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6 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
7 AT TACOMA

8 1LT. EHREN K. WATADA,

9 Petitioner,

CASE NO. C07-5549BHS

10 v.

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

ORDER GRANTING IN PART  
AND DENYING IN PART  
PETITIONER'S SECOND  
AMENDED PETITION FOR  
WRIT OF HABEAS CORPUS

14 Respondents.  
15

16 This matter comes before the Court on Petitioner's Second Amended Petition for  
17 Writ of Habeas Corpus (Dkt. 25). The Court has considered the pleadings filed in support  
18 of and in opposition to the petition, heard oral argument of counsel, and hereby grants in  
19 part and denies in part the petition for the reasons stated herein.

20 **I. PROCEDURAL HISTORY**

21 On October 3, 2007, Petitioner 1LT Ehren K. Watada filed a Petition for Writ of  
22 Habeas Corpus under 28 U.S.C. § 2241 (Dkt. 1) and an Emergency Motion for a Stay of  
23 Court Martial Proceedings (Dkt. 2) that was set to begin on October 9, 2007. Petitioner  
24 requested that the Court "Issue a Writ of Habeas Corpus releasing Petitioner from all  
25 restraint imposed by the pending court-martial charges, and declaring any trial on such  
26 charges to be barred and prohibited by the Double Jeopardy Clause of the Fifth  
27 Amendment." Dkt. 1 at 9.  
28

1 On October 5, 2007, the Court issued a preliminary stay of the court-martial. Dkt.  
2 9. On November 8, 2007, the Court granted Petitioner's Emergency Motion, issuing a  
3 preliminary injunction over the court-martial proceeding referred by Respondent Jacoby.  
4 Dkt. 18; *Watada v. Head*, 530 F. Supp. 2d 1136 (W.D. Wash 2007).

5 On June 25, 2008, Petitioner filed a Second Amended Petition for Writ of Habeas  
6 Corpus. Dkt. 25. On August 19, 2008, Respondents filed a memorandum in opposition  
7 to the petition. Dkt. 32. On September 16, 2008, Petitioner replied. Dkt. 38.

## 8 II. FACTUAL HISTORY

### 9 A. Preferred Charges and Court-Martial

10 On July 5, 2006, LTC Kevin Lancaster preferred charges against Petitioner and  
11 referred them for a court-martial. Administrative Record ("AR") at 782-86. The charges  
12 were for five violations of the Uniform Code of Military Justice ("Military Code") as  
13 follows:

14 Charge I:  
15 Violation of Article 87 - Missing Movement

16 Specification - Missing movement of Flight Number BMYA91111173

17 Charge III:  
18 Violation of Article 133 - Conduct Unbecoming an Officer and a Gentleman

19 Specification 1 - Taking part in a public press conference

20 Specification 2 - Giving a public interview

21 Specification 3 - Giving a public interview

22 The Additional Charge:  
23 Violation of Article 133 - Conduct Unbecoming an Officer and a Gentleman

24 Specification - Participating in Veterans for Peace National Convention.

25 *Id.*<sup>1</sup>

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26 <sup>1</sup> The specifications are summarized for clarity throughout this order. The original  
27 charge sheet contains numerous handwritten annotations and is less than clear. The subsequent  
28 charge sheet consolidates these charges and specifications.

1 On January 26, 2007, Respondent Head, the military judge for the court-martial,  
2 sent an email to counsel for the Government and for Petitioner regarding a proposed  
3 pretrial agreement. AR at 1312. Respondent Head inquired about the nature of the  
4 proposed agreement as follows:

5 In paragraph 3 it talks as if this is a guilty plea. There is no plea of guilty  
6 that I see. In reading the stip, the government must still prove the element  
7 'that Flight Number BMYA91111173 actually left' and there are many  
elements of the Article 133 that are not admitted. That probably needs to be  
clarified. Is it a guilty plea or what?

8 *Id.*

9 On January 29, 2007, Petitioner and the Government entered into a pretrial  
10 agreement wherein the Government agreed to dismiss "Specifications 2 and 3 of Charge  
11 III without prejudice to ripen into prejudice upon completion of trial proceedings." *Id.* at  
12 1313-14. In exchange for dismissal of those charges, Petitioner agreed to sign a  
13 document entitled "Stipulation of Fact." *Id.* The Stipulation of Fact contained facts that  
14 were "true" and "admissible without regard to any evidentiary rule [or other rule] that  
15 might otherwise make them inadmissible." *Id.* at 1315. Paragraph 4 of the Stipulation of  
16 Fact read as follows:

17 At approximately 1000 hours on 22 June 2006, 1LT Watada  
18 intentionally missed the movement of his flight to Iraq. 1LT Watada was  
19 manifested for the 22 June 2006 flight (Flight Number BMYA91111173).  
20 He knew of the manifest information regarding the deployment, including  
21 the date and time of his required movement, because the unit briefed him on  
22 numerous occasions in March, April, May, and June 2006, and specifically  
23 provided him the requisite documents detailing the manifest requirements.  
24 Additionally, LTC Bruce Antonia told 1LT Watada about the flight  
25 departing McChord Air Force Base on 22 June 2006, and specifically  
26 counseled 1LT Watada regarding the manifest details of the deployment.  
27 On 19 June 2006, 1LT Watada signed a counseling statement,  
28 acknowledging the requirement for him to deploy, to include the specific  
details of the movement (See Enclosure 2). When 1LT Watada missed the  
battalion manifest call early in the morning on 22 June 2006, LTC Antonia  
counseled 1LT Watada once again, ordering him to draw his equipment and  
report to the brigade manifest call (See Enclosure 3 – this document was  
actually signed early on the morning of 22 June 2006, not 21 June 2006).  
Rather than attending the brigade manifest call, 1LT Watada remained in his  
office. Shortly thereafter, a bus took the deploying Soldiers from Fort Lewis  
to McChord Air Force Base. 1LT Watada chose not to board the bus. From  
there, at approximately 1000 hours on 22 June 2006, the deploying Soldiers  
boarded an airplane and departed McChord Air Force Base en route to

1 Mosul, Iraq, via Flight Number BMYA91111173. 1LT Watada  
2 intentionally did not board the aircraft and as a result, missed the movement  
of Flight Number BMYA91111173.

3 *Id.* at 1321.

4 On February 5, 2007, the court-martial was called to order. *Id.* at 882. Petitioner  
5 pleaded “not guilty to all charges and specifications.” *Id.* at 905. After the plea, the  
6 judge addressed the Stipulation of Fact. Before accepting the stipulation, the judge  
7 conducted an inquiry into Petitioner’s understanding of the Stipulation of Fact. *Id.* at  
8 906-929. The judge informed Petitioner as follows:

9 If I admit this stipulation into evidence it will be used in two ways:  
10 First, members will use it to determine if you are, in fact, guilty of  
the offenses to which the stipulation relates;  
11 Second, the trial counsel may read the contents to the members, and  
they will have it with them when they decide upon your sentence.

12 *Id.* at 907. The judge asked Petitioner if “everything in the stipulation [was] the truth?”

13 *Id.* at 908. Petitioner responded “[i]t is, sir.” *Id.*

14 After further questioning, the judge asked if any additional inquiry into the factual  
15 basis for the Stipulation of Fact was necessary. *Id.* at 920. The parties answered that the  
16 inquiry was sufficient. *Id.* After a discussion of the pretrial agreement, the judge  
17 accepted the stipulation and entered it into evidence. *Id.* at 929.

