequence of its historical importance as the ultimate safeguard against unjustifiable  
deprivations of liberty.” *Schlesinger v. Councilman*, 420 U.S. 738, 752 (1975) The purpose of  
the writ of habeas corpus is to provide a remedy for severe restraints on liberty, and for this  
reason, a person requesting the writ is required to be in “custody.” *Hensley v. Municipal Court*,  
411 U.S. 345 (1973); *Peyton v. Rowe*, 391 U.S. 54 (1968); *Jones v. Cunningham*, 371 U.S. 236  
(1963). Custody can be shown where a person is subject to restraints on liberty “not shared by

1 the public generally.” *Jones*, 371 U.S. at 240. Petitions for writs of habeas corpus are available to  
2 members of the armed services who are not seeking a discharge from military service as part of  
3 their claims. *Glazier v. Hackel*, 440 F.2d 592 (9th Cir. 1971); *Bratcher v. McNamara*, 448 F.2d  
4 222 (9th Cir. 1971). Petitioner alleges that the restraint on liberty he is being subjected to is a  
5 court martial proceeding that would violate his Fifth Amendment right to be free from double  
6 jeopardy. Dkt. 1 at 9. The Supreme Court of the United States has held that being required to  
7 appear for trial is sufficient to show custody over an individual for habeas purposes. *Justices of*  
8 *Boston Municipal Court v. Lydon*, 466 U.S. 294, 300-301 (1984).

9 As a general rule, where members of the armed forces file habeas petitions seeking relief  
10 from the military’s wrongful restraint of liberty, federal civilian courts should not entertain such  
11 petitions until all available remedies within the military court system have been exhausted.  
12 *Councilman*, 420 U.S. at 758; *Noyd v. Bond*, 395 U.S. 683, 693 (1969); *Gusik v. Schilder*, 340  
13 U.S. 128 (1950). Petitioner’s habeas petition asks this Court to determine issues that have also  
14 been placed before the military trial court, the Army Court of Criminal Appeals, and the United  
15 States Court of Appeals for the Armed Forces. All of these courts have denied Petitioner’s  
16 claims. Therefore, Petitioner has exhausted his available remedies in the military court system.  
17 Petitioner has satisfied the custody and exhaustion requirements necessary for bringing this  
18 petition and the Court may properly exert jurisdiction over Petitioner’s claims.

### 19 **III. THE REMEDY SOUGHT BY PETITIONER,** 20 **WHILE RARE, IS APPROPRIATE**

21 Petitioner has requested that this Court stay his upcoming court martial until a final  
22 decision on his habeas petition has been rendered. Dkt. 2 at 23. Respondents urge that the relief  
23 requested is in effect asking this Court to enjoin the military from proceeding with Petitioner’s  
24 court martial and therefore is more properly a request for a preliminary injunction. Dkt. 11 at 14.  
25 Respondents contend that the Court is precluded from instituting this remedy by *Schlesinger v.*  
26 *Councilmen* and the Court should therefore abstain from exerting jurisdiction over Petitioner’s  
27 habeas claim until after his second court martial proceeding is completed and all avenues of  
28 military appellate review have been undertaken. Dkt. 11 at 13.

1 In the present matter, the nature of Petitioner's habeas claim militates against abstention.  
2 Petitioner sat for a court martial which ended in a mistrial declared after the close of the  
3 Government's case and before the defense was allowed to present evidence. Petitioner then  
4 exhausted his military court administrative remedies with respect to his claim that double  
5 jeopardy would bar a subsequent court martial. "[T]he very nature of a double jeopardy claim is  
6 such that it is collateral to, and separable from the principal issue at the accused's impending  
7 criminal trial, i.e., whether or not the accused is guilty of the offense charged." *Abney v. U.S.*,  
8 431 U.S. 651, 659 (1977). Under these circumstances, where Petitioner has exhausted his  
9 military court remedies on the issue of double jeopardy, allowing the second court martial to go  
10 forward would not aid the military in developing the facts, applying the law, or correcting their  
11 own errors. The military courts have already had their opportunity to develop the facts, apply  
12 the law, and to correct their own errors, and the pending court martial will not address any of the  
13 issues raised by this petition.

14 *Parisi v. Davidson* provides one example of the circumstances under which it is  
15 appropriate for an Article III court to intervene in a pending court martial. 405 U.S. 34 (1972).

16 [T]he *Parisi* exception—allowing a service member to pursue a collateral attack  
17 challenging a military action before the completion of court-martial proceedings –  
18 is limited to situations in which: (1) a service member subject to military  
19 authority asserts a legal right against the military that has been clearly established  
20 by statute, regulation, or other applicable law; (2) administrative procedures are in  
21 place to enforce that right; and (3) the service member has fully exhausted these  
22 procedures and has been denied relief attendant to the right asserted.

20 *New v. Cohen*, 129 F.3d 639, 644. Here, Petitioner has a pending court martial proceeding  
21 scheduled which he claims would subject him to being put twice in jeopardy for the same  
22 offense. The legal right to be free from double jeopardy has been clearly established by the Fifth  
23 Amendment of the United States Constitution as well as the Uniform Code of Military Justice  
24 Article 44 and 10 U.S.C. § 844(a). The administrative procedures in place to enforce that right  
25 are carried out by the military trial court, the Army Court of Criminal Appeals, and the United  
26 States Court of Appeals for the Armed Forces. Petitioner has exhausted these procedures and  
27 has been denied relief attendant to his asserted right to be free from double jeopardy. Under  
28

1 these circumstances Petitioner’s claims fall squarely within the exception enunciated by the  
2 Supreme Court in *Parisi* and this Court should not abstain from hearing this petition until after  
3 the second court martial has been concluded.

