

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
Savannah Division**

No. _____

KEVIN BENDERMAN
Plaintiff

MONICA BENDERMAN
Co-Plaintiff

v.

MR. PETE GEREN – Secretary of the Army
Defendant

ON A PRAYER FOR REDRESS
DUE TO AN UNCONSTITUTIONAL
COURT-MARTIAL OVERSEEN
BY THE OFFICES OF THE DEFENDANT

COMPLAINT & OPENING BRIEF BY THE PLAINTIFFS

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No. _____

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ON A PRAYER FOR REDRESS DUE TO AN UNCONSTITUTIONAL
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COMPLAINT & OPENING BRIEF BY THE PLAINTIFFS

PETITION FOR A “BILL OF RIGHTS” TRIAL BY JURY

The Framers of the Constitution considered the right to jury trial important. In the Sixth Amendment they provided for jury trials in criminal cases. In the Seventh, they provided for such trials in civil suits where the amount contested exceeds \$20. The amount contested, being actual damages over one year of wrongful incarceration, exceeds twenty dollars in today's terms and is a claim for Monetary Relief¹! Therefore a jury trial is demanded see FRCvP 38(b) and whereas it will be established the federal jury trial² should have initially overseen false criminal allegations against the Plaintiff by the Defendant, a jury panel of 12 is requested, so motioned!

The Plaintiff and Co-Plaintiff in support of our Complaint, state:

¹ *Teamsters v. Terry*, 494 U.S. 558 (1990) “The Court of Appeals affirmed, holding that the Seventh Amendment entitled respondents to a jury trial on their claim for monetary relief.”

² We, the Plaintiff and Co-Plaintiff, Kevin & Monica Benderman, pursuant to the Bill of Rights, demand that the Jury Trial be held at the Savannah Division of The United States District Court for the Southern District of Georgia.

DELINEATIONS OF PARTIES

1. Plaintiff, Kevin Benderman, was an enlisted member of the U.S. Army during the presented subject matter, currently he is residing in Hinesville, GA. He is a citizen of the USA.
2. Co-Plaintiff, Monica Benderman, is the wife of Kevin Benderman and she is residing with her husband in Hinesville, GA. She is a citizen of the USA.
3. Defendant, Mr. Pete Geren, Secretary of the Army, is the official of the U. S. government charged with the control and administration of all Army personnel and affairs wherever situated or assigned. He is sued in his official capacity.

JURISDICTIONAL STATEMENT

4. This honored Court has the jurisdiction to grant redress by law and justice under:
 - a. 28 U.S.C. § 2241 “[T]he writ of habeas corpus occupies a position unique in our jurisprudence, the consequence of its historical importance as the ultimate safeguard against unjustifiable deprivations of liberty.” *Schlesinger v. Councilman*, 420 U.S. 738, 752 (1975).
 - b. 28 U.S.C. § 1331 “The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”
 - c. 28 U.S.C. § 1332(a)(1) “The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000³, exclusive of interest and costs, and is between citizens of different States⁴.”
 - d. 28 U.S.C. § 1343(a)(4) Civil Rights- “The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person to recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights.”

OUR STORY BY THE PLAINTIFF & CO-PLAINTIFF

5. The Plaintiff, SGT Kevin Benderman, is a War Veteran, having served in theater during the invasion of Iraq from March 2003 until the end of August 2003, and having been awarded

³ The amount of controversy is presented infra at ¶38 and exceeds the sum or value of \$75,000.

⁴ The Defendant represents the U.S. Army and controls the administration of all Army personnel and affairs from his office located at the Pentagon in Arlington, Virginia while his mailing address is in Washington, D.C., thus his offices are incorporated outside the State of Georgia. Therefore by 28 U.S.C. § 1332(c)(1) the Defendant is deemed a citizen of a different State other than Georgia and thus this maintains the allegation of diversity jurisdiction.

two Army Commendation medals for his service there. SGT Benderman has served for ten years over two different enlistments, was a good soldier and never had any disciplinary actions. He received outstanding evaluations all the way up the ranks. No problems existed within his military career until we the Plaintiff and Co-Plaintiff encountered the command element of Delta Company 3rd Forward Support Battalion in the later part of 2004 just prior to the Plaintiff's pending 2nd deployment to Iraq in January of 2005.

6. My name is Monica Benderman and my husband, the Plaintiff, upon returning from Iraq, had difficulty discussing much about the horrors that he witnessed in Iraq. Some of his experiences, such as having to leave a little Iraqi girl to suffer with a badly burned arm, receiving orders from his company commander to shoot Iraqi children simply for climbing on a wall surrounding a camp being set up by the Plaintiff's company, and seeing open mass graves filled with dead bodies of old people, women and children while wild dogs were feeding upon them are just a portion of what caused him to ultimately seek Conscientious Objector status. Kevin Benderman returned from Iraq with a changed Conscience and after careful consideration of all legal options available to him, he made preparations to let his contract with Army expire, choosing not to re-enlist. He was scheduled to be released from active duty in October 2005 and did not ever want to witness war again. Then, in October 2004, he received a stop loss order that was to extend his active duty service through May of 2006. The Plaintiff at that point, attempted to file for conscientious objector status but his company commander would not recognize his responsibilities under AR 600-43 covering that. After many attempts at discussing his feelings with his battalion chaplain, he turned in the DA Form 4187 requesting separation from the U.S. Army on December 30, 2004 prior to the upcoming deployment to Iraq. When the application finally reached MAJ Brzezinski, the division chaplain, an interview was held on January 11, 2005

after which MAJ Brzezinski expressed, in writing, his beliefs that SGT Benderman was sincere in his desire to file the conscientious objector request!

7. Kevin and I, the Plaintiff and Co-Plaintiff respect the freedoms our Constitution affords all American citizens through the principles which are the foundations for the laws it represents. It was this Constitution which SGT Benderman took an oath to defend as a volunteer in the U.S. Army, even by putting his life on the line. It entrusts the First Amendment right to all Americans to speak out as one deems necessary. The U.S. Constitution gives all Americans the duty to resist when a branch of government exceeds its delegated constitutional powers⁵, even here by resisting members of the U.S. military command who have wrongly convicted the Plaintiff for his conscientious beliefs! U.S. Const. amend I allows the Plaintiff and Co-Plaintiff to write articles concerning these beliefs. If a soldier is not allowed to exercise his constitutional right to freedom of speech with American citizens, while off duty, that soldier becomes isolated from the citizens of his country and those citizens are unable to hear the truths about what our soldiers are facing while protecting the Constitution “from all enemies foreign and domestic.”

8. Kevin and I, the Plaintiff and Co-Plaintiff, have exercised our constitutional rights as American citizens, by publishing our Articles on the Internet beginning in 2004 from our home in Hinesville, Georgia just outside of Fort Stewart. These articles contain information about areas in which the company my husband was attached to was sorely lacking in leadership, and includes statements about his right to apply for conscientious objector status. The personal expressions of the Plaintiff were, and have always been out of uniform & within Army Regulations, AR 600-20.

⁵ “The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power... must be resisted. Although not ‘hermetically’ sealed from one another, the powers delegated to the three Branches are functionally identifiable.” *INS v. Chadha*, 462 U.S. 919, 951(1983). See *id.*, 944-51; *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64-66 (1982) (plurality opinion); *Bowsher v. Synar*, 478 U.S. 714, 721-727 (1986).