18 The court-martial proceeded with the judge giving preliminary instructions,  
19 conducting voir dire, and empaneling the members (the military equivalent of a jury). *Id.*  
20 at 930-1039. When the Government presented its case, the Stipulation of Fact was  
21 published and read to the panel. *Id.* at 1043-44. The panel also watched two videos that  
22 were part of the Stipulation of Fact. *Id.* at 1043-44. The Government rested at 1546 on  
23 February 6, 2007. *Id.* at 1134.

24 The court reconvened the next day. *Id.* Before counsel for Petitioner presented  
25 any evidence, he submitted a proposed jury instruction on the defense of mistake of fact.  
26 *Id.* The proposed instruction contained the following language: “The evidence has raised  
27 the issue of mistake on the part of the accused concerning his belief that he had a legal  
28

1 and moral obligation to refuse to participate in the war in Iraq relating to the offenses of  
2 missing movement.” *Id.* at 1331. The judge expressed concern that this proposed  
3 instruction conflicted with the Stipulation of Fact and reconsidered his acceptance of the  
4 Stipulation of Fact into evidence. *Id.* at 1134.

5 The judge informed the parties that he was going to reopen the inquiry into  
6 Petitioner’s understanding of the Stipulation of Fact. *Id.* Petitioner’s counsel objected to  
7 the reopening of any inquiry and stated that the judge was “not authorized to ask  
8 [Petitioner] questions anytime you choose to do so.” *Id.* at 1135. The judge then asked  
9 “what is your basis for mistake of fact?” *Id.* Petitioner’s counsel responded as follows:

10 It goes to the intent element; purely to the intent element. With  
11 respect to the missing movement charge, it has always been Lieutenant  
12 Watada’s position that he intended not merely to miss movement, but to  
13 avoid participating in a war 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.

14 So his specific intent, which is required by the offense, was not the  
15 mere intent to miss a movement. His intent, his state of mind, was of a  
16 different character, altogether. And, we have argued that repeatedly. We  
17 have also, as you 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.”

18 *Id.* Petitioner’s counsel also stated that “[w]e did not plead guilty because there is a  
19 dispute in this case over the intent element, and that is what the instruction goes to.” *Id.*  
20 at 1136.

21 The judge was still concerned with Petitioner's understanding of the Stipulation of  
22 Fact “and whether [Petitioner] believe[d] that there is a defense because he has stipulated  
23 to all of the elements.” *Id.* at 1137. Petitioner’s counsel responded as follows:

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

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

7 *Id.*

8           The judge was not satisfied with Petitioner's counsel's explanation and informed  
9 the parties that he "was going to reopen inquiry." *Id.* at 1138. Petitioner's counsel  
10 objected. *Id.* The judge responded that if [Petitioner] did "not want to answer the  
11 questions, then [the judge would] reject the stipulation because [he could not] resolve, in  
12 [his] mind, that there [was] not an inconsistency here." *Id.* Petitioner's counsel asked:  
13 "Then what happens?" The judge replied as follows:

14           Then I reconsider admission of [the Stipulation of Fact]. It now  
15 becomes Prosecution Exhibit 4 for identification. Under Paragraph 5 of the  
16 pretrial agreement, "It may become null and void on the occurrence of any  
17 of the following events" and Paragraph C is "The refusal of the military  
18 judge to accept the stipulation of fact."

19 *Id.* at 1139. After a brief interruption, the judge continued as follows:

20           And since the government has no evidence at this point a mistrial  
21 would be in order. And I would set a new trial date, because the  
22 government has dismissed two charges, based upon this pretrial agreement.  
23 They're entitled to their bargain, as much as your client is entitled to his  
24 bargain. That's what will happen.

25 *Id.*

26           Petitioner's counsel then raised issue of double jeopardy as follows:

27           Colonel, let me just say, I would assume that if that were to happen,  
28 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.* The judge responded that, if he declared a mistrial, then he "would set a new trial date  
and what actions [Petitioner took] with any superior court is well within what you want  
to." *Id.* From this point of the proceeding through the judge declaring a mistrial, the  
record of the trial proceeding shows that neither jeopardy nor the contents of an appeal  
based on double jeopardy were discussed. *See id* at 1139-55.

1 After a recess from 1057 until 1224, the judge reopened the inquiry into  
2 Petitioner's understanding of the Stipulation of Fact. *See id.* At 1141-44. Upon  
3 completion of the inquiry, the judge asked the Government's counsel if he "entered into  
4 this stipulation and into this pretrial agreement believing [he] had a confessional  
5 stipulation." *Id.* at 1146. Counsel responded that he had "evidence to prove every  
6 element of [Charge I – Missing Movement]." *Id.* The judge then stated his concern as  
7 follows:

8 Well, understand that we can't have disagreements as to material  
9 elements of a pretrial agreement, and we cannot have disagreements as to  
10 what the pretrial agreement means. I covered this, and I did a[n] . . . inquiry,  
11 which is a confessional stipulation inquiry, and I inquired as to, "Do both  
12 counsel agree to the stipulation, the uses of the stipulation and the pretrial  
13 agreement and my interpretation of the pretrial agreement." That's where  
14 I'm having problems is – are we – I'm not seeing that we have a meeting of  
15 the minds here. And, like any contract, if there is not a meeting of minds,  
16 there is not a contract. Tell me where I'm missing something, government?

17 *Id.*

18 The Government's counsel then stated that "[i]n terms of the four corners of this  
19 agreement, I think there is a meeting of the minds." *Id.* at 1147. Government's counsel  
20 added that "the subjective belief of the accused and that he has a defense are not  
21 relevant." *Id.* The judge still expressed concern and explained that "it's just like if  
22 [Petitioner] had plead not guilty, but as to this offense, you have to treat it essentially like  
23 a guilty plea." *Id.* Government's counsel responded that "the accused can plead to the  
24 elements of the crime and then still get up and say, 'But I have a reason.' He has plead  
25 not guilty to the offense." *Id.* After a short discussion and a recess, the judge reopened  
26 the inquiry. *Id.* at 1148-51.

27 After the inquiry, the judge expressed his belief that there was a problem with the  
28 Stipulation of Fact in that it could not be a confessional stipulation if Petitioner thought  
he had a defense to the charge of missing movement. *Id.* at 1151-52. The Government  
responded:

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

3 *Id.* The judge stated:

4 That's not the issue. At this point I'm reconsidering Prosecution  
5 Exhibit 4 and rejecting the stipulation of fact. It's now Prosecution Exhibit  
6 4 for identification, as the government has closed its case. Government, do  
7 you wish to reopen your case, or do you wish, as we now have a material  
breach of the pretrial agreement, do you wish to request a mistrial because  
at this point we don't have evidence on every element?

8 *Id.*

9 After this exchange, the court took a 40-minute recess. *Id.* at 1153. Upon return,  
10 counsel for Petitioner restated that Petitioner would not withdraw from the stipulation.

11 *Id.* at 1154. This led to an exchange as follows:

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

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

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

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

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

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

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

26 *Id.* at 1154-55. The court-martial was then adjourned. *Id.* at 1159-60.