4         However, having decided that this Court is not required to abstain from exerting  
5 jurisdiction over these claims until after the second court martial is completed, it still must be  
6 determined whether this Court may impose a preliminary injunction over the pending court  
7 martial until after the resolution of this matter. The Supreme Court in *Councilmen* provided  
8 insight into this issue by holding: “When a serviceman charged with crimes by military  
9 authorities can show no harm other than that attendant to resolution of his case in the military  
10 court system, the federal district courts must refrain from intervention, by way of injunction or  
11 otherwise.” 420 U.S. at 758. Equitable intervention is precluded “unless the harm sought to be  
12 averted is ‘both great and immediate,’ of a kind that ‘cannot be eliminated by . . . defense against  
13 a single criminal prosecution.’” *Id.* at 756. As stated above, a double jeopardy claim is collateral  
14 to and separable from underlying criminal charges. *Abney*, 431 U.S. at 659. “[A] defendant  
15 raising an *Abney*-type claim – asserting a valid, constitutional ‘right not to be tried’ – would be  
16 irreparably harmed if the trial court continued to proceed to trial prior to the disposition of the  
17 appeal.” *U.S. v. Claiborne*, 727 F.2d 842, 850 (9th Cir. 1984). “Consequently, if a criminal  
18 defendant is to avoid exposure to double jeopardy and thereby enjoy the full protection of the  
19 Clause, his double jeopardy challenge to the indictment must be reviewable *before* that  
20 subsequent exposure occurs.” *Abney*, 431 U.S. at 662 (emphasis added). Here the harm is both  
21 immediate (if a preliminary injunction is not issued, the very harm Petitioner is seeking to avoid  
22 will occur) and great (as evidenced by its embodiment in the Fifth Amendment, the Uniform  
23 Code of Military Justice Article 44 and 10 U.S.C. § 844(a)). Therefore, Petitioner has shown  
24 greater harm “than that attendant to resolution of his case in the military court system” and  
25 *Councilmen* should not bar this Court from issuing a preliminary injunction over Petitioner’s  
26 second court martial proceeding if Petitioner can meet the standards for such relief. 420 U.S. at  
27 758.

#### IV. PROPER SCOPE OF REVIEW

1  
2 While 28 U.S.C. § 2241 does not distinguish between persons confined by military and  
3 civil courts, the military context is markedly different. *Burns v. Wilson*, 346 U.S. 137, 139  
4 (1953); *Philips v. Perry*, 106 F.3d 1420, 1431 (9th Cir. 1997) (“Before a military tribunal, a  
5 defendant’s constitutional rights are not the same as before a civilian court. . . . Habeas corpus  
6 does not exist in its full robustness.”). The proper scope of review in military habeas petitions is  
7 somewhat unclear.

8 In *Burns*, the Supreme Court provided for only a limited scope of review. Under the rule  
9 of *Burns*, civil courts should not “re-examine and reweigh each item of evidence of the  
10 occurrence of events which tend to prove or disprove one of the allegations in the applications  
11 for habeas corpus.” *Burns*, 346 U.S. at 144. Rather, the Supreme Court held, the role of the civil  
12 court is to determine whether the “military review was legally inadequate to resolve the [habeas]  
13 claims.” *Id.* at 146. In other words, when reviewing a habeas corpus petition from a person in  
14 custody by order of a military court, *Burns* limits the role of Article III courts to “determin[ing]  
15 whether the military have given fair consideration to” each of the petitioner’s allegations. *Id.* at  
16 144.

17 Generally speaking, “[t]he federal courts’ interpretation . . . of the language in *Burns* has  
18 been anything but clear.” *Dodson v. Zelez*, 917 F.2d 1250, 1252 (10th Cir. 1990). For example,  
19 in *Sunday v. Madigan*, 301 F.2d 871, 873 (9th Cir. 1962), the Ninth Circuit applied the rule in  
20 *Burns*. See also *Daigle v. Warner*, 490 F.2d 358, 366 (9th Cir. 1973) (noting that proceedings on  
21 remand would be “subject to limited judicial review in habeas proceedings under the ‘fully and  
22 fairly’ test”). The Ninth Circuit has also shown reluctance to fully embrace the rule of *Burns*.  
23 The Ninth Circuit in *Broussard v. Patton*, 466 F.2d 816, 820 (9th Cir. 1972), deferred to the  
24 judgment of the military court in light of the Court of Military Appeals having fully and fairly  
25 considered the issue, but also noted that the issue was “uniquely military,” and the factual  
26 distinction was narrow. In *Hatheway*, the Ninth Circuit applied the *Burns* rule to errors  
27 concerning only discovery but held that “[t]he *Burns* plurality does not preclude civil court  
28

1 consideration of the constitutional [equal protection, due process, and First Amendment] defects  
2 alleged here.” *Hatheway v. Secretary of Army*, 641 F.2d 1376, 1380-81 (9th Cir. 1981),  
3 *abrogated on other grounds by High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895  
4 F.2d 563 (9th Cir. 1990).

5 The Fifth Circuit, noting that the federal courts have differed in their application of  
6 *Burns*, has summarized the scope of review as follows:

7 Military court-martial convictions are subject to collateral review by  
8 federal civil courts on petitions for writs of habeas corpus where it is asserted that  
9 the court-martial acted without jurisdiction, or that substantial constitutional  
10 rights have been violated, or that exceptional circumstances have been presented  
11 which are so fundamentally defective as to result in a miscarriage of justice. Consideration by the military of such issues will not preclude judicial review for  
12 the military must accord to its personnel the protections of basic constitutional  
13 rights essential to a fair trial and the guarantee of due process of law. The scope  
14 of review for violations of constitutional rights, however, is more narrow than in  
15 civil cases. Thus federal courts should differentiate between questions of fact and  
16 law and review only questions of law which present substantial constitutional  
17 issues. Accordingly, they may not retry the facts or reevaluate the evidence, their  
18 function in this regard being limited to determining whether the military has fully  
19 and fairly considered contested factual issues. Moreover, military law is a  
20 jurisprudence which exists separate and apart from the law governing civilian  
21 society so that what is permissible within the military may be constitutionally  
22 impermissible outside it. Therefore, when the military courts have determined that  
23 factors peculiar to the military require a different application of constitutional  
24 standards, federal courts are reluctant to set aside such decisions.

17 *Calley v. Callaway*, 519 F.2d 184, 203 (5th Cir. 1975). There are four inquiries under the Fifth  
18 Circuit’s approach: (1) the alleged error in the court martial be “one of constitutional  
19 significance or so fundamental as to have resulted in a miscarriage of justice”; (2) the alleged  
20 error must be a question of law and “not intertwined with disputed facts previously determined  
21 by the military”; (3) “whether factors peculiar to the military or important military  
22 considerations require a different constitutional standard”; and (4) whether the military courts  
23 adequately considered the issues raised in the habeas corpus proceeding and applied the proper  
24 legal standard. *Calley*, 519 F.2d at 201-03. The Tenth Circuit has also utilized this approach. *See*  
25 *Dodson*, 917 F.2d at 1252. The Fifth Circuit’s approach provides a useful framework for  
26 determining the proper scope of review of Petitioner’s habeas petition.

