

No. _____

IN THE SUPREME COURT OF THE
UNITED STATES

Jian-yun (John) Dong - PETITIONER

vs.

The United States of America,
U.S. Attorney's Office, South Carolina Division - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS FOR THE FOURTH
CIRCUIT
CASE NO. 17-4728

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Briefly, an Agent of Defense Criminal Investigation Service of the Inspector General's Office of the Department of Defense obtained the search and seizure warrant under the color of law enforcement, and solely conducted the investigation, grand jury indictment and bringing charges against the Petitioner, a civilian, in this campaign contribution violation case without the approval of FEC. Appellant was convicted and sentenced for imprisonment. Upon appeal, the Appellate Court affirmed the conviction, ruling that military conduct civilian law enforcement without jurisdiction and in violations of Posse Comitatus Act and the federal statutes "are defects in instituting prosecution must be raised before trial," and "provide no remedy," and only repeated violations may be considered for a "special sanction of judicial deterrent." The rulings on PCA violations are inconsistent and contradicting among nearly every circuit of the court of appeals.

1. Does the Third Amendment of the Constitution afford people the protection from military intrusion into civilian affairs, such as investigation and bringing charges against civilians for a political contribution violation?
2. Does the provision of prohibiting the use of military as a posse comitatus in law enforcement proscribed in the Posse Comitatus Act, 18 U.S.C. §1385 and Domestic Security Act, 6 U.S.C. §466 deprive the military of jurisdiction in investigation and prosecution of civilians?
3. Does Congress enact the Statutes 18 U.S.C. §1385, 6 U.S.C. §466 as jurisdiction removal rules?

4. Is it constitutional to punish a defendant for a violation committed by a co-defendant, such as the amount of the campaign contribution made by another person?

5. Is the appellate court's standard ruling unlawful that violations of Posse Comitatus Act (PCA) and its statutes "provide no remedy" for the victim of the violation, and these laws may be violated **repeatedly** before the court to consider the "possibilities" for "the special sanction of a judicial deterrent"?

LIST OF PARTIES

1. PETITIONER

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2. RESPONDENT

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**IN THE SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI**

**Petitioner respectfully prays that a writ of certiorari issue
to review the judgment below.**

OPINIONS BELOW

The Opinion of the United States Court of appeals for the fourth circuit appears at Appendix A to the petition as is reported at LEXIS 9742 (4th Cir. 2018).

The opinion of the United States district court is reported at _____.

JURISDICTION

The date on which the United States Court of Appeals decided my case was April 18th, 2018

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: on June 7th, 2018, and a copy of the order denying rehearing appears at Appendix B.

The jurisdiction of this Court is invoked under 28 U.S. C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional:

- 1. The First Amendment of the Constitution**
Freedom of Speech
- 2. The Third Amendment of the Constitution**
Free of military intrusion in civilian affairs and enforcement of law
- 3. The Fourth, Fifth, and Sixth Amendment of the Constitution**
Due Process Clause

Statutory:

1. Posse Comitatus Act, 18 U.S.C. §1385

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully use any part of the Army or the Airforce as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years or both.

2. Domestic Security Act, 6. U.S.C. §466 (2002)

(a) Section 1385 of title 18, known as Posse Comitatus Act prohibits the use of the Armed Forces as a posse comitatus to execute the laws except in cases and under circumstances expressly authorized by the Constitution or Act of Congress.

(b) Congress reaffirms the continued importance of section 1385 of title 18, United States Code, and it is the sense of Congress that nothing in this Act should be construed to alter the applicability of such section to any use of the Armed Forces as a posse comitatus to execute the laws.

STATEMENT OF THE CASE

The Third Amendment of the Constitution affords citizens of the United States the protection from military intrusion in civilian affairs. Congress enacted Posse Comitatus Act (PCA) and federal statutes prohibiting military from participation of law enforcement. However, the incidences of military participated law enforcement have increased dramatically since the establishment of variable Criminal Investigation Services of Department of Defense (DoD) under the Inspector General Act (IGA). The question of PCA violation has been raised repeatedly in nearly every Circuit of the appellate courts, and resulted in contradicting or inconsistent rulings and resulted "disastrous consequences for the Constitution".

"For a court to uphold a claim to such extraordinary power [of using military for civilian law enforcement] would do more than render lifeless the Suspension Clause, the Due Process Clause, and the rights to criminal process in the Fourth, Fifth, Sixth, and Eighth amendments; it would effectively undermine all the freedoms guaranteed by the Constitution." Judge Motz, Fourth Circuit.