1 **B. Re-Preferred Charges and Petitioner's Attempts to Dismiss**

2 On February 23, 2007, LTC Kevin Lancaster re-preferred the charges against  
3 Petitioner and referred them for trial as follows:

4 Charge I:  
Violation of Article 87 - Missing Movement

5 Specification - Missing movement of Flight Number BMYA91111173

6  
7 Charge II:  
Violation of Article 133 - Conduct Unbecoming an Officer and a Gentleman

8 Specification 1 - Taking part in a public press conference

9 Specification 2 - Giving a public interview

10 Specification 3 - Giving a public interview

11 Specification 4 - Participating in Veterans for Peace National Convention

12 AR at 476-78. Petitioner filed a Petition for Extraordinary Relief in the Nature of a Writ  
13 of Prohibition and an Application for Stay of Proceedings with the Army Court of  
14 Criminal Appeals. *Id.* at 724-69. Petitioner based the application on his belief that a  
15 second prosecution of the same charges would violate his Fifth Amendment right to be  
16 free from double jeopardy. *Id.* On May 18, 2007, the Army Court of Criminal Appeals  
17 issued an order granting the petition in part by instituting a stay of the second court-  
18 martial and requiring the Government to respond to the petition and show cause why the  
19 petition should not be granted. *Id.* at 688-89. On June 29, 2007, the Army Court of  
20 Criminal Appeals denied the petition on the grounds that Petitioner had not first moved to  
21 dismiss in the military trial court. *Id.* at 27.

22 On July 2, 2007, Petitioner filed a motion to dismiss in the trial court requesting  
23 that all charges be dismissed because they are barred by double jeopardy. *Id.* at 511-566.  
24 On July 5, 2007, the Government responded. *Id.* at 567-582. On July 6, 2008, the parties  
25 presented evidence and argued their positions. *Id.* at 355-472. On July 11, 2007,  
26 Respondent Head issued findings of fact, conclusions of law, and an order denying  
27 Petitioner's motion to dismiss. *Id.* at 583-589. Respondent Head concluded that he, as  
28

1 trial judge of the court-martial, “rejected the stipulation, thus [Petitioner] was in breach of  
2 the pretrial agreement.” *Id.* at 586. Although the trial record is not fully developed as to  
3 the “breach,” Respondent Head subsequently explained the “breach” as follows:

4 [Petitioner] made it clear that he had no intent to enter into a  
5 stipulation that admits every element of the offense charged in the  
6 Specification of Charge 1 [Missing movement]. [Trial Record at 363]. The  
7 Government believed that the stipulation was also a confessional stipulation  
8 [Trial Record at 364], only changing its position when rejection of the  
9 stipulation of fact appeared inevitable. [Trial Record at 366-367]. The  
10 Court properly reconsidered its earlier admission of [the Stipulation of Fact]  
11 and rejected [it].

12 Once the Court rejected the stipulation of fact, then the court must  
13 look to the pretrial agreement. Paragraph (5)(c) of [the agreement] provides  
14 that “the agreement may become null and void upon the occurrence of . . .  
15 (c) the refusal of the military judge to accept the Stipulation of Fact.” . . .  
16 The term of the agreement is not ambiguous. The term was a material term  
17 to the pretrial agreement, because the agreement was for the government to  
18 dismiss two specifications in exchange for the defense stipulating to the  
19 matters contained in [the Stipulation of Fact]. The government dismissed  
20 Specifications 2 and 3 of Charge II. The Court rejected the stipulation, thus  
21 the defense was in breach of the pretrial agreement.

22 *Id.*

23 As for whether Respondent Head abused his discretion in declaring a mistrial, he  
24 concluded as follows:

25 The accused’s desire and interest in having the trial concluded in a  
26 single proceeding was rendered impossible by the accused’s breach of the  
27 pretrial agreement. In fact, the accused’s actions would have necessitated a  
28 second trial on the merits of the two dismissed specifications. Further, had  
the accused been convicted of any of the charges at the first trial, those  
convictions could have been used as matters in aggravation in the second  
trial. Additionally, merely concerning itself with the accused’s interests  
would have resulted in the ends of public justice being defeated. To leave  
the accused in the same position he would have been in without his breach  
of the pretrial agreement would put the government at a severe tactical  
disadvantage – being forced to rely on testimony that could be disregarded  
by the panel rather than relying on uncontroverted facts that could not be  
disregarded. While this is normally the way a trial is conducted, under the  
facts of this case, after the government opening and after the panel was  
informed that these were the uncontroverted facts of the case, the  
government would have to overcome an instruction to disregard all of the  
facts on the issues that were covered by the stipulation. This would have  
undoubtedly confused the panel.

Last, the alternatives to a mistrial would have been worse than the  
mistrial itself. First, there is no way to have reinstated the dismissed charges  
in mid-trial. *See R.C.M. 904, Discussion.* This would have resulted in a  
second trial of the accused with the results of the first trial being used as

1       aggravation against the accused had he been convicted of any offense in the  
2       first trial. Second, even if the government had proceeded only on the  
3       Charges and Specifications that were still before the court, the stipulation  
4       contained very inflammatory statements made by the accused to the press  
5       that would not have been otherwise admissible. These statements could  
6       only have had an extremely prejudicial effect on the panel and no curative  
7       instruction would have been sufficient to cure the taint of the statements.  
8       Third, to ask the members to disregard the fact that the accused had agreed  
9       that all of the facts in the stipulation of fact were true, would place the  
10      accused in the light of being untruthful to the panel in such a way that the  
11      ordinary instruction to disregard the contents would have been insufficient  
12      to cure the problem.

13       Further, merely delaying the trial would not have fixed the problems.  
14       The trial is still tainted by the stipulation of fact. There is no guarantee that  
15       the government could have even obtained the necessary witnesses to  
16       authenticate statements in the stipulation of fact. If they had not been able  
17       to authenticate the videos or the reporters' statements, the prejudice to the  
18       accused only magnifies. Such powerful evidence would have been  
19       impossible for a panel to have disregarded.

20       Even if the accused would have benefited from the rejection of the  
21       stipulation, it is not in the interests of justice that an accused benefit from  
22       the breach of his pretrial agreement where the pretrial agreement is not  
23       unlawful. Last, to allow the case to continue where there was such a  
24       fundamental misunderstanding of the meaning and effect of the stipulation  
25       would only invite further error and call into question the fairness of the  
26       proceedings. The Court could not allow the proceedings to continue without  
27       irreparable harm occurring to either party.

28       *Id.* at 587.

      On July 27, 2007, Petitioner appealed to the Army Court of Criminal Appeals. *Id.*  
at 230-289. Petitioner filed a Renewed Petition For Extraordinary Relief and requested a  
stay of the court-martial proceedings. *Id.* On August 27, 2007, Petitioner filed a motion  
to expedite the ruling on his application for a stay. *Id.* at 156-160. On August 28, 2007,  
the Army Court of Criminal Appeals granted Petitioner's motion for expedited ruling and  
denied the petition for relief as follows:

      We have reviewed the findings of fact and conclusions of law issued by the  
trial court and find the military judge did not abuse his discretion by  
granting the mistrial. *See United States v. Diaz*, 59 M.J. 79, 90 (C.A.A.F.  
2003). "A military judge has 'considerable latitude in determining when to  
grant a mistrial.'" *Id.* (quoting *United States v. Seward*, 49 M.J. 369, 371  
(C.A.A.F. 1998)). "This Court will not reverse the military judge's decision  
absent clear evidence of abuse of discretion." *Id.* (citing *United States v.*  
*Dancy*, 38 M.J. 1, 6 (C.M.A. 1993); *United States v. Rushatz*, 31 MJ. 450  
(C.M.A. 1990)). Further, we find no violation of the Double Jeopardy  
clause or Article 44, UCMJ, and decline to dismiss, stay, or further delay  
the proceedings.