1 First, the alleged error, being put to trial twice for the same offense, does present a  
2 substantial constitutional question. The prohibition against double jeopardy is embodied in the  
3 Fifth Amendment to the United States Constitution and in the Uniform Code of Military Justice.  
4 U.S. Const. amend. V (“nor shall any person be subject for the same offence to be twice put in  
5 jeopardy of life or limb”); 10 U.S.C. § 844(a) (“No person may, without his consent, be tried a  
6 second time for the same offense.”).

7 Second, Petitioner alleges an error of law that is independent from facts found by the  
8 military trial court. The parties do not allege any factual disputes, and whether a defendant’s  
9 double jeopardy rights have been violated is a question of law. *U.S. v. McClain*, 133 F.3d 1191,  
10 1193 (9th Cir. 1998). The legal nature of Petitioner’s claims weighs in favor of this Court’s  
11 review.

12 Third, Petitioner’s habeas petition does not raise matters peculiar to the military, and  
13 Respondents do not contend that the military context requires a different standard for analyzing  
14 double jeopardy claims. Respondents raise concerns inherent to an Article III court’s review or  
15 critique of military court actions but do not contend or demonstrate that matters raised in the  
16 instant petition are better left to the knowledge and experience of the military court system.

17 Finally, the question of whether the military court system adequately considered  
18 Petitioner’s double jeopardy argument and applied the proper legal standard is not entirely clear.  
19 The orders of the United States Army Court of Criminal Appeals and the United States Court of  
20 Appeals for the Armed Forces are brief and not accompanied by opinions. While this Court will  
21 not presume that consideration of Petitioner’s claims was anything less than adequate merely  
22 because those courts did not provide detailed analyses, this Court cannot conclude that  
23 Petitioner’s claims have received full and fair consideration. *See* Dkt. 7 at 3-6; *see also*  
24 *Hatheway*, 641 F.2d at 1380 n.4. In addition, it is unclear whether the military courts applied the  
25 proper standard of review. While the United States Court of Appeals for the Armed Forces  
26 employed the abuse of discretion standard, the order of the United States Army Court of  
27 Criminal Appeals does not disclose the standard applied. Dkt. 7 at 3, 6.

1 Having determined that the petition raises a substantial constitutional question, that the  
2 alleged error is independent from the military trial court's determination of the facts, that the  
3 petition does not raise matters unique to the military, and that it is unclear whether the military  
4 courts gave Petitioner's double jeopardy claim full and fair consideration under the proper legal  
5 standard, the Court concludes that review of the military trial court's denial of the motion to  
6 dismiss the court martial is subject to collateral attack under 28 U.S.C. § 2241.

#### 7 **V. PROPER STANDARD OF REVIEW**

8 When evaluating Petitioner's request for injunctive relief, the Court is mindful of not  
9 only the relevant scope of review, addressed *supra*, but also of the proper standard of review.  
10 The parties disagree as to the standard of review applicable to habeas corpus petitions under 28  
11 U.S.C. § 2241. Respondent contends that this Court should review the military court's  
12 declaration of a mistrial for abuse of discretion, citing cases that involved direct appeals rather  
13 than collateral attacks. *See* Dkt. 11 at 18 ("The appropriate standard of review of a decision to  
14 declare a mistrial is an abuse of discretion."); *U.S. v. Vincent*, 758 F.2d 379 (9th Cir. 1985); *U.S.*  
15 *v. Dancy*, 38 M.J. 1 (C.M.A. 1993). Petitioner contends that this Court should employ de novo  
16 review. *See* Dkt. 15 at 10 ("It is well-established that where, as here, a mistrial is declared over  
17 the defendant's objection, federal courts 'review a district court's denial of a motion to dismiss  
18 on double jeopardy grounds de novo.'"); *U.S. v. Sammaripa*, 55 F.3d 433 (9th Cir. 1995) (direct  
19 appeal); *U.S. v. McKoy*, 78 F.3d 446 (9th Cir. 1996) (same); *Weston v. Kernan*, 50 F.3d 633 (9th  
20 Cir. 1995) (petition under 28 U.S.C. § 2254); *Stow*, 389 F.3d 880 (petition under 28 U.S.C. §  
21 2241). Because AEDPA does not apply to petitions under 28 U.S.C. § 2241, pre-AEDPA  
22 standards govern this Court's review: determinations of law are reviewed de novo and findings  
23 of fact are presumed to be correct. *Hoyle v. Ada County*, 501 F.3d 1053, 1059 (9th Cir. 2007).  
24 Even under the more deferential standard urged by Respondent, however, the Court concludes  
25 that the requirements for injunctive relief are satisfied, as explained below.

1                   **VI. THIS COURT SHOULD ISSUE A PRELIMINARY INJUNCTION OVER**  
2                   **PETITIONER’S PENDING COURT MARTIAL**

3                   Petitioner’s request is presented to the Court as a motion to stay. Dkt. 2. Respondents  
4                   urge the Court to construe the request as a motion for injunctive relief. Dkt. 11 at 14. Petitioner  
5                   does not object to this construction of his request, and the Court deems principles governing  
6                   injunctive relief appropriate to analyze Petitioner’s request. *See* Dkt. 15.

7                   The basic function of injunctive relief is to preserve the status quo pending a  
8                   determination of the action on the merits. *Los Angeles Memorial Coliseum Com'n v. Nat'l*  
9                   *Football League*, 634 F.2d 1197, 1200 (9th Cir. 1980). Under the traditional standard, in order  
10                  for Petitioner to obtain injunctive relief, the Court must find that: “(1) the moving party will  
11                  suffer irreparable injury if the relief is denied, (2) the moving party will probably prevail on the  
12                  merits, (3) the balance of potential harm favors the moving party, and (4) the public interest  
13                  favors granting relief.” *Cassim v. Bowen*, 824 F.2d 791, 795 (9th Cir. 1987). The Court finds  
14                  that a preliminary injunction should issue over Petitioner’s pending court martial for the  
15                  following reasons.