The current case exemplifies this Constitutional disaster because it is unprecedented that the entire investigation and prosecution of a civilian for a campaign contribution violation are solely conducted by a military agent of the Inspector General's Office of the Department of Defense (DoD) without jurisdiction and in blatant violation of PCA and its statutes, and the lower courts, inter alia, granted the awesome power to the government to use the military as a posse comitatus for enforcing the political contribution laws, and made a mockery of the Acts of Congress and the First and the Third Amendments of the Constitution.

It is also unprecedented that the prosecutors, led by the Deputy Director of the Civil Division of the U.S. Attorney's Office used a military agent to investigate and bring criminal charges against the Petitioner based on a qui tam lawsuit in order to achieve the financial goals of the civil litigation under the False Claim Act (FCA). By confirming the conviction, the Fourth Circuit made meaningless of the Due Process Clause assured by the Fourth, Fifth, and the Sixth Amendment of the Constitution.

The Petitioner, Jian-Yun (John) Dong, M.D., Ph.D., 61 year old, is a first-generation immigrant, who considers himself "escaped from the communist China" in early 1984, and has become a "proud American citizen." Dr. Dong (Petitioner) was a tenured professor at the Medical University of South Carolina (MUSC). In 1999, MUSC and a group of private investors established a biotechnology company, GenPhar, Inc.. On behalf of MUSC, Dr. Dong served as the technology founder and Chief Scientific Officer for GenPhar, Inc.

GenPhar was dedicated to serve the US Military and the National Institute of Health (NIH) in developing vaccines and therapies against deadly biological weapons and lethal infectious diseases, such as Ebola, Marburg, and Dengue hemorrhagic fever viruses. GenPhar is privately owned and financed by the 120 private investors, who collectively invested about thirteen million dollars (\$13 million) into GenPhar, during 1999-2010, to support the research and development of these vaccines for the Military and NIH.

By the end of 2009, GenPhar had completed all its contracted research work SUCCESSFULLY AND SATISFACTORILY to the Army, Navy, and NIH, and obtained "excellent" or "outstanding" evaluations in every category of the performance and was awarded additional contracts to advance these successful vaccines to clinical trials.

In early 2009, two disgruntled short-term and entry-level employees filed a *qui tam* lawsuit under the False Claim Act (FCA) alleging that GenPhar made false claims in contract proposal or progress reports, and made changes in research procedures in order to use fund to build a building, which in fact, is a research facility essential for the vaccine developments for the Government Agencies.

The Relator's attorney, Mr. Joseph Griffith, Jr. is an ex-U.S. Attorney of South Carolina. Mr. Griffith was able to file the *qui tam* lawsuit through his previous subordinate, Ms. Jennifer Aldrich, the Deputy Director of the Civil Division of the U. S. Attorney's Office. Based on court documents, Ms. Aldrich brought

in Larry Leonard, a Military Agent of the Office Inspector General of the Department of the Defense (DOD) to conduct the initial investigation. After more than four months of investigation, Agent Leonard failed to find any evidence of false claims, but obtained the information from the Relator, John Johnston, that he and a few other GenPhar employees made political contributions with money given them as gift from Dr. Wang, the Vice President for Research and Development of GenPhar and Dr. Dong. At the request of Civil AUSA, Ms. Aldrich, Agent Leonard obtained a search warrant by falsely claiming his law enforcement authority and alleging that Dr. Dong and GenPhar committed theft and embezzlement of the research contract fund awarded to GenPhar for the vaccine research without any factual basis.

Military Agent Leonard brought a teams of military agents and conducted the search and seizure of GenPhar and removed all GenPhar's operational and financial documents, interrogated GenPhar employees and effectively shut down the operations of the company while the research teams of the army, navy and NIH

were in the process to award GenPhar additional contracts for the further developing the badly needed vaccines based on GenPhar's "exceptional success." Navy Capt. Dr. Kevin Porter

Under the color of law enforcement, the Military Agent played the central role in investigation, grand jury indictment and prosecution of Dr. Dong for the political contribution violation. At the trial, Agent Leonard disclosed his true identity for the first time to the defense, that he is a Special Agent of the Defense Criminal Investigation Service (DCIS) of the Inspector General Office of the DoD, not really a FBI agent, but claimed that he has the authority to investigate civilians for "any crime against the DoD" and had "extensive experience" in investigating civilians.