1 *Id.* at 155.

2 On September 17, 2007, Petitioner sought relief from the United States Court of  
3 Appeals for the Armed Forces by way of a Petition for a Writ of Prohibition and an  
4 Application for Immediate Stay of Trial Proceedings. *Id.* at 99-153. On October 5, 2007,  
5 in a one-page order, the United States Court of Appeals for the Armed Forces stated  
6 “[t]hat said motion for stay is hereby denied; and [t]hat said writ-appeal petition is hereby  
7 denied.” *Id.* at 1.

### 8 III. JURISDICTION

9 The Court has ruled that, under 28 U.S.C. § 2241, it has subject matter jurisdiction  
10 to issue a writ of habeas corpus in this case. *Watada*, 530 F. Supp. 2d at 1146-47. The  
11 Court, however, did not decide the full extent of its jurisdiction over Petitioner’s claims.  
12 In granting the preliminary injunction, the Court found that it had jurisdiction to review  
13 “Petitioner’s double jeopardy claim,” *id.* at 1151, but the Court neither considered nor  
14 decided the question of whether double jeopardy attached “to the charges dismissed  
15 without prejudice pursuant to the pretrial agreement,” *id.* at 1161.

16 As a threshold matter, this case is now in a substantially different procedural  
17 posture because the Court must consider more than Petitioner’s “irreparable injury” or  
18 “likelihood of success.” *See id.* at 1151. In the petition before the Court, Petitioner  
19 requests that “[e]ither on double jeopardy grounds, or due process grounds, or both, the  
20 two conditionally dismissed Article 133 specifications, as well as the other three charges,  
21 should be dismissed with prejudice.” Dkt. 38 at 21. In other words, Petitioner asks the  
22 Court to consider both double jeopardy and due process arguments regarding all “five  
23 specifications or charges with which he was originally charged.” *Id.* Therefore, the  
24 Court must first determine the merits upon which it may grant habeas relief.

#### 25 A. Military Habeas

26 The Supreme Court has recognized that:

27 Military law, like state law, is a jurisprudence which exists separate  
28 and apart from the law which governs in our federal judicial establishment.

1 This Court has played no role in its development; we have exerted no  
2 supervisory power over the courts which enforce it; the rights of men in the  
3 armed forces must perforce be conditioned to meet certain overriding  
demands of discipline and duty, and the civil courts are not the agencies  
which must determine the precise balance to be struck in this adjustment.

4 *Burns v. Wilson*, 346 U.S. 137, 140 (1953). The separate jurisprudence, however, does  
5 not serve as a complete bar to adjudication in this Court because it “does not displace the  
6 civil courts’ jurisdiction over an application for habeas corpus from the military  
7 prisoner.” *Id.* at 142. But the separation does mean “that when a military decision has  
8 dealt fully and fairly with an allegation raised in that application, it is not open to a  
9 federal civil court to grant the writ simply to re-evaluate the evidence.” *Id.*

10 Although in *Burns* the Supreme Court seemed to have declared a rule of limited  
11 jurisdiction for civil courts, “[t]he federal courts’ interpretation . . . of the language in  
12 *Burns* has been anything but clear.” *Dodson v. Zelez*, 917 F.2d 1250, 1252 (10th Cir.  
13 1990). Respondents argue that the Court’s scope of review with respect to Petitioner’s  
14 claims should be “extremely narrow.” Dkt. 32 at 3. Respondents assert that “[a]bsent an  
15 adequate showing that the military courts have failed to give full and fair consideration to  
16 the matter, this Court should not reach the merits and should deny the petition.” *Id.*  
17 Petitioner counters that the Court should decline the Government’s invitation to limit its  
18 review of Petitioner’s claims because Respondents’ arguments are based upon opinions  
19 from the Tenth Circuit instead of Ninth Circuit precedent. Dkt. 38 at 4-12. The Court  
20 agrees with Petitioner and finds that the Ninth Circuit has adequately addressed the extent  
21 of this Court’s exercise of jurisdiction over Petitioner’s claims.

22 The Ninth Circuit has stated that:

23 The limited function of civil courts in habeas corpus proceedings involving  
24 military convictions is to determine whether the court-martial had  
jurisdiction of the person accused and the offense charged, and whether it  
25 acted within its lawful powers.

26 *Sunday v. Madigan*, 301 F.2d 871, 873 (9th Cir. 1962). In a more recent decision, the  
27 Ninth Circuit stated that “[t]he *Burns* plurality does not preclude civil court consideration  
28

1 of the constitutional [equal protection, due process, and First Amendment] defects alleged  
2 here.” *Hatheway v. Secretary of Army*, 641 F.2d 1376, 1380 (9th Cir. 1981), *cert. denied*,  
3 454 U.S. 864 (1981). The Court is unaware of, and Respondents have failed to provide,  
4 any binding authority holding otherwise.

5 In this case, Petitioner presents claims of constitutional defects in his military  
6 court-martial. Therefore, the Court may consider those constitutional defects to  
7 determine whether the military court is acting without jurisdiction. This is not the final  
8 jurisdictional hurdle, however, because questions of equitable jurisdiction are raised when  
9 federal courts are asked to intervene in pending court-martial proceedings. *Schlesinger v.*  
10 *Councilman*, 420 U.S. 738, 740 (1975).

11 **B. Equitable Jurisdiction and Abstention**

12 “[T]he question of equitable jurisdiction [is] a question concerned, not with  
13 whether the claim falls within the limited jurisdiction conferred on the federal courts, but  
14 with whether consistently with the principles governing equitable relief the court may  
15 exercise its remedial powers.” *Councilman*, 420 U.S. at 754.

16 One principle of equitable restraint is the exhaustion of available remedies.  
17 “[F]ederal courts normally will not entertain habeas petitions by military prisoners unless  
18 all available military remedies have been exhausted.” *Id.* at 758; *Noyd v. Bond*, 395 U.S.  
19 683, 693 (1969); *Gusik v. Schilder*, 340 U.S. 128 (1950).

20 Another principle of equitable restraint is abstention from interfering with pending  
21 court-martial proceedings. On this issue, the Supreme Court summarized its reasoning  
22 and held as follows:

23 As we have stated above, judgments of the military court system  
24 remain subject in proper cases to collateral impeachment. But implicit in the  
25 congressional scheme embodied in the [Military Code] is the view that the  
26 military court system generally is adequate to and responsibly will perform  
27 its assigned task. We think this congressional judgment must be respected  
28 and that it must be assumed that the military court system will vindicate  
servicemen's constitutional rights. . . . The same principles are relevant to  
striking the balance governing the exercise of equity power. We hold that  
when a serviceman charged with crimes by military authorities can show *no*  
*harm other than that attendant to resolution of his case in the military*

1 *court system*, the federal district courts must refrain from intervention, by  
2 way of injunction or otherwise.