16                  **A.     Petitioner Will Suffer Irreparable Injury if Relief is Denied**

17                  The Uniform Code of Military Justice Article 44(a) and 10 U.S.C. § 844(a) apply the  
18                  protections of the Fifth Amendment of the United States Constitution to members of the military.  
19                  Under the Fifth Amendment a person cannot be tried twice for the same offense. U.S. Const.  
20                  amend. V. Once a jury, or a panel of members in a military court, is impaneled and sworn,  
21                  jeopardy attaches. *Crist v. Bretz*, 437 U.S. 28, 35 (1978); *U.S. v. Jaramillo*, 745 F.2d 1245, 1247  
22                  (9th Cir. 1984). One of the protections afforded an individual accused of a crime by the Fifth  
23                  Amendment is that once jeopardy attaches, the accused has a “valued right to have his trial  
24                  completed by a particular tribunal.” *Wade v. Hunter*, 336 U.S. 684, 689 (1949). A defendant has  
25                  a strong interest in “being able, once and for all, to conclude his confrontation with society  
26                  through the verdict of a tribunal he might believe to be favorably disposed to his fate.” *U.S. v.*  
27                  *Jorn*, 400 U.S. 470, 486 (1971).

1 Even if the first trial is not completed, a second prosecution may be grossly  
2 unfair. It increases the financial and emotional burden on the accused, prolongs  
3 the period in which he is stigmatized by an unresolved accusation of wrongdoing,  
4 and may even enhance the risk that an innocent defendant may be convicted. The  
5 danger of such unfairness to the defendant exists whenever a trial is aborted  
6 before it is completed. Consequently, as a general rule, the prosecutor is entitled  
7 to one, and only one, opportunity to require an accused to stand trial.

8 *Arizona v. Washington*, 434 U.S. 497, 503-505 (1978).

9 The Supreme Court has held that the protections afforded by the Double Jeopardy Clause  
10 “would be lost if the accused were forced to ‘run the gauntlet’ a second time before an appeal  
11 could be taken; even if the accused is acquitted, or if convicted, has his conviction ultimately  
12 reversed on double jeopardy grounds, he still has been forced to endure a trial that the Double  
13 Jeopardy Clause was designed to prohibit.” *Abney*, 431 U.S. at 662. The Ninth Circuit left no  
14 doubt as to the degree of harm that would be suffered if a defendant asserting a valid double  
15 jeopardy claim was subjected to a second trial before his claim was decided; the harm “would be  
16 irreparabl[e].” *U.S. v. Claiborne*, 727 F.2d 842, 850 (9th Cir. 1984). Therefore, if Petitioner is  
17 able to demonstrate a valid double jeopardy claim, allowing the second court martial to proceed  
18 before his habeas petition is decided would subject him to irreparable harm.

#### 19 **B. Petitioner is Likely to Succeed on the Merits**

20 The critical issue to be determined is whether Petitioner’s double jeopardy claim is likely  
21 to succeed on the merits.

22 The determination by the trial court to abort a criminal proceeding where  
23 jeopardy has attached is not one to be lightly undertaken, since the interest of the  
24 defendant in having his fate determined by the jury first impaneled is itself a  
25 weighty one . . . . Nor will the lack of demonstrable additional prejudice preclude  
26 the defendant’s invocation of the double jeopardy bar in the absence of some  
27 important countervailing interest of proper judicial administration.

28 *Arizona*, 434 U.S. at 505, quoting *Illinois v. Somerville*, 410 U.S. 458, 471 (1973). In order to  
avoid a double jeopardy bar where the defendant has objected to the declaration of a mistrial, the  
“prosecution must demonstrate ‘manifest necessity.’” *Arizona*, 434 U.S. at 505. Manifest  
necessity requires “a ‘high degree’ [of necessity] before concluding that a mistrial is  
appropriate.” *Id.* The prosecution’s burden “is a heavy one.” *Id.* “The power to grant a mistrial

1 should be used with great caution, under urgent circumstances, and for plain and obvious  
2 reasons.” *U.S. v. Brooks*, 42 M.J. 484, 485 (1995).

3 A mistrial without defense consent is therefore justified “only in very  
4 extraordinary and striking circumstances,” where it becomes impossible for the  
5 jury to reach an impartial verdict, or there is improper conduct of such a nature  
6 that a conviction would likely be reversed on appeal. Even where there are  
7 circumstances which raise serious doubt regarding the fairness of the proceedings,  
8 the trial judge must, before granting a mistrial, determine that an alternative  
9 measure, less drastic than mistrial, would not alleviate the problem so as to allow  
10 the trial to continue to an impartial verdict.”

11 *U.S. v. Ghent*, 21 M.J. 546, 550 (A.F.C.M.R. 1985) citations omitted.

12 [I]f a trial judge acts irrationally, irresponsibly, precipitately or otherwise abuses  
13 his discretion, his decision to grant a mistrial cannot be condoned. This is also  
14 the case where he has not engaged in sufficient inquiry to decide the issue.  
15 Without complete information, a judge cannot “assess all the factors which must  
16 be considered in making a necessarily discretionary determination regarding the  
17 jury’s ability to render an impartial verdict.

18 *Id.* at 551 (citations omitted). The judge is not required to make affirmative findings of fact to  
19 support his declaration of a mistrial. *Arizona*, 434 U.S. at 516-17.

20 However, the record must support (1) a reasonable conclusion that the events at  
21 trial were sufficiently serious to override the interests of the defendant in  
22 completing the trial, and (2) a determination that there were no “measures short of  
23 mistrial” that “might have sufficed to mitigate or cure any perceived undue trial  
24 prejudice.”

25 *Ghent*, 21 M.J. at 551 (citations omitted). For several reasons, explained more fully below, this  
26 Court concludes that it is likely that Petitioner will succeed on the merits of his double jeopardy  
27 claim because it is likely the military judge abused his discretion in rejecting the stipulation  
28 midway through the trial on the same information upon which he accepted it, that there was no  
manifest necessity for calling a mistrial, and that the record does not reflect that reasonable  
alternatives to calling a mistrial were explored or entertained.