Two years after the indictment, Dr. Dong was convicted on February of 25th, 2013 for conspiracy of making contribution in the name of others under 18 U.S.C. §371 and §441(f), under a "lower standard" as referred by the presiding judge. At the insistence of the prosecutors, the judge agreed to instruct the jury with the "lower standard" that "knowingly and willfully violate

Federal Election Commission Act (FECA)" means "knowing and willfully contribute over the limit." However, the judge promised that "if the verdict come back with a 'guilty,' I would re-instruct the jury with the 'heightened standard' the person has to know the FEC law to violate it [in the case of campaign contribution]." However, at the end of the trial, the judge allowed the jury to enter verdict under the "lower standard" and did not re-instruct jury with the "heightened standard," but concluded the trial by stating that "the campaign laws are so complicated, and I need to do some study myself to make my decision."

Court Records show that the trial was interrupted for the judge's undisclosed emergent health issues, and the judge clearly show signs of failing health and lack of energy during the trial. After the trial, Dr. Dong submitted a Motion for Dismissal or New Trial due to PCA violation. After the hearing, the judge recused himself due to the health reasons but ordered the government to submit a proposed order for the Motion. The judge denied the defense motion by simply signing the government proposed Order

which cited rulings from the Fourth Circuits that (1) military is allowed to assist law enforcement, (2) the motion is untimely, and (3) violations of PCA provide no remedy for the defendant.

The sentencing hearing was conducted two and half years after the trial, and after the judge went through chemo-therapies for his pancreatic cancer (the judge deceased a few months later). The judge clearly showed signs of faded memory and failing health, but determined to finish his case before his final retirement. The judge completely relied on the pre-sentence report (PSR) for the sentence. The PSR erroneously combined the amounts of the campaign contribution made by two parties, at \$8,000 each, into \$16,000 and assigned the entire amount to Dr. Dong in order to push the amount contribution over the \$10,000 threshold for a felony offense, instead of a misdemeanor for under \$10,000. The PSR further erroneously stated the guideline as 5 year imprisonment, 3 year supervised release and not eligible for probation on each count of violation of §371 and §441(f), instead of the correct guideline for no more than 1 year imprisonment as a

misdemeanor. Based on the erroneous PSR, the judge sentenced Dr. Dong to a term of 18 months imprisonment and 3 year supervised release, and did not announce any of reasons.

On appeal to the Fourth Circuit, Dr. Dong's court-appointed attorney raised the issues that (1) Military Agent violated the PCA and federal statutes by obtaining the search warrant posing as a law enforcement officer and solely and directly conducted the search and seizure, and interrogation, and prosecution of the civilians, (2) the government failed to obtain a referral from the Federal Election Commission (FEC) who has the exclusive jurisdiction over campaign finance violations, and (3) the sentence was based on erroneous guidelines.

The government filed the Response claiming that (1) Military Agent of DCIS is specifically exempted by Congress from PCA by knowingly taking phrases out of context from IGA which clearly limits the DCIS investigative authority within the DoD--an department of the Executive Branch of the Government, and (2) Even if PCA is violated, the motion was untimely.

Dr. Dong filed a timely Reply pointing out that (1) Military Agent is prohibited from participation in law enforcement by PCA and therefore, does not have the jurisdiction in investigation and bringing charges against a civilian, especially for political contribution matter that is protected by the First Amendment of the Constitution; (2) PCA is an jurisdiction removal rule violate which strips the jurisdiction of the district court; (3) the prosecutor did not acquire the jurisdiction from FEC without a formal referral of the FEC, the district court acted without subject matter of jurisdiction (4) both the prosecutor and the court constructively amended the indictment and broadened the possibility of a conviction, and (5) the sentencing is based on erroneous guidelines. Appendix C.

The appellate court directed parties to submit a supplement brief to specifically address the sentence. After consulting the the government, Dr. Dong's court-appointed attorney only addressed the erroneous guidelines, but failed to include the issue that the government illegally added the amount of contribution

independently made by Dr. Wang to those of Dr. Dong in order to make Dr. Dong's contribution to pass the threshold of \$10,000 for a felony offense, instead of the misdemeanor.

Dr. Dong timely filed a supplemental Brief pro se that raised the issue that the government illegally added the amount of contributions by another party to those of Dr. Dong and a motion to moot the brief filed by counsel. Appendix D.

The Government filed a Response quickly conceding the guideline was incorrect.