3 *Councilman*, 420 U.S. at 758 (emphasis added).

4 Under this framework, the Court will evaluate whether it should refrain from  
5 asserting its remedial powers. Petitioner's claims can be separated into three categories:  
6 (1) whether double jeopardy bars Charge I and Charge II, Specifications 1 and 4 (the  
7 charges and specifications that were not subject to dismissal as part of the pretrial  
8 agreement); (2) whether double jeopardy bars Charge II, Specifications 2 and 3 (the "two  
9 conditionally dismissed Article 133 specifications" that were part of the pretrial  
10 agreement); and (3) Petitioner's due process claim for dismissal of Charge II,  
11 Specifications 2 and 3.

12 **1. Double Jeopardy on Charge I and Charge II, Specifications 1 and 4**

13 On July 5, 2006, LTC Kevin Lancaster referred charges against Petitioner. AR at  
14 782-86. The charges that were not included in a subsequent pretrial agreement between  
15 Petitioner and the Government are as follows: Charge I – Missing Movement; Charge III  
16 – Conduct Unbecoming an Officer and a Gentleman, Specification 1 – Taking part in a  
17 public press conference; and the Additional Charge – Conduct Unbecoming an Officer  
18 and a Gentleman. *Id.* On February 5, 2007, the court-martial was convened. *Id.* at 774.  
19 On February 7, 2007, the military judge declared a mistrial. *Id.* at 1159. On February 23,  
20 2007, the convening authority re-referred those three offenses as follows: Charge I and  
21 Charge II, Specifications 1 and 4. *Id.* at 476-77.

22 Petitioner claims that "jeopardy attached" to those two charges and specifications.  
23 Dkt. 25 at 3. Respondents assert that "Petitioner presented his double jeopardy claim to  
24 the military trial court, the Army Court of Criminal Appeals . . . , and the United States  
25 Court of Appeals for the Armed Forces . . . ." Dkt. 32 at 3 (citing *Watada*, 530 F. Supp.  
26 2d at 1147). Respondents also assert that "[t]he joint administrative record demonstrates  
27 that the double jeopardy issue has been extensively briefed and argued by the petitioner  
28

1 and respondents . . . .” Dkt. 32 at 3 (citing AR at 1-474, 511-589, 606-769). The military  
2 courts denied Petitioner’s request to dismiss these charges on the grounds that they are  
3 barred by double jeopardy. Therefore, Petitioner’s available remedies have been  
4 exhausted as to these three specifications.

5 The next issue concerns the fact that the exhaustion of remedies has occurred  
6 before the court-martial has convened. Pretrial intervention requires the Court to consider  
7 the harm to Petitioner should the court-martial be allowed to proceed. *See Councilman*,  
8 420 U.S. at 758. No person shall “be subject for the same offense to be twice put in  
9 jeopardy of life or limb.” U.S. Const. amend. V. This Court has already concluded that  
10 abstaining from exerting jurisdiction over Petitioner’s double jeopardy claims and  
11 allowing the court-martial to proceed would subject Petitioner to “greater harm ‘than that  
12 attendant to resolution of his case in the military court system.’” *Watada*, 530 F. Supp. 2d  
13 at 1148-49. Petitioner has again, on a full review of the record, met this burden.

14 Therefore, the Court’s assertion of jurisdiction over Petitioner’s double jeopardy  
15 claims on Charge I and Charge II, Specifications 1 and 4 is proper because Petitioner has  
16 exhausted his available remedies in the military courts and Petitioner would suffer great  
17 harm if the Court declined to intervene prior to the convening of the court-martial.

18 **2. Double Jeopardy on Charge II, Specifications 2 and 3**

19 On January 29, 2007, Petitioner entered into a pretrial agreement with the  
20 Government. AR at 1313-14. Prior to the court-martial, the Government agreed to  
21 dismiss two specifications that LTC Kevin Lancaster had referred for trial against  
22 Petitioner if the military court accepted the Stipulation of Fact. *Id.* On February 5, 2007,  
23 the military court accepted Petitioner’s Stipulation of Fact. *Id.* at 929. On February 23,  
24 2007, the LTC Kevin Lancaster re-referred for court-martial these two offenses as  
25 follows: Charge II – Conduct Unbecoming an Officer and a Gentleman, Specifications 2  
26 and 3 – Giving public interviews. *Id.* at 476-77.

1 It is uncontested that Petitioner presented and argued his double jeopardy claims  
2 on these specifications to the military trial court, the Army Court of Criminal Appeals,  
3 and the United States Court of Appeals for the Armed Forces. Dkt. 32 at 7-10; *see also*  
4 AR at 1-474, 511-589, 606-769. Although Petitioner raised these issues at every level of  
5 the military court system, it cannot be said that he has exhausted all his available military  
6 remedies as to the dismissal of these charges. Specifically, Petitioner claims that these  
7 charges should also be dismissed on either due process grounds, Dkt. 25 at 13-25, or First  
8 Amendment grounds, Dkts. 34 and 37. Thus, Petitioner may pursue pretrial dismissal of  
9 these charges in ways other than requesting this Court's intervention to prevent an alleged  
10 deprivation of his double jeopardy right. In other words, Petitioner has failed to show  
11 that this Article III court is, at this time, the court of last resort.

12 The Supreme Court has "established the general rule that habeas corpus petitions  
13 from military prisoners should not be entertained by federal civilian courts until all  
14 available remedies within the military court system have been invoked in vain." *Noyd v.*  
15 *Bond*, 395 U.S. at 693. Moreover, "[i]f the military courts do vindicate petitioner's claim,  
16 there will be no need for civilian judicial intervention." *Id.* at 695. In this case, the Court  
17 recognizes that the remedies that it deems available are alternative grounds of relief.  
18 Petitioner, however, has brought these alternative forms of relief to the attention of the  
19 Court and the Court has not, *sua sponte*, raised hypothetical legal arguments on  
20 Petitioner's behalf. In this situation, the Court finds that equitable restraint counsels  
21 against this Court's intervention until Petitioner fully exhausts his available remedies.

22 The most compelling reason for this Court to abstain from exercising jurisdiction  
23 over these claims is the Court's ultimate conclusion in this order. As discussed *infra*, the  
24 Court concludes that there was not a manifest necessity for the trial judge to declare a  
25 mistrial and, therefore, double jeopardy bars Petitioner's retrial on certain charges. The  
26 military courts should have an opportunity to consider how that ruling affects the  
27 conditionally dismissed charges before a constitutional review becomes either necessary  
28

1 or appropriate. For example, Respondent Head has concluded that “there is no way to  
2 have reinstated the dismissed charges in mid-trial” and, therefore, “the accused's actions  
3 would have necessitated a second trial on the merits of the two dismissed specifications.”  
4 *See supra* (emphasis in original). The military court has a significant issue to determine  
5 under its law before a civil court should consider if any constitutional defects are present  
6 in a pending court-martial.

7 Therefore, for the purposes of this order, the Court will abstain from exercising  
8 jurisdiction at this time over Petitioner’s claim that double jeopardy bars the military from  
9 convening a court-martial on Charge II, Specifications 2 and 3. Petitioner’s double  
10 jeopardy claim on this charge and these specifications is dismissed without prejudice.