### 23 **1. The Military Judge Abused his Discretion in Rejecting the Stipulation of Fact**

24 The rejection of the Stipulation of Fact occurred virtually simultaneously with the  
25 declaration of mistrial in this matter, with the former facilitating the latter, and the Court must  
26 therefore determine whether the military judge abused his discretion in rejecting the stipulation  
27 and declaring a mistrial over the defense’s objection. The military judge’s determination that the  
28

1 stipulation needed to be thrown out and a mistrial declared was based upon his belief that  
2 Petitioner's insistence that he had a defense to the charge of missing movement showed that  
3 Petitioner did not understand what he had stipulated to. Dkt. 12 at 55. This analysis seemed to  
4 center on the military judge's belief that the Stipulation of Fact was a "confessional stipulation"  
5 and that he believed Petitioner had pled to every element of the offense and could not have a  
6 defense. *Id.* at 56. Despite counsel for both the Government and Petitioner urging the military  
7 judge that there was no problem with the stipulation, the military judge persisted in his beliefs,  
8 rejected the stipulation, and immediately declared a mistrial. *Id.* at 60-64.

9 First, the military judge likely abused his discretion in rejecting the Stipulation of Fact,  
10 regardless of whether it was a confessional stipulation or not, because the record does not  
11 support that there was a misunderstanding on the part of Petitioner (or the Government for that  
12 matter). Pursuant to RCM 811, "the military judge should not accept a stipulation if there is any  
13 doubt of the accused's or any other party's understanding of the nature and effect of the  
14 stipulation." Here, the triggering event that created an inconsistency in the military judge's mind  
15 was the submission of a jury instruction presenting a legal theory of mistake of fact. *Id.* at 47. A  
16 jury or panel instruction is a statement of the law of the case. Instructions "state what the jury  
17 must believe from the evidence . . . in order to return a verdict in favor of the party who bears the  
18 burden of proof." *James v. Kentucky*, 466 U.S. 341 (1984); *see also* 23A C.J.S. Criminal Law §  
19 1760. It is difficult to understand how the submission of an instruction on the law could, before  
20 any evidence was submitted by Petitioner, create a conflict with a stipulation of fact. Petitioner's  
21 understanding and beliefs as to the relevant law governing his court martial were not the subject  
22 of the Stipulation of Fact. In fact, Petitioner had reserved his right to persist in his belief that  
23 previous motions (including those involving the illegal war defense) had been decided  
24 incorrectly by the explicit terms of the Stipulation of Fact. Dkt. 14 at 11.

25 Furthermore, the military judge rejected the stipulation based on the same information  
26 and understanding as he had determined he could accept it before jeopardy attached. Counsel for  
27 Petitioner explained Petitioner's belief that the charge of missing movement required a showing  
28

1 of specific intent before the stipulation was accepted. Dkt. 12 at 4-6. Petitioner explained his  
2 understanding as to the issue of intent to the military judge before the stipulation was accepted.

3 *Id.* at 17. Petitioner stated the following:

4           Sir, my intent, as I stated in public statements and as I stated to my chain  
5 of command numerous times, was that the order to deploy to Iraq to support  
6 combat operations in OIF was to me, as I believed in the facts and evidence that I  
7 saw, was an illegal order. And that the war itself was illegal, and any  
8 participation of mine would be contrary to my oath, and therefore I would have no  
9 other choice but to refuse. So my intent was to refuse the order sir.

10 *Id.* Furthermore, Petitioner's statements reported in the stipulation expounded on and reiterated  
11 exactly this view of his intent and his belief about his duty to deploy. Dkt. 14 at 11-22. During  
12 the second inquiry, Petitioner responded to the question of his intent as follows:

13           Your Honor, in that sentence, Paragraph 4, what I was saying is that I  
14 intentionally missed the movement because I believed my participation in the war  
15 in Iraq would contribute to war crimes, and it would be contributing to what I  
16 believed an illegal war.

17 Dkt. 12 at 50. Petitioner further stated:

18           Your Honor, I have always believed, especially at this point in time, that I  
19 had a legal and moral defense. I realize that the government has made arguments  
20 contrary to that, and you've also made rulings contrary to that. It still does not  
21 negate my belief that I still have a defense.

22 *Id.* at 51. The military judge believed, at the time that he accepted the stipulation, that Petitioner  
23 understood the nature and effect of the stipulation and that Petitioner was reserving his position  
24 on the legality of the order to make movement. *Id.* at 24. Based on this belief, the military judge  
25 accepted the stipulation into the record. *Id.* Then, upon Petitioner articulating the same  
26 understanding as when the stipulation was accepted, namely that he understood how the  
27 stipulation could be used based on the military judge's rulings, and espousing the same beliefs  
28 regarding his intent as when the stipulation was accepted, the military judge rejected the  
stipulation. For this reason, the record indicates that the military judge likely abused his  
discretion in rejecting the Stipulation of Fact midway through the court martial.

          Furthermore, if there was a misunderstanding on the part of Petitioner, it was apparent at  
the time the stipulation was accepted, before jeopardy had attached. In *U.S. v. Sammaripa*, 55  
F.3d 433 (9th Cir. 1995), the court found that there was no manifest necessity for declaring a

1 mistrial where the error, which was created by defendant's counsel, was apparent before  
2 jeopardy attached. In the instant matter, any misunderstanding or conflicting position Petitioner  
3 may have had with the Stipulation of Fact was apparent before jeopardy attached. Like in  
4 *Sammaripa*, the alleged misunderstanding therefore cannot create a manifest necessity to declare  
5 a mistrial.

6 Second, the military judge likely abused his discretion in rejecting the Stipulation of Fact  
7 because the record does not support the conclusion that the stipulation was a "confessional  
8 stipulation." "[W]here a stipulation constitutes an acknowledgment of guilt" the trial judge must  
9 "ascertain from the accused on the record that a factual basis exists for the stipulation." *U.S. v.*  
10 *Bertelson*, 3 M.J. 314, 317 (C.M.A. 1977). In *Bertelson*, the accused "had stipulated to the truth  
11 of every inculpatory fact charged against him." *Id.* at 315. The court noted that its analysis  
12 (requiring inquiry into the factual basis of the stipulation) would have been different had the  
13 accused presented a defense to the charges, but because he did not do so, "his stipulation  
14 admitted every essential fact and amounted to a confession of guilt." *Id.* In this case, the military  
15 judge believed that Petitioner had stipulated to every element of the offense of missing  
16 movement. However, even if, by stipulating to the facts which the panel could find sufficient to  
17 prove every element of the offense of missing a movement, that would not automatically be  
18 determinative of the issue of whether the stipulation was confessional or not. There is a  
19 difference between stipulating to every fact sufficient to prove every element of a charge and  
20 stipulating to every element. The latter is a de facto guilty plea. The military judge confused the  
21 parties agreement to enter into a stipulation of fact with essentially a stipulation of guilt.