9. The Plaintiff's submitted Conscientious Objector packet and the Plaintiff and Co-Plaintiff exercising their constitutionally mandated First Amendment Rights as citizens are alleged to have raised unjust prejudices from the Plaintiff's Command who determined that any discussions by the Plaintiff regarding his thoughts on war were offensive⁶. Regardless, suddenly before the Plaintiff's second deployment to Iraq, just one day before on January 6, 2005, SGT Benderman was severely counseled in the presence of most E6 and above soldiers in SGT Benderman's Company. In the presence of all of his comrades, CPT Gary Rowley formally notified the Plaintiff that CPT Rowley was going to prosecute him under UCMJ for alleged disloyal statements and alleged disrespect to a superior officer. CPT Rowley also informed the Plaintiff that he would no longer have security clearance which was vital to the Military Occupational Specialty he loved doing, and equally as vital to the Plaintiff as he has been and will always be a proud U.S. Army Soldier: VITAL, for SGT Benderman to have the complete trust from all of the soldiers he served with. However that trust was ripped away by CPT Gary Rowley, the company commander! The Plaintiff had no Lawyer present and limited legal knowledge, but felt at the time this was definitely a military arrest as CPT. Rowley issued Rights Waiver Verbatim, so what choice was there? SGT Benderman invoked his Article 31 Rights immediately!

10. From then on during this crucial time constraint for deployment, January 7-11, 2005, every time SGT Benderman had an encounter with any of his superior officers, the first thing he would hear is the Article 31 Rights being read to him, followed by a self-incriminating counseling statement prepared by the command, for which the command required the Plaintiff's signature. Certainly none of it was a lawful order to deploy and furthermore was definitely not a

⁶ In the USSC case of *Texas v. Johnson*, 491 U.S. 397 (1989), the Court mentioned the importance of protecting free speech, especially speech that is unpopular or offensive to others. It said, "If there is a bedrock principle underlying the First Amendment, it is that government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."

lawful order to deploy with counsel present as required by all four Rights Waiver Verbatim read to the Plaintiff over the crucial time to deploy, January 7-11, 2005. The Plaintiff was placed in the rear detachment element of the First Brigade while awaiting the trial to begin. MAJ S. Scot Sikes was the military attorney finally assigned as SGT Benderman's defense counsel, but not until **DATE**.

11. Grounds are alleged for the Plaintiff and Co-Plaintiff to seek redress pursuant to the double jeopardy clause of the Constitution as the legality of re-issuing orders on the same alleged violations of the uniformed Code of Military Justice is indicated by two separate Article 32 proceedings that levied against the Plaintiff two separate trials.

12. SGT Benderman faced a second court-martial on July 28, 2005, and was sentenced for 15 months confinement, loss of all pay and allowances, is to receive a dishonorable discharge. SGT Benderman was incarcerated and deprived of his life, liberty and the pursuit of happiness for nearly 14 months from July 28, 2005 to August 18, 2006, for a fabricated crime of Missing Movement; a charge which had previously been terminated by the Plaintiff's first court-martial on May 11, 2005. Why shatter the U.S. Constitution by prosecuting a veteran of the 2003 Iraq War? CPT Gary Rowley, CPT John Gregg (media spokesperson for the Judge Advocate General) and CPT Jonathan DeJesus (lead prosecutor) released and endorsed the following statement, "a stiff sentence was called for, to send a message to other soldiers that they could not use conscientious objection to get out of going to war," as quoted from the prosecution's closing arguments, statements made by CPT Gregg during a press conference held after the Plaintiff's conviction, and comments made by CPT Rowley during interviews with the press immediately following the second court-martial of the Plaintiff.

TIMELINE FROM TWO ARTICLE 32(b) TRANSCRIPTS

1st ARTICLE 32(b) TRANSCRIPT

United States v. SGT Kevin M. Benderman, Rear Detachment, 2-7 Infantry
Held Fort Stewart Court Room, 09:30, 7 February 2005
LTC Linda Taylor, Investigating Officer (IO)

First Fort Stewart, GA Court Martial May 11, 2005

COL. Stephen Henley - Judge
COL. John Kidd - Convening Authority

2nd ARTICLE 32(b) TRANSCRIPT

United States v. SGT Kevin M. Benderman, Rear Detachment, 2-7 Infantry
Held Fort Stewart Court Room, 10:05, 12 May 2005
MAJ David M. Bedard, Investigating Officer (IO)

Second Fort Stewart, GA Court Martial July 28, 2005

LTC Donna Wright - Judge
COL. John Kidd - Convening Authority

13. **1st Art 32(b) CPT Gary D. Rowley, 2-7th IN Bn** I have been in command since 5 May 2004. I've known SGT Benderman since I took command. I hand picked SGT Benderman as my training NCO... I received SGT Bendormans conscientious objector packet around the 30 or 31 December 2004...Yes I met with the soldier (SGT Benderman) on the **6 January 2005** regarding articles (on the Internet) ... At that time I intended to prosecute the soldier, then realized it was not worth pursuing. I told the soldier to cease making public statements. I conducted my own independent investigation on (the Internet) articles. I never called CID...I recommended that SGT Benderman **security clearance** get pulled.

14. **2nd Art 32(b) CPT Gary D. Rowley, 2-7th IN Bn** I know the accused (SGT Benderman). He was my training NCO from May 2004 until we deployed on January 2005. He has been in my unit since 5 May 2004. He volunteered for the position as training NCO. His duties included maintaining the company calendar, managing the training files for all the soldiers, and many administrative duties...Training files include weapons qualification, **security clearance**, and training soldiers received...I talked to the accused on **6 January 2005**, the day prior to the unit's deployment to Iraq. I was informed on **5 January 2005** that he had written an Internet article and the Colonel was concerned about the content of the article. We counseled the accused (**6 Jan 2005 counseling session**) about his article. We discussed that the content of his

web article could be considered disrespect to a commissioned officer, and charges could be filed under the UCMJ...SGT Benderman had an appointment with the CSM Coston at 1700 (**7 Jan 2005**)...I don't know who requested the meeting with CSM Coston...The accused had a lot of responsibility and was involved in the majority of the pre-deployment...I didn't talk with any legal representative or other office about this situation...MAJ Dean Lynch, the legal advisor, recommended SGT Benderman be called and informed he needed to go to rear detachment commander and deploy on another flight...Yes, I testified in a previous Article 32(b) investigation via telephone from Iraq... Yes, I indicated to him (**on 6 Jan 2007 counseling meeting, E6 and above**) that he would no longer be authorized to have access into the company and battalion operations center. Yes, I recommended we put this information in his personnel records and **consider him as a security risk**. I told him that he would be facing charges under UCMJ for his disloyal statements. I was professionally disappointed. Yes, I conducted a counseling session (**6 Jan 2005**) with the accused in front of every E-6 and above in my company. It was an unorthodox manner to conduct a counseling session to an E-5...Maybe 15 people were present in the counseling session...I don't believe the ARMY requires a mechanic have a security clearance. Yes, he is a Bradley fighting vehicle mechanic. I don't believe by his MOS he will need a secret security clearance. **I maybe wrong**... I read him his rights (**on 6 Jan 2007 counseling meeting, E6 and above**) and he decided to request a lawyer and did not want to be questioned (**1st Invoked Rights Waiver Verbatim**).

15. **1st Art 32(b) 1LT Christopher Staab, 2-7th IN Bn** The (**6 Jan 05**) meeting was reference about the articles on the Internet and charges against SGT Benderman... The nature of the charges was disrespect to a superior officer...I found it odd for there to be a lot people at the counseling concerning SGT Benderman...CPT Rowley made it known that he was going to prosecute SGT Benderman for the charges. SGT Benderman was advised of his legal rights by CPT Rowley and invoked them (**1st Invoked Rights Waiver Verbatim**).