11 **3. Due Process on Charge II, Specifications 2 and 3**

12 Petitioner claims that due process bars the court-martial from proceeding on the  
13 two conditionally dismissed specifications (Charge II, Specifications 2 and 3). Dkt. 25 at  
14 13-25. Respondents claim that Petitioner’s “due process claim . . . has never been  
15 asserted before any military court.” Dkt. 32 at 10. Petitioner concedes that he has not  
16 exhausted his available remedies on these issues, but he argues that the due process  
17 claims are intimately tied to his double jeopardy claims and that asking the military courts  
18 to resolve these issues would be futile. Dkt. 38 at 20-21. Petitioner’s arguments are  
19 unavailing. Petitioner should seek available relief from the military courts. *Noyd*, 395  
20 U.S. at 693. Moreover, Petitioner has failed to show that, if this Court does not intervene  
21 on due process grounds before the court-martial, he will suffer harm other than that  
22 attendant to the resolution of his case in the military court system. *Councilman*, 420 U.S.  
23 at 758. Therefore, the Court will abstain from exercising jurisdiction over Petitioner’s  
24 claim that due process bars the military from convening a court-martial on Charge II,  
25 Specifications 2 and 3.

1 **C. Scope of Review**

2 Respondents argue that the Court should not reach the merits of Petitioner's claims  
3 because the Court's review is limited to the question of whether "petitioner's claims have  
4 been given a full and fair consideration in the military courts." Dkt. 32 at 4. Federal  
5 habeas relief, however, "is available if the military exceeds its jurisdiction." *Zaputh v.*  
6 *Cowgill*, 335 F.3d 885, 887 (9th Cir. 2003) (citing *Gibson*, 329 U.S. at 358-59).  
7 Moreover, the Ninth Circuit stated that "the military is not the last word on federal  
8 questions." *Id.* n.3. Respondents fail to explain how the Court can determine whether the  
9 military court has exceeded its jurisdiction in violation of the U.S. Constitution without  
10 reaching the merits of Petitioner's claims.

11 Therefore, the Court will reach the merits of Petitioner's claim that his Fifth  
12 Amendment right to be free from double jeopardy bars his retrial on Charge I and Charge  
13 II, Specifications 1 and 4 because the Court must determine whether the military court  
14 would exceed its jurisdiction by convening the court-martial on those charges.

15 **D. Standard of Review**

16 The parties dispute the proper standard of review that the Court should apply to  
17 this habeas proceeding. *See Watada*, 530 F. Supp. 2d at 1151. This confusion most  
18 likely arose because Petitioner has been subjected to two separate court decisions: (1) the  
19 original declaration of a mistrial (AR at 1155, ln. 3), and (2) the denial of Petitioner's  
20 motion to dismiss the re-referred charges because they are barred by double jeopardy (AR  
21 at 583-589). Petitioner is requesting that this Court grant him habeas relief under 28  
22 U.S.C. § 2241. The Ninth Circuit has held that, under Section 2241, "we review factual  
23 findings with a presumption of correctness and conclusions of law *de novo*." *Hoyle v.*  
24 *Ada County*, 501 F.3d 1053, 1059 (9th Cir. 2007) (emphasis in original). Therefore, the  
25 trial court's conclusion of law that retrial would not violate Petitioner's Fifth Amendment  
26 right to be free from double jeopardy (AR at 588) will be reviewed *de novo*.

1 **IV. DOUBLE JEOPARDY**

2 Petitioner claims that convening a court-martial on the charges of missing  
3 movement and conduct unbecoming violates his constitutional right to be free from  
4 double jeopardy because the first trial ended with the declaration of a mistrial over his  
5 objection. Respondents argue that manifest necessity mandated the declaration of a  
6 mistrial.

7 **A. Fifth Amendment**

8 The Fifth Amendment provides that “[n]o person shall . . . be subject for the same  
9 offence to be twice put in jeopardy of life or limb.” U.S. Const. amend. V. Jeopardy  
10 attaches when a jury, or a panel of members in a military court, is impaneled and sworn.  
11 *Crist v. Bretz*, 437 U.S. 28, 35 (1978); *U.S. v. Jaramillo*, 745 F.2d 1245, 1247 (9th Cir.  
12 1984). Once jeopardy attaches, the accused has a “valued right to have his trial  
13 completed by a particular tribunal.” *Wade v. Hunter*, 336 U.S. 684, 689 (1949).

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

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

23 There are, however, exceptions to this general rule. “If a case is dismissed after  
24 jeopardy attaches but before the jury reaches a verdict, a defendant may be tried again for  
25 the same crime only in two circumstances: (1) if he consents to the dismissal; or (2) if the  
26 district court determines that the dismissal was required by ‘manifest necessity.’” *U.S. v.*  
27 *Bonas*, 344 F.3d 945, 948 (9th Cir. 2003). In this case, Petitioner objected to the  
28 Government’s motion for a mistrial. AR at 1154. Therefore, Respondents argue that  
“[t]he manifest necessity exception applies to this case, so retrial as to the three charges  
previously before the panel are not barred by the double jeopardy clause.” Dkt. 32 at 12.

1 **B. Manifest Necessity**

2 When a criminal prosecution has ended in a mistrial, “the prosecutor must shoulder  
3 the burden of justifying the mistrial if he is to avoid the double jeopardy bar.”

4 *Washington*, 434 U.S. at 505. “[The prosecutor’s] burden is a heavy one. [He] must  
5 demonstrate ‘manifest necessity’ for any mistrial declared over the objection of the  
6 defendant.” *Id.* There need not be an “explicit finding of ‘manifest necessity’” as the  
7 record may provide sufficient justification for the ruling. *Id.* at 516-517.

8 “A judicial determination of manifest necessity is reviewed for abuse of discretion,  
9 but the level of deference varies according to the circumstances in each case.”<sup>2</sup> *U.S. v.*  
10 *Chapman*, 524 F.3d 1073, 1082 (9th Cir. 2008) (citing *Bonas*, 344 F.3d at 948). If there  
11 is evidence in the record that the prosecution sought the mistrial for a “tactical  
12 advantage,” then the determination of manifest necessity must be reviewed with the  
13 “strictest scrutiny.” *Id.* (citing *Washington*, 434 U.S. at 508). In the alternative, the Court  
14 must apply a more deferential standard of review when the trial judge’s declaration of a  
15 mistrial is based on the judge’s “own observations and personal assessment that a fair trial  
16 would be impossible.” *Chapman*, 524 F.3d at 1082.

17 In this case, it is difficult to determine what standard applies to this case. The  
18 Government argues that “[n]o one alleges prosecutorial misconduct; thus the strictest  
19 standard of review should not be applied.” Dkt 32 at 19, n.14 (citing *Chapman*, 534 F.3d  
20 at 1082). Petitioner did not directly respond to this argument.<sup>3</sup> Regardless, the phrase

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21  
22 <sup>2</sup> The “abuse of discretion” standard seems to be in conflict with the “*de novo*” standard  
23 the Court has applied to this petition. However, “[r]eviewing courts should respect the setting in  
24 which the trial judge finds [him]self.” *U.S. v. Bates*, 917 F.2d 388, 394 (9th Cir. 1990) (citing  
25 *Washington*, 434 U.S. at 505-506). The Court, therefore, is mandated to apply the abuse of  
26 discretion standard to the declaration the mistrial.