22 Post-*Bertelson* military case law attempted to more clearly define when a stipulation to  
23 facts becomes a "confessional stipulation." The court in *U.S v. Hagy*, 12 M.J. 739, 746  
24 (A.F.C.M.R. 1981) stated:

25 [W]hen a factual stipulation expressly admits every element of an offense to  
26 which the accused has pled not guilty, it does not become a confessional  
27 stipulation until the accused, having failed to set forth any affirmative defense,  
28 finally rests his case. Certainly a factual stipulation that does not admit every  
element of an offense to which the accused has pled [not] guilty, unless and until

1 the fact finder draws an inference with respect to an essential element of that  
2 offense, does not become a confessional stipulation any sooner.

3 Here, the military judge rejected the stipulation on the basis that Petitioner was asserting that he  
4 had a defense to the charge, before Petitioner could present any evidence to his defense. The  
5 proposed panel instruction also presented a possible defense of mistake of fact as to the  
6 lawfulness of the order given to deploy. Under these circumstances, the Stipulation of Fact  
7 could not conclusively be determined to be a confessional stipulation under *Bertelson* at this  
8 stage of the proceedings, and since nothing presented by Petitioner conflicted with anything he  
9 had stipulated to in the Stipulation of Fact, the military judge likely abused his discretion in  
10 rejecting the stipulation.

11 Additionally, it is not apparent that Petitioner had stipulated to every element of the  
12 offense of missing a movement. It was clear from Petitioner's statements that he believed the  
13 offense to be a specific intent crime that required that he intend to disobey a lawful order when  
14 he did not board Flight Number BMYA91111173. Petitioner only stipulated that he  
15 intentionally did not board the aircraft, but throughout the proceeding maintained that he did not  
16 board because he believed that he had a moral and legal obligation not to deploy and therefore  
17 did not have the specific intent to disobey a lawful order. The military judge had ruled as a  
18 matter of law that this evidence was not relevant and that the facts stipulated to may have been  
19 enough for the panel to draw all the required inferences to find that the essential elements had  
20 been met, but the record does not reflect that this inference had been drawn, especially where  
21 Petitioner had not yet presented his case. The *Bertelson* rule was restated in *U.S. v. Kepple*, 27  
22 M.J. 773, 779 (A.F.C.M.R. 1988) as follows: "Unless the stipulation itself admits every element  
23 and no further evidence is required from the Government for a finding of guilty, the stipulation is  
24 not 'confessional.'" While the military judge, through his pretrial rulings, may have ruled that  
25 certain inferences as to elements of the relevant charges could be drawn as a matter of law from  
26 the facts stipulated to, the stipulation itself does not appear to admit to every element and was  
27 therefore not a "confessional stipulation." The military judge likely abused his discretion in  
28 rejecting the Stipulation of Fact midway through the proceedings.

1 Finally, even if the Stipulation of Fact were a “confessional stipulation,” Petitioner did  
2 not take a position inconsistent with the stipulation and entered into it for exactly the purpose  
3 and use for which “confessional stipulations” are allowed. The determination of whether a  
4 stipulation of fact amounts to a “confessional stipulation” only establishes whether the trial judge  
5 is required to conduct an inquiry into whether the defendant has “knowingly, intelligently and  
6 voluntarily consented to its admission” and “that a factual basis exists for the stipulation.”  
7 *Bertelson*, 3 M.J. at 315, 317. Once the trial judge has conducted this inquiry, a reviewing court  
8 cannot find error in the acceptance of the stipulation, whether it is determined to be confessional  
9 in nature or not. *Id.* For this reason military courts have determined that “prudence dictates  
10 conducting a *Bertelson* inquiry prior to accepting any factual stipulation into evidence which  
11 amounts to an admission of those inculpatory facts necessary for a conviction.” *Kepple*, 27 M.J.  
12 at 780; *see also Hagy*, 12 M.J. at 745 n.10. Had the stipulation later been determined on review  
13 to be a “confessional stipulation,” despite Petitioner’s insistence that it was not, the military  
14 judge had insulated the proceedings from reversible error by conducting the *Bertelson* inquiry  
15 and, as stated above, Petitioner did not present any facts that conflicted with or contradicted  
16 those contained in the Stipulation of Fact.

17 The military judge apparently viewed the Stipulation of Fact as a guilty plea rather than a  
18 confessional stipulation. A guilty plea is distinguished from a stipulation of facts as follows:

19 [A] guilty plea represents a conscious choice by the accused not to contest any  
20 issues relevant to his guilt. It clearly contemplates an immediate announcement  
21 of a guilty verdict without the introduction of any evidence. A factual stipulation,  
22 on the other hand, is actually an anticipation on the part of all parties that  
23 additional evidence contradicting guilt will be admitted into trial prior to findings.  
24 Factual stipulations ordinarily reflect such anticipations for two reasons. They  
25 either stem from the desire of both parties to separate agreed-upon facts from  
26 contested ones so as to insure evidence directly relevant to contested issues is  
27 clearly delineated for the fact finder, or they indicate the accused’s intent to plead  
28 guilty “but for” his desire to preserve contested interlocutory issues for review.

*Hagy*, 12 M.J. at 745. The record reflects that Petitioner entered into this Stipulation of Fact for  
exactly the purpose stated by the court in *Hagy*. Counsel for Petitioner clearly stated:

This is a stipulation; it’s not a guilty plea. It’s a stipulation of facts. That is to be  
judged differently. The impact or the effect of the stipulation, the parties can  
disagree about. And we apparently do disagree, but Lieutenant Watada’s

1 pleading not guilty. He's always made that clear. And yet, he is willing to plead  
2 to the facts which he understood could be sufficient on which to find him guilty,  
3 as you instructed. He knows that based upon the legal rulings and determinations  
the court makes. But he still maintains notwithstanding those rulings that he is  
entitled to plead not guilty for the reasons that he has stated to you.