16. **1st Art 32(b) 2LT Jesse Wright, 2-7th IN Bn** I do recall the counseling meeting held on the **6 January 2005** for SGT Benderman. I know that the meeting was about charges against

SGT Benderman. I think the charges were disrespect to a superior officer and disloyal statements. NCOs and officers were present during the meeting, E6 and above. It was odd to me that there were a lot of people at SGT Bendermans counseling...CPT Rowley made it known that he was going to prosecute SGT Benderman for the charges. CPT Rowley did advise SGT Benderman of his rights. SGT Benderman did invoke his rights (**1st Invoked Rights Waiver Verbatim**).

17. **1st Art 32(b) 2LT Newton Gassant, 2-7th IN Bn** Yes I was at the (**6 Jan 05**) meeting for SGT Benderman. The meeting was about charges against SGT Benderman. I think the charges were disloyal statements and disrespect to a superior officer. CPT Rowley told SGT Benderman that he intended on prosecuting him. CPT Rowley did advise SGT Benderman about his rights. SGT Benderman invoked his rights (**1st Invoked Rights Waiver Verbatim**). NCOs and officers were at the meeting. I do not recall the number of people in the meeting. I found it odd at first because of the number of people at the meeting.

18. **1st Art 32(b) CSM Samuel D. Coston, 2-7th IN Bn** I didn't agree with the (Internet) articles or comments he (SGT Benderman) publicized. I read one article that had his name and his wife (Monica Benderman) name on the article, not there signatures, just their names. I couldn't believe some of the things he said about his new company...I did not know about any (**6 Jan 05**) counseling that CPT Rowley conducted pertaining to SGT Benderman...I haven't read any regulation or policy where you can counsel an individual soldier to the effect of having all E6 and above present...I met with SGT Benderman around 1600/1645 (**7 Jan 05**) time frame. His wife Monica Benderman was present and SGT (Benderman) introduced me to his spouse. Then from there SGT Benderman and myself went into my office to discuss the problem. I didn't bring a witness in. I read him rights straight from the rights card verbatim. SGT Benderman asked why I was reading him his rights. I told because if felt like he needed a lawyer then he could get one, or if he chose not say anything then he didn't have to say anything. SGT Benderman invoked his rights (**2nd Invoked Rights Waiver Verbatim**).

19. **2nd Art 32(b) CSM Samuel D. Coston, 2-7th IN Bn** I met the accused and his wife at 1700 (7 Jan 05) in my office...I read him his rights... I called MAJ Lynch to ensure I did the correct procedure with the statement. He said that we needed to have a commissioned officer call him with instructions to deploy. I don't know anything about UCMJ.

Response by Plaintiff & Co-Plaintiff SGT Benderman's wife, Monica Benderman, was not in CSM's office; I was outside waiting as clearly stated in the 1st Art. 32(b) by CSM Coston. CSM Coston immediately read Rights Waiver Verbatim and tried to make the Plaintiff sign a self incriminating paper by pretending to be a good old pal. The Plaintiff, SGT Benderman, confirmed three times with CSM that he was released for the weekend and that is the sworn truth! UCMJ art. 51 reasonable doubts turns this sworn truth into the legal truth, as there were no witnesses.

20. **2nd Art 32(b) SSG Arnold Lewis, 2-7th IN Bn (On 7 January 2005)** SGT Benderman spoke with the CSM (CSM Coston) in the back and then the CSM came out and said that he would be back, and that SGT Benderman was to wait right there until he came back. When the CSM came back he then finished talking with SGT Benderman. SGT Watkins then told SGT Benderman to report back to his unit. I asked SGT Watkins what unit, since the unit is gone, did CSM want him to report to the Rear D and SGT Watkins said I guess...I interpreted that CSM Coston told SGT Benderman to go back to his unit, but since his unit was gone, he was to report to the Rear Detachment the following duty day (**of Monday 10 Jan 2005**). This was around 1800 (**7 Jan 2005, Friday**) during the duty day when CSM Coston told SGT Benderman to go to his unit.

21. **2nd Art 32(b) LTC Woods, 2-7th IN Bn** My duty position is the Battalion Commander, 2-7th IN, 3d Infantry Division. CSM Coston is my CSM. I had a conversation with CSM Coston to make sure SGT Benderman got on the plane and **to get with the legal folks** and CPT Rowley and make sure he got on the plane. This was before his meeting with CSM.

Congresswoman McKinney⁷ sent me a fax asking me to look into facts surrounding SGT Benderman's CO packet. I read the fax then called Brigade Commander and told him that I did not think this would lead to a Congressional Inquiry. I would consider everything before making a determination...I left at 1500 (**7 Jan 2005**) ...The meeting between CSM Coston and SGT Benderman was at my behest... I arrived in theater on approximately the evening of **8th January 2005**. We did not have land line comm's established for **5 to 6 days at Brigade headquarters** because we were the first unit to deploy from the Brigade. We **never had a phone** the entire time we were in Kuwait... I spoke to CPT Tavares, the Rear Detachment Commander, about getting SGT Benderman on a plane and other general information... I told the unit it was my intention that he go forward with his paperwork to process his Conscientious Objector packet.

Response by Plaintiff & Co-Plaintiff The ignored congressional FAX is footnoted⁸. No mentioning of giving CPT Gary D. Rowley the authority to do his 6 January 2005 counseling session, stating serious charges while all E6 and above from his Company witnessed SGT Benderman getting his Rights read to him forcing him to Invoke His Rights to those serious charges. SGT Benderman invoking his rights was a **judicial CRY to have**

⁷ "In republican government the legislative authority, necessarily, predominates." The Federalist No. 51 (J. Cooke ed. 1961), 350 (Madison). See also id., No. 48, 332-334. This theme continues to influence the Court's evaluation of congressional initiatives. E.g., *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 S.Ct. 252, 273-274, 277 (1991).

⁸ Congress of the United States, House of Representatives, Washington, DC 20515-1004, From: Cynthia McKinney, 4th District, Georgia, **JAN 07, 2005**, To: Colonel Woods, Command Sergeant Major Coston, 2-7 Infantry, 3rd Infantry Division, Dear Colonel Woods: (¶1) I write to express my concern for the case of Sergeant Kevin M. Benderman. It is my understanding that although he currently has an application for Conscientious Objector status pending, he still faces imminent deployment back to Iraq. (¶2) I am sure you understand, as an applicant for CO status, he can not be required to carry or use a weapon. Should your unit deploy him to Iraq, you put at risk others in your unit who could have someone in his slot who will carry and use a weapon and contribute to the mission of the 2-7 Infantry. (¶3) I write to encourage that Sergeant Benderman be put to the rear of the unit; or as an alternative that he be declared undeployable. (¶4) Given that your upcoming deployment in Iraq is meant to support the establishment of a Constitutional Democracy there, I would hope that Sergeant Benderman's Right to Conscience, protected by the First Amendment to our own Constitution, will receive the respect it deserves, and that his application for Conscientious Objector status will receive due consideration. (¶5) Please consider the request within all applicable laws, regulations and rules. Sincerely, s/Cynthia McKinney, Member of Congress.

immediate appointed Counsel under the forced extraordinary time constraints as to advise SGT Benderman on what to do! How could SGT Benderman determine if deployment was in his best Legal Interest without a lawful order to deploy going through his Legal Counsel, Legal Counsel the U.S. chose not to supply?

