



6. A hearing on the “Nuernberg defense” would consist of witnesses who would testify that the war in Iraq was a crime against peace, a war of aggression, and a violation of the United Nations Charter, other international law, and U.S. law. The accused would testify that his refusal to go to Iraq was based upon the belief that he would be committing war crimes because the United States was involved in a war of aggression and a crime against peace.

## **I. Conclusions of Law.**

1. The defense moves the court to allow testimony at a motion hearing and then at court that the conflict in Iraq is unlawful thus making the deployment order unlawful. The government seeks to prevent this testimony and additionally to prevent the accused from introducing evidence of his motive for missing the movement. Finally, the government requests the court to decide, as an interlocutory matter, the lawfulness of the order to deploy.

2. The question of the lawfulness of an order is an interlocutory matter for the judge to decide. United States v. New, 55 M.J. 95, 105 (2001). The order to deploy soldiers is a nonjusticiable political question. Id. at 109. Further, the Court of Military Appeals, now Court of Appeals for the Armed Forces, wrote “an accused may not excuse his disobedience of an order to proceed to foreign duty on the ground that our presence there does not conform to his notions of legality.” United States v. Johnson, 17 U.S.C.M.A. 246, 38 C.M.R. 44, 45 (1967). Applying the law to the facts of this case, the issue of whether the Iraq war is lawful is a nonjusticiable political question.

3. An order issued by a superior to a subordinate is presumed lawful if:

The order ... relate[s] to military duty, which includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with the maintenance of good order in the service. The order may not, without such a valid military purpose, interfere with private rights or personal affairs. . . . Disobedience of an order . . . which is given for the sole purpose of increasing the penalty for an offense which it is expected the accused may commit, is not punishable under this article.

Paragraph 14c(2)(a)(iii), Part IV, Manual for Courts-Martial, United States (2005 ed.). See also, Unger v. Ziemniak, 27 M.J 349, 359 (C.M.A. 1989).

The defense bears the burden of overcoming the presumption of lawfulness. United States v. Hughey, 46 M.J. 152, 154 (1997). The defense has presented no evidence other than their “Nuernberg defense” proffer. The defense has failed to meet their burden. Even had the defense been granted the full hearing they requested, the decision would be no different. The evidence proffered all went to a nonjusticiable political question or to a motive not to make the movement, which, as discussed below, is irrelevant.

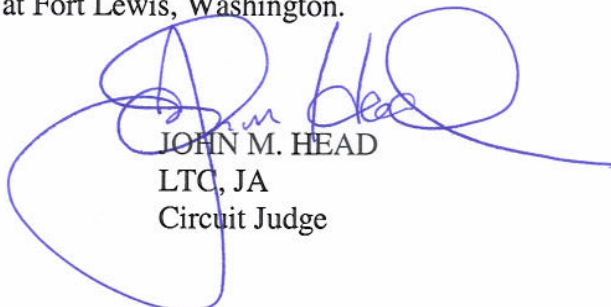
4. The elements of missing movement under Article 87, UCMJ are:

- (1) That the accused was required in the course of duty to move with a ship, aircraft or unit;
- (2) That the accused knew of the prospective movement of the ship, aircraft or unit;
- (3) That the accused missed the movement of the ship, aircraft or unit; and
- (4) That the accused missed the movement through design or neglect.

Paragraph 11(b) Part IV, Manual for Courts-Martial, United States (2005 ed.). The accused's motive not to deploy and his belief about the lawfulness of the Iraq war are not elements of the offense. Motive is, therefore, irrelevant on the merits. United States v. Huet-Vaughn, 43 M.J. 105, 114-115 (1995).

**Ruling of the Court: The defense motion for a hearing on the "Nuernberg defense" is DENIED. The government motion to prevent the defense from presenting evidence on the legality of the war is GRANTED. The government motion to prevent the defense from introducing evidence of the accused's motive not to deploy is GRANTED. Further, I find by a preponderance of the evidence, the order to deploy, if given, was LAWFUL.**

Done this 16<sup>th</sup> day of January 2007 at Fort Lewis, Washington.



JOHN M. HEAD  
LTC, JA  
Circuit Judge