4 \* \* \*

5 What he's said to you in his answers to your questions is that the act of not  
6 getting on the plane was not a mistake. He did that deliberately. But he did it for  
a specific reason out of a specific intent with which the government does not  
7 agree and which the government deems to be irrelevant, and which you have  
ruled is not relevant. That's all he's saying. And he's made that argument from  
8 the beginning, long before he actually failed to get on the plane. That's simply  
our position.

9 \* \* \*

10 [H]e's saying what he's saying, which is essentially that he's stipulating as far as  
11 he's able and willing to go with the understanding that the facts to which he's  
stipulating might be sufficient to dispose of that charge against him based upon  
the rulings of the court. And that's as far as we can go. And he understands that.

12 Dkt. 12 at 55-57. Petitioner was thus either preserving the issue of whether the offense was a  
13 specific intent crime for appeal, or was attempting to distill the issues down for the Government  
14 so that it only had to provide evidence that specific intent was met. Under either view, there was  
15 no inconsistency with the stipulation and Petitioner's belief that he had a defense. The military  
16 judge likely abused his discretion in rejecting the Stipulation of Fact after the Government had  
17 presented its case and before Petitioner was allowed to present his. Neither the Government, nor  
18 Petitioner, believed that there was any reason to reject the stipulation and both parties agreed that  
19 they had a meeting of the minds as to the contents of the stipulation and its use. Despite both  
20 parties insisting that there was not any issue present that would require the rejection of the  
21 stipulation (and the record before the Court does not support a contrary position), the military  
22 judge rejected the Stipulation of Fact and immediately declared a mistrial. Under these  
23 circumstances, the Court finds that Petitioner is likely to prevail on the merits of his double  
24 jeopardy claim on the basis that the record does not reflect the requisite high degree of necessity  
25 for declaration of a mistrial, and that the military judge likely abused his discretion in rejecting  
26 the Stipulation of Fact.

1           **2. Even if the Military Judge did not Abuse His Discretion in Rejecting the**  
2           **Stipulation, There is Still a Lack of Manifest Necessity**

3           For the reasons stated above, it is clear that the parties did not believe that there was an  
4 issue with the Stipulation of Fact and that they did have a meeting of the minds as to the  
5 stipulation's use and effect. Petitioner also believed that he understood the effect and the  
6 proposed use of the stipulation. "[T]he trial judge must, before granting a mistrial, determine that  
7 an alternative measure, less drastic than mistrial, would not alleviate the problem so as to allow  
8 the trial to continue to an impartial verdict." *Ghent*, 21 M.J. at 550. "Even if the trial judge  
9 believes in subjective good faith that a mistrial is called for, we must reverse if the record belies  
10 his concern." *U.S. v. Meza-Soria*, 935 F.2d 166, 171 (9th Cir. 1991). Here, where both parties  
11 wanted to continue with the Stipulation of Fact and the pretrial agreement still in place, and  
12 where Petitioner did not misunderstand the stipulation's use or effect, allowing the stipulation  
13 and continuing with the trial would have been a viable, less drastic alternative to the declaration  
14 of a mistrial. Even after the stipulation was rejected, the parties' position as to the stipulation  
15 provides evidence that if a continuance would have been granted, the parties may have been able  
16 to come to an understanding by which they could have revived the Stipulation of Fact and the  
17 pretrial agreement. Furthermore, the military judge may have been able to reconsider his ruling  
18 after further review of the case law discussing "confessional stipulations." This court finds that  
19 all of these alternatives would have been less drastic and more desirable than the declaration of a  
20 mistrial, and would have alleviated any problem, thereby allowing the trial to continue to an  
21 impartial verdict. The record does not reflect, and the Government likely cannot carry its burden  
22 of showing, that there was manifest necessity for declaring a mistrial because reasonable  
23 alternatives were available. Therefore, Petitioner is likely to prevail on the merits of his double  
24 jeopardy claim even under an abuse of discretion standard.

25           **3. The Military Judge Failed to Adequately Consider Possible Alternatives**

26           An explicit finding of manifest necessity is not required as long as the record is sufficient  
27 to justify the conclusion that manifest necessity was present. *Arizona v. Washington*, 434 U.S. at  
28 516-17. However, courts have found that the failure of the judge to even consider feasible

1 alternatives to mistrial may demonstrate a lack of manifest necessity. *Ghent*, 21 M.J. at 550; *U.S.*  
2 *v. Sanders*, 591 F.2d 1293, 1299 (9th Cir. 1979).

3 [W]hen the judge explains his or her reasons for declaring a mistrial, the record  
4 must support the explicit or implicit finding of “manifest necessity.” This is  
5 especially true when the judge makes a *Sua sponte* [sic] ruling over the  
6 defendant’s objection. When the record . . . reveals that the judge failed  
adequately to consider feasible alternatives to a mistrial, then the decision to  
declare a mistrial may be reversed by a reviewing court, despite the high degree  
of deference to be accorded the conclusions of the trial judge in such cases.

7 *Sanders*, 591 F.2d at 1299.

8 In the instant matter, the military judge made no inquiry whatsoever into any feasible  
9 alternatives to the declaration of a mistrial. Counsel for Petitioner warned the military judge that  
10 jeopardy had attached and that if a mistrial was being contemplated, an inquiry into alternatives  
11 was required. Dkt. 16-2 at 4. Despite this warning, the record does not reflect the military  
12 judge’s consideration of any alternatives to declaring a mistrial. Instead, the following exchange  
13 took place:

14 [MILITARY JUDGE]: Government, what’s your druthers? At this point, I  
15 certainly entertain a motion for mistrial and I’ll set a new trial date. At this point,  
16 I believe there is a breach of the pretrial agreement, which would allow the  
17 government to resurrect the additional charges that were dismissed because we  
18 have not reach[ed] the determination point, as required, for a dismissal with  
19 prejudice. I believe the government was, at 802, asking about the [intent] element  
20 that’s in there. But if you review the entirety of the stipulation of fact, that I think  
21 even a casual reading of the stipulation—every statement in there goes to the, “I do  
22 not intend to deploy.” I don’t know how we get around that. What we’re left  
23 with is I can instruct the members, if the government wishes to go forward. I  
24 know the government does not have all their witnesses that they would have  
25 called for the other offenses. So, government, what’s your choice?

26 [GOVERNMENT]: Your Honor, at this point, the government moves for  
27 mistrial.

28 [MILITARY JUDGE]: Defense, do you want to be heard?

[COUNSEL FOR PETITIONER]: Yes. We would oppose the motion.