22. **1st Art 32(b) CPT Gary D. Rowley, 2-7th IN Bn** I was not present when SGT Benderman met with CSM Coston (**on 7 Jan 2005**). I did not know the purpose of the conversation.... I called MAJ Lynch, the brigade's SJA (**1730/1830 Jan 7, 2005**) he told me to give the soldier **a lawful order to deploy**. I know the rear detachment would have given SGT Benderman a (**lawful**) order to deploy. I didn't have a direct conversation with CPT Taveres. I left him a memorandum...I left directions to the rear detachment to get SGT Benderman manifested on the next plane upon his returned.

Response by Plaintiff & Co-Plaintiff Requiring rear detachment to issue the lawful order through SGT Benderman's appointed counsel that was never accomplished.

23. **2nd Art 32(b) CPT Gary D. Rowley, 2-7th IN Bn** I told LTC Wood that I would recommend disapproval of the CO (Conscientious Objector) packet based on the conversation between SGT Benderman and myself. I told him that I would send SGT Benderman to see CSM Coston after the meeting. I believe SGT Benderman did go to see CSM Coston... If I would have had knowledge of the (Conscientious Objector) regulation we would have corrected the procedures. Recently, I became aware that **MAJ Brzezinski approved the CO packet**... I knew the accused would meet CSM Coston on **7 January 2005**. I didn't set up the appointment. I couldn't make the 1700 meeting with CSM Coston and SGT Benderman. The last time I saw the accused, it was approximately 1800 (**7 Jan 05**). I did not know the 1SG (1SG Donald McClinton) told the accused to report with no equipment. I did not see the accused with any equipment (**approximately 1800 7 Jan 05**)...

Response by Plaintiff & Co-Plaintiff We saw CPT Rowley about **1800 7 Jan 2005** clearly and he definitely saw us, SGT

Benderman & Monica Benderman, and he did not say a WORD,
MAJ Lynch's instructions were pending for a commissioned
officer to issue a lawful order for SGT Benderman to deploy!

2nd Art 32(b) CPT Gary D. Rowley continuing...MAJ Lynch indicated that if the accused missed the manifest on 7 January 2005, I should contact CPT Tavares, as the rear detachment commander, and when SGT Benderman did show back up to have him put on the next manifest flight out. Yes, a manifest can change before the actual flight...left a note for CPT Tavares to call MAJ Lynch for more guidance...Yes, only CSM Coston knows if the accused understood that he was still supposed to deploy when he left CSM Coston office (**7 Jan 2005**).

24. **1st Art 32(b) SSG Mauro Hernandez, 2-7th IN Bn** I called SGT Benderman on Sunday (**Jan 9, 2005**) I'm not sure what time it was. I left a message on his machine for him to show up on Monday. He showed up on Monday. I never had any problems with his work ethic or professionalism. I didn't believe that he went AWOL.

25. **1st Art 32(b) CPT Diogo Taveres, 2-7th IN Bn** SGT Benderman has been my soldier under the rear detachment since the **10 or 11 of January 2005**... I heard two different stories of SGT Benderman not showing up. One story was that SGT Benderman had not shown up and CSM had went to his house and the other story is that he had missed movement and had been arrested by the Military Police...SGT Benderman missing movement and being AWOL came secondary to me from prior command... I had then found out when I returned that either story had not been true and that SGT Benderman had shown up... we took him off of AWOL status... I received a call from MAJ Oescheger that I needed to read SGT Benderman his rights and ask him questions...I've known SGT Benderman since probably around August 2004. SGT Benderman had the duty position as the training NCO at the S1 shop...I had one exchange with CPT Rowley pertaining to some statements put on the Internet by SGT Benderman. I read the articles from the Internet, not all but some. I was given some printed out versions of the articles and read them...CPT Rowley didn't give me any marching orders pertaining to SGT Benderman (to deploy SGT Benderman to Iraq) before he left, I came to the conclusion myself while talking

to SGT Benderman and counsel... I signed the DA Form 4187. The effective date of reassignment would be **11 January 2005**...I read him his rights on the **11 January 2005**. MAJ Oescheger advised me that I needed to read him his rights...I spoke with MAJ Lynch on the **11 January 2005** who is the Brigades SJA. MAJ Lynch advised me that I needed to read him his rights. MAJ Oescheger may have just asked me what was going on, I can't recall...I issued a rights waiver to him and SGT Benderman did invoke his rights (**3rd Invoked Rights Waiver Verbatim**) ...CID was never involved to the best of my knowledge. MAJ Lynch was in the office and questioned SGT Benderman after he read him his rights verbatim from the rights waiver... MAJ Lynch met with SGT Benderman and myself in my office and read him his rights as well. He invoked his rights once again (**4th Invoked Rights Waiver Verbatim**).

26. **2nd Art 32(b) CPT Diogo Taveres, 2-7th IN Bn** On **7 January 2005** I found out he (SGT Benderman) will be assigned as part of my unit. I got a phone call receiving that information. I spoke to him the evening of the **10th of January 2005**... I told him to be at the Brigade parking lot at 0900 in BDU's, and he was there. He was reassigned through a DA Form 4187. The effective date was **11 January 2005**... I counseled him (**11 January 2005**) for being AWOL and missing movement. I read him his article 31 rights. A legal representative came and swore me. I then proceeded to read the accused his rights. He invoked his rights (**3rd Invoked Rights Waiver Verbatim**). He was in my office when MAJ Lynch came in and we read his rights again. This is on 11 January 2005... (1st Art. 32(b) SGT Benderman invoked his rights once again **4th Invoked Rights Waiver Verbatim**)... I do not know if he (SGT Benderman) was released or not (**by CSM Coston on 7 Jan 2005**), therefore he was AWOL and came back on the **10 January 2005** and asked to see the IG and was granted that opportunity. I then contacted SGT Benderman that evening and asked him if he was coming back in and he said yes. I told him to report at 0900, BDUs, in the Brigade parking lot. SGT Benderman showed up on **11 January 2005**. The radio interview was about whether or not SGT Benderman was going to deploy because he (SGT Benderman) wanted to do everything legally correct.

Response by Plaintiff & Co-Plaintiff The United States seeking evidence from “Weekend America” Radio Program post two Invoked Rights Waiver Verbatim is simply judicial nonsense as on that weekend SGT Benderman was awaiting to have legal counsel and a lawful order to deploy from a commissioned officer and advice from his legal counsel about those construed serious 6 Jan 2005 charges the U.S. had raised with all of SGT Benderman’s E-6 and above soldiers from his Company as witnesses!

27. **1st Art 32(b) MAJ Dean L. Lynch, HHC, 1st Bde** I advised SGT Benderman (**11 Jan 2007**) on his rights at CPT Tavares office. I cited AWOL, failure to report, desertion, and we covered disloyal statements to him. I gave his rights orally and then he invoked his rights (**4th Invoked Rights Waiver Verbatim**).

Response by Plaintiff & Co-Plaintiff MAJ Dean L. Lynch, Staff Judge Advocate, stating previously that SGT Benderman was to be afforded a Lawful Order by a commissioned officer to deploy to Iraq and flights were still available! And in presence of appointed Legal Counsel to the accused, SGT Kevin Benderman! The Staff Judge Advocate knew that was required pursuant to all of the Invoked Rights Waiver Verbatim under these extraordinary circumstances and had time to arrange that if he had chosen to be conscientious of his oath to our Constitution and its Laws. The SJA allowing the U.S. ARMY, under the color of military law, to violate SGT Kevin Benderman’s Bill of Rights as stated by the Fifth and Sixth Amendments of the U.S. Constitution is unacceptable and dishonors apparent fairness our constitutional Framers strongly embedded into American Jurisprudence!