The District Court ruled, inter alia, that (1) military can assist law enforcement, (2) the investigation and prosecution solely conducted by the military is not a jurisdictional defect, but a "defect in instituting a prosecution must be raised before trial," (3) PCA violation provides no remedy for the defendant but only to punish the transgressor, (4) "we reserve the possibility of remedies for a the offender 'should repeated cases involving military enforcement of civilian laws demonstrate the need for the special sanction of a judicial deterrent,'" and therefore, inter alia,

legitimize the use of military as a posse comitatus for law enforcement in violations of the PCA, federal statutes and the Third Amendment of the US Constitution. The court declined to address any of the issues raised by Dr. Dong, pro se. Appendix A. Dr. Dong filed a timely Motion for Rehearing or En Banc Hearing and identified substantial legal and fact issues missed by the appellate court. Appendix E.

The court denied the Motion for Rehearing without stating a reason on April 15th, 2018. Appendix B.

REASONS FOR GRANTING THE PETITION

The Supreme Court has been long held that military control cannot subsume the constitutional rights of civilians, and repeatedly catalogued our country's "deeply rooted and ancient opposition..to the extension of military control over civilians," and "a traditional and strong resistance of Americans to any military intrusion into civilian affairs" that is "firmly embodied in the Constitution"--" of keeping military power subservient to civilian

authority." Reid, 354 U.S. at 33, 40; Laird v. Tatum, 408 U.S. 1, 15, 92 S. Ct. 2318, 33 L.Ed. 2d 154 (1972) (Burger, C.J.)

However, the incidences of military-participated civilian law enforcement have increased dramatically, since the Department of Defense (DoD) established various criminal investigative services under Inspector General Act. The question of Posse Comitatus Act (PCA) violations has been raised numerous times and resulted in inconsistent and contradicting rulings among nearly all circuits of federal appellate court. This case, however, exemplified the problem by the unprecedented expansion of military intrusion into civilian law enforcement, because the military **solely and directly** conducted the entire investigation and prosecution of the civilian for an activity that has no nexus to the operations of the military, but protected by the First Amendment of the Constitution.

In this case, the agent of Defense Criminal Investigation Service (DCIS) of DoD obtained the warrant under the color of law enforcement, actively and directly conducted the search and seizure, interrogation, and brought charges against the civilians,

and played the central role during the entire prosecution of the civilian for a political contribution violation. However, the lower courts have ruled that "military is allowed to assist investigation of civilians" and the lack of jurisdiction and violations of the prohibition of military intrusion of civilian affairs and people's constitutional right are "defects in instituting a prosecution must be raised before trial" and such violation afford "no remedy" for the victim, but only to "punish the transgressor." Worst of all, the Fourth Circuit has established the standard that PCA and its statutes may be violated "repeatedly" the court only reserve the "possibility" when such a "need" is show for a "special sanction for a judicial deterrence." If left uncorrected, this case will establish a dangerous precedent allowing the unrestricted use of military as a posse comitatus for civilian law enforcement in blatant violations of federal statutes and the people's entitlements of free of military intrusion and Due Process Clouse afforded by the Third, the Fourth, the Fifth and the Sixth Amendments of the Constitution. It will also set the precedent to allow federal courts,

in the effect, to break the "Nation's tradition that firmly embodied in the Constitution" and to abolish the PCA and substantial federal statutes enacted by Congress.

These substantial issues raised here have never been reviewed by the Supreme Court. Granting this petition is necessary to resolve the inconsistent and contradicting rulings among nearly every federal appellate court, including the Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, Eleventh and the DC Circuit, and even within some circuits due to the lack of guidance of the Supreme Court. If this erroneous ruling by the Fourth Circuit is left uncorrected by the Supreme Court, it would legitimize the federal courts to award the prosecutors and the military the awesome power to violate the Act of Congress and the US Constitution at will. It would have

"disastrous consequences for the Constitution-- and the country. For a court to uphold a claim to such extraordinary power of the military would do more than render lifeless the Suspension Clause, the Due Process Clause, and the rights to a criminal process in the Fourth, Fifth, Sixth and Eighth Amendments; it would effectively undermine all the freedoms guaranteed by the Constitution. It is the power--

were a court to recognize it-- that would lead all our laws 'to go unexecuted and the government itself to go to pieces,' (President Lincoln). [This Court] should refuse to recognize a claim to power that would so alter the constitutional foundations of our Republic"

The first step toward a military dominated government. Al-Marri, 534 F.3d 213 at 253-4 (4th Cir. 2007) (denying the President's power in using military to detain civilians as "enemy combatants.")