[MILITARY JUDGE]: Counsel, I have the week of 19 March available.

[COUNSEL FOR PETITIONER]: Can we first determine, are you declaring a  
mistrial?

[MILITARY JUDGE]: I’m going to declare a mistrial.

Dkt. 12 at 62-63. This brief exchange hardly depicts a process of weighing feasible alternatives.

1           There may, in fact, have been other feasible alternatives available at the time mistrial was  
2 declared beyond those mentioned here. Because no alternatives were discussed or entertained, it  
3 is difficult to speculate as to what alternatives were available. However, given the record before  
4 it, this Court finds it likely that the military judge did not consider any feasible alternatives to the  
5 declaration of a mistrial. Petitioner is likely to succeed at demonstrating that the military judge  
6 acted “irrationally, irresponsibly, precipitately” and abused his “discretion, [therefore] his  
7 decision to grant a mistrial cannot be condoned.” *Ghent*, 21 M.J. at 550.

8 **C. Balance of Potential Harms Weighs in Favor of Petitioner**

9           Having determined that Petitioner is likely to succeed on the merits of his double  
10 jeopardy claim and that if the court martial were to proceed, Petitioner would be irreparably  
11 harmed, the Court must now weigh this potential harm against any potential harm that may be  
12 suffered by the military.

13           The military is “a specialized society separate from civilian society” with “laws  
14 and traditions of its own [developed] during its long history.” Moreover, “it is the  
15 primary business of armies and navies to fight or be ready to fight wars should the  
16 occasion arise.” To prepare for and perform its vital role, the military must insist  
17 upon a respect for duty and discipline without counterpart in civilian life. The  
18 laws and traditions governing that discipline have a long history; but they are  
19 founded on unique military exigencies as powerful now as in the past. Their  
20 contemporary vitality repeatedly has been recognized by Congress.

21           *Councilman*, 420 U.S. at 757 (citations omitted). Respondents argue that if the Court issues an  
22 injunction, it “would be a disruptive force as to affairs peculiarly within the jurisdiction of the  
23 military authorities.” *Orloff v. Willoughby*, 354 U.S. 83, 95-95 (1953). However, *Parisi*,  
24 *Councilmen*, and *Callaway* all show that where certain criteria are met, as is the case in the  
25 instant matter, the Court may issue an injunction. Also, this case concerns an alleged violation  
26 of the Fifth Amendment Double Jeopardy Clause, which cannot be said to fall within a set of  
27 affairs that are peculiar to the jurisdiction of the military authorities.

28           Furthermore, if an injunction is issued, it would in no way impinge on the military’s  
ability to fight and be ready to fight wars or discipline its soldiers. Such a ruling would be  
limited in scope to cases where a double jeopardy claim is likely to prevail on its merits and only

1 after all military court remedies had been exhausted. In this limited context, the precedential  
2 effect of an injunction would only serve to vindicate servicemen's Fifth Amendment rights while  
3 allowing the military to discipline its soldiers as it sees fit and military appellate courts to review  
4 all the claims arising within its jurisdiction. In this context, where Petitioner's potential harm is  
5 irreparable, the balance of potential harms weighs in favor of issuing a preliminary injunction  
6 over Petitioner's upcoming court martial.

7  
8 **D. Public Interest Favors Granting Relief**

9 There is a strong military and public interest in protecting individuals from being  
10 subjected to double jeopardy, as shown by the Framers' inclusion of this right in the Fifth  
11 Amendment and its inclusion in the Uniform Code of Military Justice Article 44(a) and 10  
12 U.S.C. § 844(a). Having found that this decision will in no way infringe on the military's ability  
13 to fight and be ready to fight wars or to discipline its soldiers, public interest in this matter  
14 strongly favors upholding Petitioner's constitutional rights.

15 Respondents do not contest that an Article III court would be able to take up this matter  
16 after the second court martial had concluded; they instead ask that this Court allow a possible  
17 Fifth Amendment violation to occur and then conduct habeas review after the injury has already  
18 been suffered, even where Petitioner has exhausted all of his military remedies on the issue. Dkt.  
19 11 at 8. The same Fifth Amendment protections are in place for military service members as are  
20 afforded to civilians. *Wade v. Hunter*, 336 U.S. 684, 690 (1949). There is a strong public interest  
21 in maintaining these rights inviolate for civilian and servicemen alike, including Petitioner. To  
22 hold otherwise would ignore the many sacrifices that American soldiers have made throughout  
23 history to protect these sacred rights. For this reason, the public interest favors granting a  
24 preliminary injunction over Petitioner's upcoming court martial.  
25  
26  
27  
28

**VII. CONCLUSION**

1  
2 This court has jurisdiction of this petition for habeas corpus under 28 U.S.C. § 2241.  
3 While the remedy sought by Petitioner is rare, it is available in limited circumstances, and those  
4 circumstances are present here. Petitioner has shown that he will suffer irreparable harm, that  
5 there is a likelihood to prevail on the merits, that the balancing of potential harms weighs in  
6 favor of Petitioner, and that the public interest favors granting Petitioner’s requested relief;  
7 therefore, a preliminary injunction should issue. No bond will be required. See *Gorbach v.*  
8 *Reno*, 219 F.3d 1087, 1092 (9th Cir. 2000).

9  
10 The Court has not received briefing from either Petitioner or Respondents, nor does the  
11 record clearly indicate how this decision affects the double jeopardy analysis with respect to the  
12 charges dismissed without prejudice pursuant to the pretrial agreement or whether those charges  
13 were effectively included in the first court martial by virtue of the military judge’s attempt to  
14 resurrect the charges. Therefore, the Court does not attempt to decide those issues here.

**VIII. ORDER**

15  
16 Therefore, it is hereby

17 **ORDERED** that Petitioner’s Emergency Motion for a Stay of Court Martial Proceedings  
18 (Dkt. 2) is **GRANTED**. A preliminary injunction is hereby **ORDERED** over the court martial  
19 proceeding referred by Respondent Jacoby and shall remain in effect until the conclusion of this  
20 habeas corpus proceeding or until further proceedings result in a modification or dissolution of  
21 the preliminary injunction.  
22

23 DATED this 8<sup>th</sup> day of November, 2007.

24  
25   
26 \_\_\_\_\_  
27 BENJAMIN H. SETTLE  
28 United States District Judge