CLAIMS AGAINST THE DEFENDANT

28. *The Defendant violated Double Jeopardy* when the May 11, 2005 court-martial allegations of Missing Movements were terminated and re-raised by a July 28, 2005 court-martial

that unconstitutionally convicted the Plaintiff requiring Kevin Benderman, the Plaintiff, to complete a 15-month sentence. “[T]he very nature of a double jeopardy claim is such that it is collateral to, and separable from the principal issue...whether or not the accused is guilty of the offense charged.” *Abney v. U.S.*, 431 U.S. 651, 659 (1977). The double jeopardy claim stems not just from double punishment but also from the harm of a second trial. *Abney*, 431 U.S. 660 at 661. And there was no excuse for the Defendant to violate Plaintiff’s double jeopardy protection as it was reiterated by Congress to the U.S. Army by 10 U.S.C. § 844. Plaintiff’s May 11, 2005 court-martial was terminated without a conviction after double jeopardy was attached; that jeopardy was violated when the Plaintiff was convicted on the same missing movements charge by the July 28, 2005 court-martial. Once a jury, or a panel of members in a military court, is impaneled and sworn, jeopardy attaches⁹, *Crist v. Bretz*, 437 U.S. 28, 35 (1978); *U.S. v. Jaramillio*, 745 F.2d 1245, 1247 (9th Cir. 1984). The second court-martial for the same offense has robbed the Plaintiff’s “valued right to have his trial completed by a particular tribunal.” *Wade v. Hunter*, 336 U.S. 684, 689, 690 (1949) and this same protection is for military members as it is for civilians. The Defendant has taken away the Plaintiff’s strong interest to have had his double jeopardy protection and been “able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate.” *U.S. v. Jorn*, 400 U.S. 470, 486 (1971). Plaintiff’s double jeopardy rights violation committed by the Defendant is independent from facts found by the military trial court(s) and is simply a question

⁹ Plaintiff has Record of the first Trial for this particular tribunal convened by the 21 January 2005 Court-Martial Convening Order 4 & General Court-Martial Order 25 stated that the U.S. has withdrawn the charges terminating the Case signed by A.J. BALBO; CPT, JA; Chief, Military Justice, 22 July 2005 by order from the convening authority and note these quotes from trial date of 11 May 2005: “Colonel Stephen R. Henley... has been properly certified and sworn and is detailed to this court-martial...The prosecution had no desire to voir dire...The defense counsel had no further voir dire”. More evidence was introduced by calling of the defense’s first witness in response to the accuser’s 7 FEB 05 UCMJ art. 32b evidence that was already part of the record, thus this particular tribunal completed the trial with jeopardy attached by UCMJ art. 44(c) as it relevantly states, “A proceeding which, after the introduction of evidence but before a finding, is terminated by the convening authority, is a trial in the sense of this article.”

of law arising under our Constitution, *U.S. v. McClain*, 133 F.3d 1191, 1193 (9th Cir. 1998). The Defendant defied *Arizona v. Washington*, 434 U.S. 497, 503, 504, 507 (1978) and “prolong(ed) the period in which [the Plaintiff was] stigmatized by an unresolved accusation of wrongdoing [that] enhance[d] the risk that an innocent defendant [was] convicted...the prohibition against double jeopardy in this country was plainly intended to condemn this “abhorrent” practice”. “The double jeopardy clause bars retrials...as to afford the prosecution a more favorable opportunity to convict the defendant.” *United States v. Dinitz*, 424 U.S. 600, 611 (1976). The Army conducted two trials against the Plaintiff and it is a longstanding principal that loss of rights must be knowingly, intelligently and voluntarily given up. *U.S. v. Bertelson*, 3 M.J. at 315, 317(C.M.A. 1977). See also footnote 20 infra.

29. *The Defendant prejudiced the Court-Martial(s) and violated UCMJ art. 32 (b) with the Govt’s April 25, 2005 Motion In Limine.* A Motion In Limine use is for protecting one that is accused against false evidence. It is not intended to be used as a way to allow U.S. Army prosecutors, the accusers, to claim the Iraq War is constitutional in a military court with no jurisdictional authority to address that and so its only use in this case was to prejudice the Military Judge against the Plaintiff simply for filing a request for conscientious objector status. This wrongly eliminated a soldier's right¹⁰ to “present anything he may desire in his own behalf either in defense or mitigation...” per UCMJ art. 32(b) that allows the following reasonable doubts to be presented by UCMJ art. 51(c)(2)¹¹ and UCMJ art. 51(c)(4)¹². In March of 2003 the

¹⁰ The legality of an order sending men to participate in an 'undeclared war' may be raised by someone, to whom such an order has been directed, see *Mottola v. Nixon*, 464 F.2d 178, 179 (9th Cir. 1972). *Holtzman v. Schlesinger*, 484 F.2d 1307, 1315 (2d Cir. 1973) (service members with "orders to fight," have STANDING to challenge legality of military activities).

¹¹ UCMJ art. 51(c)(2) “if there is a Reasonable Doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and he must be acquitted.”

¹² UCMJ art. 51(c)(4) “the burden of proof to establish the guilt of the accused beyond a Reasonable Doubt is upon the United States.”

upcoming War was alleged illegal by military soldiers & their Parents & Congressmen: John Conyers (Michigan), Dennis Kucinich (Ohio), Jesse Jackson (Illinois), Sheila Jackson Lee (Texas), Jim McDermott (Washington), José E. Serrano (New York); and **74 Concerned Law Professors** by their amici curiae Brief in Support, see *Doe v. Bush*, 323 F.3d 133 (1st Cir. 2003). The Article I Judge in *Doe v. Bush*, contrary to law, flaunted Article III judicial power the day after the president's March 17, 2003 DOW to Iraq¹³ when *Doe v. Bush* became a USSC ripened Case of such imperative public importance "drastically" affecting Ambassadors, other public Ministers and Consuls to the United Nations and according to 28 U.S.C. § 1291 & USSC Rule 11 the USSC was required to docket and intercede! *Doe v. Bush* invoked Exclusive USSC Original Jurisdiction by U.S. Const. art. III, §2, cl. 2 as confirmed by USSC Rule 17 and thus on March 17, 2003 the 108th Congress (535 elected popular sovereignty links with We the People) and the USSC had 48 hours to live up to their constitutional responsibilities regardless what conflict that adjudication would have arisen! Unfortunately the first and third branch failed to respond to the president's 48-hour DOW to Iraq. This bullying is unchecked, has filtered down into the lower ranks of government and has unconstitutionally bullied a CO Iraq War Veteran, the Plaintiff, invoking this Federal Case! The 2002 107th Congress did not delegate to the president the exclusive right of the Congress to Declare War and the 108th Congress abdication of responsibility to protect that right was not an approval of the president's March 17, 2003 DOW to Iraq. When blended political war powers fails to uphold the Constitution and the third branch does nothing, then the danger becomes unchecked! *Clinton v. City of New York*, 524 U.S. 417,

¹³ The Declaration of War to Iraq broke a promise made to America such a long time ago! Alexander Hamilton by The Federalist No. 69 wrote in New York on Friday, March 14, 1788, "The president is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the DECLARING of war and to the RAISING and REGULATING of fleets and armies, all which, by the Constitution under consideration, would appertain to the legislature."