The erroneous rulings of the Fourth Circuit in the current case are substantial errors and contradicting to Congressional intention, and exacerbate the confusions of the contradicting rulings among, and even within, the circuit courts.

I. The Third Amendment of the Constitution and Posse Comitatus Act prohibit military intrusion in civilian affair and deprive the military of the Jurisdiction in civilian law enforcement.

A. The District acted without subject-matter jurisdiction when DCIS of DoD is prohibited from direct participation of law enforcement by PCA and Federal Statutes and does not have the jurisdiction to investigate and to bring charges against a civilian.

Posse Comitatus Act (PCA) is rooted in the Third Amendment of the Constitution that prohibits military intrusion

into civilian affair. Congress further strengthened PCA by enacting a series of federal statutes, 18 U.S.C. §1385 (2012), 6 U.S.C. §466 which explicitly prohibit and criminalize the use of any member of the military for civilian law enforcement.

PCA provides:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.

By enacting 18 U.S.C. §1385 Congress makes it abundantly clear that PCA applies to all members of the military, including the civilian employees of the DoD and cannot be circumvented, except where is authorized by the Constitution or Act of Congress.

In Domestic Security Act (DSA) 6. U.S.C. §466 (2002) Congress further established that "Sense of Congress reaffirming the continued importance and applicability of the Posse Comitatus Act." §466(a)(1) provides "Posse Comitatus Act prohibits the use of any part of the Armed Forces as a posse comitatus to execute

the laws," and (a)(4) and (5) provides: the exceptional circumstances are "when the use of the Armed Forces is authorized by Act of Congress or the President determines that the use of the Armed Forces is required to fulfill the President's obligation under the Constitution to respond promptly in time of war, insurrection, or other serious emergency" such as " an attack against the Nation using weapons of mass destruction." §466(b) provides: "Congress reaffirms the continued importance of section 1385 of title 18," and "it is the sense of Congress that nothing in this act should be construed to alter the applicability of such section to any use of the Armed Forces as a posse comitatus to execute the laws."

Under the Mandate of Congress, DoD issued Directives, specifically prohibited any member of the military, including civilian employees of the DoD, from direct participating law enforcement activities, specifically include "search and seizure, interrogation, arrest..."

In this case, it is an undisputed fact that a rogue Agent of DCIS under the direction of the prosecutor obtained the search

warrant under the color of law enforcement, and solely, directly conducted the investigation, indictment, and prosecution of the civilian. DCIS is the criminal investigation arm of the DoD, and Agents of DCIS are military officers of the DoD. By definition, DCIS does not have the jurisdiction or authority in civilian law enforcement and is prohibited by federal statutes and Act of Congress from directly investigating, indicting and making referral of civilian cases to DOJ for criminal prosecution. When the prosecutor dose not have the jurisdiction to prosecute charges brought by the military, and cannot firmly prove its jurisdiction, consequently the district court cannot acquire a competent subject-matter jurisdiction. The Supreme Court has long established that "when a court lacks subject-matter jurisdiction or an error occurs in that regards, it nullifies All the proceedings taken by the court" Re Bonner v. U.S. 151 U.S. 242, 14 S. Ct. 323, 38, L.Ed. 149, 151 (1893). When a objection to a court's subject matter jurisdiction is made, "the government bears the burden of proving jurisdiction" U.S. v. Denedo, 556 U.S. 904, 173 L.Ed. 2d 1235 (2009) "A

judgment may be void if a court usurps power, acts in a way inconsistent with due process or lacks of subject-matter jurisdiction." *United Students Aid Funds, Inc. V. Espinosa*, 559 U.S. 260, 130 S. Ct. 1367, 176 L. Ed. 2d 158 (2010).

In contrary to the laws, the Fourth Circuit has in this case and a series of other cases ruled that "military is allowed to assist civilian law enforcement," and ruled that the lack of jurisdiction of military in investigating and prosecuting a civilian for campaign contribution irregularity is a "defect[] in instituting the prosecution must be raised before trial," and further ruled that even if PCA is violated there is no remedy for the victim of the violation, "[b]y its terms, the remedy for a violation of the PCA is not to dismiss the criminal charges against the offender or reverse his convictions but to hold the transgressor criminally liable." citing *U.S. v. Walden*, 490 F. 2d.. 372, 376 (4th Cir. 1974). This is a further expansion from the Johnson stating that "generally exclusionary rule is not a remedy for PCA violation" even when the objection was raised timely. 410 F.3d, 137 at 149 (4th Cir. 2005) The Fourth Circuit

confusedly and erroneously generalized the ruling of the 10th Circuit that "defendant was entitled to no relief for raising the issue only at late stage of the proceedings" because the court found no PCA violation and "that the military officer had been appointed a special assistant United States attorney." U.S. v. Wooten 377 F.3d 1134, 1140 (10th Cir. 2004)