27 <sup>3</sup> Petitioner claims that “the Government [is] re-hashing well-plowed territory” because  
28 the Court has already found that the military trial judge had abused his discretion. Dkt. 38 at 13-  
17. It is presumptuous of Petitioner to state that the Court is bound by a discussion of likelihood  
of success on the merits when it is considering *actual* success on the merits. A preliminary  
injunction is not a dispositive order of the Court as it only provides limited relief pending an

1 “tactical advantage” is not necessarily “prosecutorial misconduct” as Respondent  
2 suggests. *See Washington*, 434 U.S. at 508 (“the strictest scrutiny is appropriate when the  
3 basis for the mistrial is the unavailability of critical prosecution evidence”).

4 **1. The Prosecution’s Evidence**

5 When evaluating the unavailability of evidence, “[e]ach case must turn on its  
6 facts.” *Downum v. United States*, 372 U.S. 734, 737 (1963). In *Downum*, when the first  
7 trial began, the prosecution allowed the jury to be sworn even though a key witness was  
8 absent and his whereabouts unknown. *Id.* at 735. In finding a double jeopardy violation,  
9 the Supreme Court reasoned that the prosecutor had taken “a chance” in allowing the jury  
10 to be empaneled without confirmation of his witness’s presence. *Id.* at 737 (quoting  
11 *Cornero v. United States*, 48 F.2d 69, 71 (9th Cir.1931)). “There is no difference in  
12 principle between a discovery by the district attorney immediately after the jury was  
13 impaneled that his evidence was insufficient and a discovery after he had called some or  
14 all of his witnesses.” *Id.* “[W]hen a jury is discharged because the prosecution is not  
15 ready to go forward with its case, the accused may not then be tried before another jury.”  
16 *Howard v. U.S.*, 372 F.2d 294, 299 (9th Cir. 1967).

17 In this case, the trial judge rejected the Stipulation of Fact after the Government  
18 had rested but before Petitioner had begun to present his case. The court-martial was  
19 called to order at 1543 on February 6, 2007 and the Government’s counsel stated that “at  
20 this time the government rests.” AR at 1133. The judge inquired “[y]ou have no more  
21 evidence to present at this time?” *Id.* Counsel responded: “That’s correct, Your Honor.”  
22 *Id.* The court-martial was then recessed and called to order the next morning at 1043. *Id.*  
23 at 1134. The members of the panel did not hear any evidence between the time the  
24 Government rested and the Government’s motion for a mistrial. *See id.* at 1134-54. The  
25 motion for a mistrial and declaration of a mistrial proceeded as follows:

26  
27 \_\_\_\_\_  
28 outcome on the merits.

1 [MILITARY JUDGE]: Government, what's your druthers? At this  
2 point, I certainly entertain a motion for a mistrial and I'll set a new trial  
3 date. . . . What we're left with is I can instruct the members, if the  
4 government wishes to go forward. I know the government does not have all  
5 of their witnesses that they would have called for the other offenses. So,  
6 government, what's your choice?

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

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

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

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

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

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

15 *Id.* at 1154.

16 Although Respondents argue that the publication of the Stipulation of Fact  
17 irreparably tainted the panel (*see* Dkts. 11 at 18-23 and 32 at 19-24), the trial judge never  
18 stated that irreparable taint was the basis for his declaration of a mistrial. *See* AR at  
19 1134-60. The trial judge did, however, ask the government if it "wish[ed] to request a  
20 mistrial because at this point we don't have evidence on every element?" *Id.* at 1152.  
21 The judge also stated that "since the government has no evidence at this point a mistrial  
22 would be in order." *Id.* at 1139. In other words, the trial judge was under the impression  
23 that a lack of evidence warranted a mistrial. Moreover, it is clear from the record that the  
24 Government was provided an opportunity to reopen its case and continue the court-  
25 martial with a curative instruction to the members. Respondents offer no explanation of  
26 why the trial judge offered the government the opportunity to proceed with the court-  
27 martial if he believed that the panel was irreparably tainted.

28 The Government's reluctance to reopen its case leads to the inference that it  
moved for a discharge of the panel because it was unable to proceed with its case. While  
not dispositive of this issue, it should be noted that Respondent Head concluded that the  
Government was at a "severe tactical disadvantage" after he rejected the Stipulation of

1 Fact at the court-martial.<sup>4</sup> AR at 587. Although the severity of any disadvantage may be  
2 debated, the bearer of the risk of that disadvantage may not be the petitioner, because  
3 respondents shoulder the burden of justifying the mistrial over a petitioner's objection.  
4 *See Washington, supra.* The Government began the court-martial under the assumption  
5 that the Stipulation of Fact would be accepted. The trial judge subsequently rejected the  
6 stipulation and offered the Government a chance to proceed with its case. Instead of  
7 accepting that opportunity, the Government moved for a mistrial and a discharge of the  
8 panel. The Government most likely declined to proceed with its case because it was  
9 under the assumption and expectation that it would be allowed to correct its significant  
10 reliance on the Stipulation of Fact in another court-martial of Petitioner. The  
11 Government, however, does not get such opportunity if it amounts to double jeopardy.

12 There is evidence in the record that the trial judge declared a mistrial over  
13 Petitioner's objection because the prosecution lacked evidence to proceed with its case.  
14 *See AR at 1134-60.* In that circumstance, the Court should review the judicial  
15 determination of a manifest necessity to declare a mistrial with the strictest scrutiny. *See*  
16 *Washington, supra.* Under that test, Respondents have not shown that the inability of the  
17 Government to either call witnesses or present other evidence necessitated a mistrial. A  
18 delay may have been in order, but the Government is not entitled to a second opportunity  
19 to perfect its case. The record does not reflect that there was a manifest necessity for the  
20 trial judge to declare a mistrial. Therefore, the Fifth Amendment bars Petitioner's retrial  
21 on Charge I and Charge II, Specifications 1 and 4.

## 22 **2. The Judge's Observations**

23 In the alternative, the Court also finds that there was not a manifest necessity for  
24 the trial judge to declare a mistrial, even under the more deferential standard of review.  
25

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26  
27 <sup>4</sup> Respondent Head declared the mistrial and he issued the findings of fact, conclusions of  
28 law, and order denying Petitioner's motion to dismiss based upon double jeopardy. *See AR at*  
362 ("I was the original trial judge in this case.").

1 “Under this deferential standard of review, [the reviewing Court] must ensure that  
2 the [trial judge] exercised ‘sound discretion.’” *Chapman*, 534 F.3d at 1082. (citing *Bates*,  
3 917 F.2d at 394). A reviewing court should focus on the procedures employed by the  
4 trial judge in reaching his determination of manifest necessity by considering whether the  
5 trial judge “(1) heard the opinions of the parties about the propriety of the mistrial, (2)  
6 considered the alternatives to a mistrial and chose [ ] the alternative least harmful to a  
7 defendant’s rights, [and/or] (3) acted deliberately instead of abruptly. . . .” *Id.* In this  
8 case, the procedures employed by the trial judge do not satisfy any of these considerations  
9 for an exercise of sound discretion.