452 (1998), (Kennedy, J., concurring) ("That a congressional cession of power is voluntary does not make it innocuous. The Constitution is a compact enduring for more than our time, and one Congress cannot yield up its own powers, much less those of other Congresses to follow. Abdication of responsibility is not part of the constitutional design."); cf. *New York v. United States*, 505 U.S. 144, 182 (1992) ("The Constitution's division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment."). In *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825) Justice Marshall noted, "It will not be contended that Congress can delegate... powers which are strictly and exclusively legislative." The principal function of the tripartite separation of powers is to protect individual liberty by providing a "safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U. S. 1, 122 (1976) (per curiam); *Mistretta v. United States*, 488 U. S., at 380-382 (1989). See The Federalist No. 51, p. 349 (J. Cooke ed. 1961) (J. Madison) (separation of powers confers on each branch the means "to resist encroachments of the others"); 1 K. Davis, *Administrative Law* § 1.09, p. 68 (1958) ("The danger is not blended power[;] [t]he danger is un-checked power"). *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U. S. 50 (1982) (Congress may not give away Article III "judicial" power to an Article I judge). According to the USSC in *Powell v. McCormack*, 395 U.S. 486 (1969):

"Our system of governments requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such adjudication may cause cannot justify the court's avoiding their constitutional responsibility."

30. *The Defendant convicted the Plaintiff without subject-matter jurisdiction.* Public Law No. 105-338; 2002 H. J. Res. 114¹⁴; Public Law No. 107-243; U.S. Const. art. II, §2; U.S. Const. art. I, §8, cl. 11; The Political Question¹⁵; and non justiciability the United States April 27, 2005 Motion In Limine rose also raises U.S. Const. art. VI, §2; 22 U.S.C. § 287 United Nations treaty; & Nuremburg Obligations and is not jurisdictional by UCMJ art. 18¹⁶ as they are raised constitutional issues arising under our Constitution. Laws a conscientious soldier is entrusted to enforce per his constitutional oath. These jurisdictional 28 U.S.C. § 1331 issues are reasonable doubts for honoring by law the Plaintiff's sought Conscientious Objector 1-A-O Status by his AR 600-43 Conscientious Objector filings of December 30, 2004 and May 05, 2005. It is a substantial right to present all these raised reasonable doubts and the government's sought exclusion is contrary to law; see Federal Rules of Evidence 103(a). The Plaintiff's military conviction was not jurisdictional see 28 U.S.C. § 1331.

31. *The Defendant failed to use his sua sponte authority to dismiss the July 28, 2005 Court-Martial for lack of subject-matter jurisdiction.*¹⁷ Thus, the Plaintiff was compelled to choose a

¹⁴ 2002 H. J. Res. 114 raised constitutional reasonable doubt, i.e. the 2002 H. J. Res. 114, Section 3(c)(1) violated the 1973 War Powers Act, Section 8(d)(1)&(2) implicating the 2002 Resolution was a specific authorization for the president to violate U.S. Const. art. I, § 8, cl. 11 & Declare War while dishonoring the United Nations Treaty. The 1973 War Powers Act, Section 8(d)(1)&(2) states, "Nothing in this joint resolution is intended to alter the constitutional authority of the Congress or of the President, or the provision of existing treaties; or shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances which authority he would not have had in the absence of this joint resolution." The 2002 H. J. Res. 114 violated the disclaimer of the 1973 War Powers Act!

¹⁵ In 1968 Judge Charles Wyzanski [*United States v. Sisson*, 294 F. Supp. 511 (D. Mass. 1968), appeal on other grounds dismissed, 396 U.S. 1035 (1970).] confronted a Vietnam war-power question as justiciable by disregarding the "political question doctrine". Judge Wyzanski recognized, as the Supreme Court has, that to pronounce a question "political" is itself a profound act of constitutional interpretation; justiciability and substance are "so close as often to overlap". See *Baker v. Carr*, 369 U.S. 186 (1962).

¹⁶ UCMJ art. 18 "general courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe"

¹⁷ Jurisdictional investigation was binding on all court officers pursuant to UCMJ art. 32(d) and is explicit by UCMJ art. 34(a)(3) upon the convening authority This blatant mistake on jurisdiction was common knowledge to the Judge Advocate General pursuant to UCMJ art. 6(b).

military judge rather than a military jury¹⁸ stealing the Plaintiff's right to apparent fairness as the U.S. Army's raised constitutional issues required a Sixth Amendment federal impartial jury to have prevented the U.S. Army's uncontrolled prejudices, see *Duncan v. Louisiana*, 391 U.S. 145 (1968)¹⁹.

32. *The Defendant stole under the color of military law the Plaintiff's essential Bill of Right liberties to convict the Plaintiff by a non-jurisdictional court-martial contrary to two centuries of U.S. Supreme Court Case Law:*

Duncan v. Kahanamoku, 327 U.S. 304, 335 (1946) (Murphy, J., concurring) (quoting *Ex parte Milligan*, 71 U.S. 2, 120-21 (1866)). As the Supreme Court noted in a different era, “‘war power’ cannot be invoked as a talismanic incantation . . . Even the war power does not remove constitutional limitations safeguarding essential liberties.” *United States v. Robel*, 398 U.S. 258, 264 (1967), emphasis added.

33. *The Defendant violated the Plaintiff's 14th Amendment Due Process Clause.* USSC Substantive Due Process requires uniformed procedural rights for the protection of civil rights, to include an American decorated veteran of the Iraq war, the Plaintiff. This double court-martial of the Plaintiff did not have any uniformity whatsoever required by UCMJ 36(b). It avoided raised constitutional dimensions within a military tribunal and is grounds for non uniformity pursuant to

¹⁸ How may a selected group of Military Officers with drilled in allegiances to the president be an impartial jury when the constitutional dimensional Reasonable Doubt defense of the accused is the president's unconstitutional abuse of his War Powers?

¹⁹ *Duncan v. Louisiana*, 391 U.S. 145 (1968) "The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The Framers of the constitutions strove to create an independent judiciary, but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." USSC Justice Byron White.

recent U.S. Supreme Court Law as confirmed by Justice John Paul Stevens' opinion for the Court in *Hamadan v. Rumsfeld*, 126 S.Ct. 2749 (June 29, 2006).

34. *SGT Benderman's Invoked Rights Waiver Verbatim were breached by the Defendant.* Rights Waiver Verbatim is pursuant to U.S. Const. amend V, right against self-incrimination and U.S. Const. amend VI, right to the assistance of an attorney. The Plaintiff had only 5 days, January 6-12, 2005 to make legal decisions that would have a major impact on the rest of his life and that of his wife, the Co-Plaintiff. In that period, four Rights Waiver Verbatim were issued and each time Rights Waiver Verbatim were invoked, thus this honored Court should ask where was the Plaintiff's legal counsel in this crucial period with very serious legal questions to answer? The answer is, one was not supplied, emphasis added! In *Escobedo v. Illinois*, 378 U.S. 438 (1964) the USSC ruled that when an accused person is denied the right to consult with his attorney, his or her Sixth Amendment right to counsel is violated. In *Miranda v. Arizona*, 384 U.S. 436 (1966) Miranda Rights invoked requires an Attorney to be present with the accused, no questioning allowed and no signing of any legal documents until an attorney is present, these rights the Plaintiff attempted to have but were never given, see *United States v. Avery*, No. 96-1157²⁰. Acquiescence of evidence were acquired against the Plaintiff while he was held under loose arrest without CID input or assistance during a 5-day state of legal confusion while not having an attorney. If any American citizen is read his rights and invokes his rights four times in a period of 5 days, that citizen and, in this case soldier, would have the right to question "I am under arrest, where is my lawyer?" SGT Benderman's Invoked Rights Waiver Verbatim as dictated by the Constitution were breached! This Constitutional violation strengthens the