10 **i. Propriety of a Mistrial**

11 Respondents claim that the “administrative record illustrates how the military  
12 judge went to great lengths to hear the opinions of the parties about the propriety of a  
13 mistrial over a four hour period.” Dkt. 32 at 30 (citing AR at 1139-41, 1150-54). This  
14 statement is not entirely accurate because during that four-hour period the majority of the  
15 discussions focused on the acceptance or rejection of the Stipulation of Fact. The result  
16 of those conversations was that the judge decided to reject the Stipulation of Fact and  
17 believed that Petitioner was, therefore, in breach of the pretrial agreement. AR at 11-52-  
18 54. There were only a few conversations regarding the propriety and effects of the judge  
19 declaring a mistrial. *See id.* at 1139, 1154. In fact, when Petitioner’s counsel informed  
20 the judge that “jeopardy has attached, and it may very well be that the retrial is  
21 impermissible,” the judge responded that, upon the declaration of a mistrial, he “would  
22 set the [new] trial date and what actions you take with any superior court is well within  
23 what you want to.” *Id.* at 1139. The constitutional cut-off point for retrial is when  
24 jeopardy attaches, which is usually when the members of the court are empaneled. It is  
25 not the exercise of sound discretion to fail to consider this constitutional right by  
26 instructing the accused to take his arguments elsewhere.

1 Further, in his order denying Petitioner's motion to dismiss, Respondent Head  
2 seems to have been fully aware of "the accused desire and interest in having the trial  
3 concluded in a single proceeding." AR at 587. Respondent Head then proceeded to  
4 outline numerous facts and hypothetical scenarios that weigh for and against the  
5 declaration of a mistrial. *Id.* This suggests that he was aware of the significance of  
6 declaring a mistrial after the members had been empaneled. The record of the court-  
7 martial, however, reflects that Respondent Head neither placed these considerations  
8 before the parties before declaring a mistrial nor allowed the parties an opportunity to be  
9 heard as to the propriety of a mistrial in light of those considerations. An after-the-fact  
10 justification cannot support an after-the-fact finding by Respondent Head that his  
11 determination of a mistrial was an exercise of sound discretion.

12 **ii. Considered Alternatives to a Mistrial**

13 The consideration of a mistrial is usually triggered by a jury improperly hearing or  
14 receiving evidence. Thus, the first step in considering an alternative to declaring a  
15 mistrial is to determine or make a finding as to what must be corrected. The record does  
16 not reflect that the trial judge adequately ascertained the magnitude of the harm that was  
17 created, if any there was, by rejecting the Stipulation of Fact. Respondents claim that the  
18 trial judge "made it clear that he believed the trial could not continue because it would be  
19 impossible to obtain a fair verdict with a tainted panel." Dkt. 22 at 36. The judge did ask  
20 the government that, if the court-martial continued, the panel would be instructed to  
21 disregard the Stipulation of Fact in its entirety and "the problem we have is . . . how are  
22 we going to unring that bell?" AR at 1153. The only bell that was rung, however, was  
23 that the panel had heard facts that Petitioner had conceded. Petitioner's concession of  
24 facts, however, seems to have been entirely consistent with his theory of the case.

25 Regardless, the panel possessed the ultimate authority to return a verdict whether the  
26 evidence before them was an admission of guilt or a concession of specific facts. The  
27 judge was aware of this when he accepted the stipulation because he informed Petitioner  
28

1 that the “members will use it to determine if you are, in fact, guilty to the offenses to  
2 which the stipulation relates.” Thus, while the stipulation could have been used to find  
3 guilt, it was not, in fact, a determination of guilt. The record does not reflect that, at the  
4 time the judge rejected the Stipulation of Fact, the panel was irreparably tainted. As such,  
5 the error, if any, may have been remedied.

6 The record reflects that the trial judge only considered one alternative to a mistrial,  
7 which was a curative instruction to the panel. *See* AR at 1154 (“What we’re left with is I  
8 can instruct the members”). It has already been noted that Respondent Head developed  
9 numerous alternatives to a mistrial in his subsequent denial of Petitioner’s motion to  
10 dismiss. *See supra*; *see also* AR at 587-88. None of these alternatives appear on the  
11 record of the court-martial. Moreover, the judge failed to ask the parties if they were  
12 aware of possible alternatives. The failure to develop the record as to possible  
13 alternatives is a strong suggestion that they were not adequately considered by the trial  
14 judge before the mistrial was declared.

15 **iii. Acted Deliberately Instead of Abruptly**

16 Respondents claim that the trial judge acted deliberately because, “[f]rom 10:30 in  
17 the morning to 2:00 in the afternoon, the court struggled with the possibility of a  
18 mistrial.” Dkt. 32 at 22. The parties, however, used that time to mostly discuss the  
19 acceptance or rejection of the Stipulation of Fact. *See supra*. Once the government  
20 moved for a mistrial, the motion was granted without any inquiry or discussion. *See* AR  
21 at 1154-55. The record reflects that the judge considered the Government’s lack of  
22 evidence a sufficient reason for a mistrial when he informed the Government that he  
23 “would entertain a motion for a mistrial.” *Id.* at 1154. Once the motion was presented,  
24 the judge granted it over Petitioner’s objection and immediately moved to setting the new  
25 trial date. *Id.* at 1154-55. This was not the exercise of sound discretion in that the judge  
26 abruptly granted the motion for a mistrial without considering either the propriety of a  
27 mistrial, alternatives to a mistrial, or the repercussions of a mistrial.

1 Therefore, under the more deferential standard of review, the trial judge did not  
2 exercise sound discretion in reaching his judicial determination that a mistrial was  
3 required because the judge did not employ adequate procedures in reaching that  
4 determination. The record does not reflect that there was a manifest necessity for the  
5 declaration of a mistrial.

6 **C. Conclusion on Double Jeopardy**

7 The strictest scrutiny should be applied to the trial judge's determination because  
8 the record reflects that the Government moved for a mistrial on the basis that it was  
9 unable to proceed with its case. In the alternative, the judge did not exercise sound  
10 discretion when he failed to engage in a procedurally adequate development of his  
11 determination that a mistrial was appropriate. Under either level of review, the record  
12 does not reflect that there was a manifest necessity to declare a mistrial over Petitioner's  
13 objection. As a result, the Government is barred from retrying Petitioner on Charge I and  
14 Charge II, Specifications 1 and 4, because it would violate Petitioner's Fifth Amendment  
15 right to be free from double jeopardy.

16 **V. ORDER**


17 Therefore, it is hereby

18 **ORDERED** that Petitioner's Second Amended Petition for Writ of Habeas Corpus  
19 (Dkt. 25) is **GRANTED in part** and **DENIED in part** as follows:

20 1. Petitioner's claim that the military court is without jurisdiction to convene a  
21 court-martial on Charge I – Missing Movement and Charge II – Conduct Unbecoming an  
22 Officer and a Gentlemen, Specifications 1 and 4, is **GRANTED** and the military court  
23 may not convene a court-martial against Petitioner on these charges; and

24 2. The remainder of Petitioner's claims are **DENIED without prejudice**.

25 DATED this 21<sup>st</sup> day of October, 2008.

26   
27 BENJAMIN H. SETTLE  
28 United States District Judge