²⁰ UNITED STATES, Appellee v. Joseph K. AVERY, Jr., Specialist U.S. Army, Appellant No. 96-1157/AR Crim. App. No. 9500062 United States Court of Appeals for the Armed Forces; Argued October 27, 1999; Decided April 14, 2000. "waiver of fundamental constitutional rights must be knowingly and intelligently rendered; courts indulge every reasonable presumption against such waiver and do not presume acquiescence in relinquishment of these rights; waiver of fundamental rights must be an affirmative action, not merely a failure to object."

jurisdiction of this Court by 28 U.S.C. § 1331, as this claim, all our claims arise under our Constitution. U.S. Const. art. III, §2, cl. 1, “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution,²¹ the Laws of the United States, and Treaties made, or which shall be made, under their Authority...”

JURISDICTION BY HABEAS CORPUS

35. “[T]he writ of habeas corpus occupies a position unique in our jurisprudence, the 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 here is a writ providing the remedy by our requested redress in compensation for severe restraints on liberty, and for this reason, a person requesting the writ is required to be (or to have been) 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). Plaintiff’s 386 days of custody is shown before this Court as restraints on liberty “not shared by the public generally.” *Jones*, 371 U.S. at 240 and petitioning by 28 U.S.C. § 2241 for review is appropriate, see *Aguayo v. Harvey*, 476 F.3d 971, 975-76 (D.C.Cir. 2007). *Alhassan v. Hagee*, 424 F.3d 518, 521-22 (7th Cir. 2005). The habeas petitions from the military’s wrongful restraint of liberty will not be entertained by the federal courts until all available remedies within the military court system have been exhausted. *Councilman*, 420 U.S. at 758; *Noyd v. Bond*, 395 U.S. 683, 693 (1969); *Gusik v. Schilder*, 340 U.S. 128 (1950). The slow process through the Army and Military Court of Appeals completed **day.mo.yr and day.mo.yr respectively was exhausted ## days after the 386 days of Plaintiff’s 28 JUL 05 to 18 AUG 06 prison sentence that has worn down the Plaintiff and Co-Plaintiff mentally & financially, but we so do believe that this judicial tragedy**

²¹ The right of the federal courts to handle cases arising under our Constitution is the basis of the Supreme Court’s right to declare laws of Congress unconstitutional.

must be exposed and redressed, that we have on our own initiative studied the law as to approach this honored Court for crying out our suffered miscarriage of justice. Our family was financially devastated when we suddenly lost our bread winner, the Plaintiff, and we painstakingly struggled just to make ends meet and had no means to judicially deal with what was thrust upon us. So the Plaintiff had to endure the sentence and I the Co-Plaintiff struggled to keep our home and possessions from perishing and after the completion of Plaintiff's sentence, we slowly composed ourselves to honor this Court with our Complaint. 28 U.S.C. § 2241 is the proper avenue for the Plaintiff who has completed his unconstitutional military sentence and no longer in custody pursuant to a judgment. See *Stow v. Murashige*, 389 F.3d 880, 885 (9th Cir. 2004). Considering the Plaintiff's exhaustion within the Military was recent, 28 U.S.C. § 2241, is reiterated as the proper judicial avenue combined with our other couched jurisdictional codes and authorities that provides to this honored Court the means of redressing our claims for providing the remedy as intended by 28 U.S.C. § 2241. The remedy sought by the Plaintiffs, while rare, is appropriate as it militates against abstention of judicial procedures for guaranteeing substantial fundamental constitutional rights and thus that abstention is subject to this Court's collateral attack under 28 U.S.C. § 2241 and because AEDPA does not apply to petitions under 28 U.S.C. § 2241, pre-AEDPA standard govern this Court's review and determinations of law are reviewed de novo and findings of fact are presumed to be correct. *Hoyle v. Ada County*, 501 F.3d 1053, 1059 (9th Cir. 2007). *Burns v. Wilson*, 346 U.S. 137, 144 (1953) has provided a limited scope of review that is clarified in *Calley v. Callaway*, 519 F.2d 184, 203 (5th Cir. 1975) that, "Military court-martial convictions are subject to collateral review by federal civil courts on petitions for writs of habeas corpus where it is asserted that the court-martial(s) acted without jurisdiction, or that substantial constitutional rights have been violated, or that exceptional circumstances have been presented

which are so fundamentally defective as to result in a miscarriage of justice...the military must accord to its personnel the protections of basic constitutional rights essential to a fair trial and the guarantee of due process of law.” All of the *Calley* criteria are met within our Complaint for conducting habeas review. In *Parisi v. Davidson*, 405 U.S. 34, 46 (1972) Justice Douglas noted, “I agree with the Court’s view that habeas corpus is an overriding remedy to test the jurisdiction of the military to try or to detain a person.” As the Supreme Court stated over thirty years ago; the federal courts may grant the writ “within their respective jurisdictions.” 28 U.S.C. § 2241(a). While the Act speaks in terms of “a prisoner” (28 U.S.C. § 2241(c)), the term has been liberally construed to include members of the armed forces who have been unlawfully detained, restrained, or confined. *Schlanger v. Seamans*, 401 U.S. 487, 489 (1971).

WHY THIS COURT SHOULD AUDIT PLAINTIFF’S COURT MARTIAL(S)

36. The Defendant disregarded as "impractical"; constitutional, customary, and congressionally dictated procedural norms and deviated from the principals of law and rules of evidence recognized in the federal district courts, UCMJ art. 36(a). Uniformity?²² U.S. Const. art. I, §8, cl. 9 allows Congress to create the military courts, but the manner of how Judges are appointed required by U.S. Const. art. III, §1 and U.S. Const. art. II, §2, cl. 2 is not followed. Court-Martial judges are government officials, obey orders from their convening authority,²³ are not appointed for life and not congressionally vested. Our Framers wanted that mechanism to

²² Twenty-Two Soldiers were missing from Plaintiff’s unit upto 6 months at time of deployment. Was there uniformity, like the Plaintiff, did these soldiers receive cruel and unusual punishment contrary to U.S. Const. amend VIII? Sergeant Kevin Benderman never missed a duty day before, during and after the alleged charge of desertion & missing movement and while awaiting court-martial, processed back into the Army about twelve soldiers that did miss movement and/or had deserted defined as 30 or more days AWOL. These soldiers came back post deployment, were processed back in by the Plaintiff and the U.S. Army only gave them a bad conduct discharge!

²³ Transcript Quotes Concluding Second Trial: MJ: [D]o you consent to your defense counsel arguing that if I find confinement is appropriate, that, in lieu of any confinement, to award you a bad conduct discharge? ACC: Yes, ma’am. MJ: Then, at this time, court is closed for deliberation on sentence. [The Judge by circumstantial evidence conferred with the convening authority by phone and received her orders and broke her sworn agreement!] [After about 15 minutes of deliberation] MJ: Sergeant Kevin M. Benderman, this court sentences you to be reduced to E1, to be confined for 15 months, and to be dishonorably discharged from the service.

ensure judicial independence in constitutional dimensional cases, to ensure that “traditional ways of conducting government ... give meaning to the Constitution,” *Mistretta, v. United States*, 488 U.S. 361, 401 (1989) and that the “the balance” between the branches that “already has been struck by the Constitution itself” is maintained. *Public Citizen v. United States Dept. of Justice*, 491 U.S. 440, 486 (1989) (Kennedy, J., concurring).

37. Jurisdiction is the power to say what the law is and thus must stay exclusively with the civilian federal courts when subject-matter issues arise under our Constitution, so jurisdiction within the military requires strict limitation, under the doctrine of avoidance of constitutional questions. See *Indus. Union Dept. v. American Petroleum Inst.*, 448 U.S. 607, 646 (1980) (“A construction of [a jurisdictional] statute that avoids [an] open-ended grant [of legislative authority] should certainly be favored.”). Thus, Military jurisdiction to have convicted the Plaintiff is challenged and requires judicial review. “[W]hen a Government official’s determination of a fact or circumstance ... is dispositive of a court controversy, federal courts generally do not hold determination unreviewable. Instead, federal judges traditionally proceed from the ‘strong presumption that Congress intends judicial review’” *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 424 (1995). Jurisdictional power by court-martial was delegated by the Legislative to the Executive and has no link to jurisdiction as set down by Article III so this congressional delegation of power to the Executive is not “unbounded, and it is the duty of a reviewing court to determine whether the course followed by the [convening authority] is consistent with its mandate from Congress.” *Atchison, Topeka & Santa Fe Ry. v. Wichita Bd. Of Trade*, 412 U.S. 800, 806 (1973) and that jurisdiction has properly been evaluated to maintain congressional “principal of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts.” 10 U.S.C. § 836. Which are neutral decision makers;

rules of evidence used in criminal trials in the federal district courts; inadmissibility of hearsay²⁴; the right to have all evidence considered; the right against double jeopardy; and the right to collateral review of one's conviction.

PLAINTIFF & CO-PLAINTIFF DEMANDED REDRESS

38. The 42 U.S.C. § 1983²⁵ Monetary Relief is demanded:

42 U.S.C. § 1983 Description	# of Days	\$ / Day	Amount
Wrongful Imprisonment	386	425	\$164,050
Loss Of Income	386	125	\$48,250
Wife's Hardship w/o Husband	386	100	\$38,600
Husband's Hardship w/o Wife	386	100	\$38,600
Punitive Damages To U.S. Army	386	550	\$212,300
Sub Total			\$501,800
Total Monetary Relief Demanded			\$500,000
"Plaintiff was wrongly incarcerated from 28 JUL 05 to 18 AUG 06 = 386 Days"			

39. It is further demanded for the Plaintiff, Kevin Benderman that his rank of E-5 is restored, and since his contract with the Army is now fulfilled, that the Army willingly and honorably discharge Sergeant Kevin Benderman and that his Dress Uniform with that ranking, insignia and medals are returned and that all rights as a War Veteran are reinstated! And that the Secretary of the Army issues to the media a public apology to Sergeant Kevin Benderman in hopes that such a miscarriage of justice like this one, never happens to another soldier!

CONCLUSIONS

40. The 14th Amendment enforces The Bill of Rights by Civil Rights, an enforceable right, which if interfered with by another gives rise to an action for injury, see 18 U.S.C. §§ 241, 242;

²⁴ During the crucial time of deployment found Plaintiff previously charged prior to the time of the alleged hearsay missing movement and we all knew a member of Congress had stated to the U.S. Army that the Plaintiff was not to use a weapon as an authenticated filed Conscientious Objector that strongly recommended no deployment! The Plaintiff knew all of Iraq was a combat zone, anywhere at anytime! The Plaintiff's right to self preservation and his pending First Amendment right to Conscientious Objector status was an enormous conflict of law and life that required immediate assistance of an attorney to sort out on how to get my husband out of this no win situation!

²⁵ 42 U.S.C. § 1983, "Every person who, under color of any statute, ordinance, regulation, custom, or usage subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress!"

28 U.S.C. § 1443 & 42 U.S.C. §§ 1981, 1983, 1985, 1986, 1988(a) and by the Civil Rights Act of 1964 prohibited the completed discrimination against the Plaintiff on account of his previous condition of servitude as a U.S. Army combat soldier who had filed for CO status. All of this arises under our Constitution and are pursuant to acts of Congress and puts in force our two jurisdictional codes, see ¶4b and ¶4d. The monetary redress demanded for the suffered injury enforces Diversity Jurisdiction, see ¶4c. And thus ¶4a habeas corpus is completely supported for giving remedy, thus jurisdiction is established to this honored Court!

41. We the Plaintiff and Co-Plaintiff state our Claims are judicial burdens the Defendant will never overcome. The Claim of violating Double Jeopardy, breaching Rights Waiver Verbatim, trampling on Federal Jurisdiction, paying no attention to honorable Congresswoman Cynthia McKinney and the identified prejudices against a Veteran Combat Soldier, and outright violation of the Due Process Clause; most of them stand alone are enough to win our Case. However, we have submitted all our Claims in one mighty judicial basket!

42. Our Claims have been submitted and require substantive right answers pursuant to FRCvP 8(d) and 28 U.S.C. § 2072(a)(b). According to FRCvP 8(d), “Averments in a pleading to which a responsive pleading is required are admitted when not denied in the responsive pleading.” Failure of the Defendant to ANSWER each claim, one by one, admits these claims of such imperative judicial importance are true! And as stated our Claims are too much of a judicial burden for the Defendant to ever overcome!

WHEREFORE, the Plaintiff and Co-Plaintiff prays²⁶ from this honored Court **1)** This Court encourages the Defendant by ADR arrangement to offer a settlement acceptable to the Plaintiffs, or **2)** This Court grants the relief asked for found supra at (¶38 & 39) or grants a relief agreeable to the Plaintiff and Co-Plaintiff, **otherwise: 3)** After our exhaustive attempts to reach an agreeable relief and that this Court determines [**1) & 2)**] have been exhausted; then we respectfully request a Federal Jury Trial to present our suffered miscarriage of justice and its relief to the people; and **4)** such other and further relief as this Court shall deem proper!

DECLARATION UNDER PENALTY OF PERJURY

The undersigned declares under penalty of perjury under the laws of the United States of America that we are natural born U.S. citizens and the Plaintiffs in the above action and have read that action and we state that the information contained therein is true and correct.

PROOF OF SERVICE

Original and required copies of this Compliant & Opening Brief were filed by hand and in person with this Court in **March** of 2008 the specific date to be stamped by this honored Court. Officially serving the Complaint on the Defendant will be by a method and time pursuant to FRCvP 4 and/or the Rules of this Court to the addresses as stated below and left:

MR. PETE GEREN
Secretary of Army
101 Army Pentagon
Washington, DC, 20310-0101

U.S. Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

United States Attorney's Office
100 Bull Street, 2nd Floor
Savannah, GA 31401

Kevin Benderman, Plaintiff, pro se

Monica Benderman, Co-Plaintiff, pro se

Kevin Benderman, Plaintiff, pro se Monica Benderman, Co-Plaintiff, pro se P.O. Box 2322 Hinesville, GA 31310 Phone: 912-369-4585 E-mail: mdawnb@coastalnow.net
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²⁶ The Plaintiff and Co-Plaintiff prays whenever this Complaint & Opening Brief is under close scrutiny, we reserve the right to insert alleged and/or allegedly as deemed necessary and where, as here, we the Plaintiffs are acting pro se, the USSC has directed courts to construe pleadings liberally, see *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).