Furthermore, the Fourth Circuit established the dangerous standard, which has been adopted by other circuits, that PCA, *inter alia*, may be violated repeatedly by ruling that :

"we reserved the possibility of remedies for the offender 'should repeated cases involving military enforcement of civilian laws demonstrate the need for the special sanction of a judicial deterrent' " Judgment, at 4, citing Walden, 490 F. 2d at 373; also see Dreyer, 804 F. 3d at 1279-81 (11th Cir. 2015).

Even in this case, where the military agent solely, actively conducted the entire investigation and prosecution of a campaign violation, the Fourth Circuit concluded that "this is not an extraordinary case that warrants a judicial deterrent." This erroneous and dangerous standard warrants a review by the

Supreme Court, because it directly contradicts the established judicial principles: (1) PCA is a substantial statute with the Constitutional meaning, the court has no authority to relax it but to enforce it; (2) the Third Amendment and PCA afford a person the protection from military intrusion and when such a substantial right is violated, relief for the victim is warranted as a matter of law; (3) PCA is a substantial Statute, and therefore, a jurisdiction removal rule, when violated, it strips the jurisdiction of the court; (4) the doctrine "*nullus commodum capere potest de injuria sua propria;*" does not allow the government to benefit from its wrong; (5) even more importantly, in this case, the defects are jurisdictional.

B. Inconsistent and contradicting rulings among circuits of appellate court regarding to the constitutionality of PCA

Due to the lack of direction by the Supreme Court, the rulings on the PCA violations have been inconsistent and contradicting among, and sometimes within, almost every circuits

of the appellate courts, which include the Circuits from the Third to Eleventh and the D.C. Circuit. These contradicting rulings on this Constitutional and Jurisdictional matter have created a "disastrous consequence for the Constitution" that warrants a review by this Court.

As discussed above, the rulings within the Fourth Circuit differ in the two extremes. In the first group of rulings, as in this case, the Fourth Circuit repeatedly ruled that "the military is allowed to assist the law enforcement," PCA violation is a "defect in instituting prosecution must be raised before trial" and the violation of the PCA provides "no remedy" for the victim "but to punish the transgressor" and the violation of the PCA may be "repeated and widely spread" until it shows such a "need" for the "possibility" of a "special sanction of judicial deterrent," and even when, as in this case, the military solely and directly conducted the entire investigation and prosecution of political contribution activity without the jurisdiction, the Fourth Circuit maintained that "this is not an extraordinary case that warrants a judicial deterrent."

see Judgment P.4 In other cases, however, the Fourth Circuit made the opposite ruling that

"[t]o sanction such presidential authority to order the military to seize and indefinitely detain civilians, even if the President call them 'enemy combatants' would have disastrous consequences for the Constitution--and the country. For a court to uphold a claim to such extraordinary power, would do more than render lifeless the Suspension Clause, the Due Process Clause, and the rights to criminal process in the Fourth, Fifth, Six, and Eight Amendments; it would effectively undermine all of the freedoms guaranteed by the Constitution. It is that power--were a court to recognize it--that would lead all our laws 'to go unexecuted, and the government itself to go to pieces.' (quoting Abraham Lincoln) We refuse to recognize a claim to power that would so alter the constitutional foundations of our Republic. *Al-Murri v. Puccialli*, 534 F. 3d. 213, at 253-4 (4th Cir. 2007)

Yet, the same Fourth Circuit has, inter alia, awarded the prosecutor the awesome power to use the military to investigate, arrest, press charges against a civilian for activity in political contribution, that is protected by the First Amendment of the Constitution. see *McCusheon v. FEC* 572 US __, 134 S. Ct. __, 188 L Ed 2d 468 (2014)

The first erroneous standard established by the Fourth Circuit has been, at least in part, adopted by different circuits, such as the 11th circuit in a number of cases; while the other circuits made a variety of rulings ranging in between the two opposite standards

set forth by the Fourth Circuit. For example, the ruling of the Ninth Circuit has been more in sync with the second ruling of the Fourth Circuit, and further clarified the confusion if the Criminal Investigation Services of the Inspector General's Office of the DoD, who's authority is limited both within the Executive Branch of the government by the Inspector General Act (IGA) and within the military by the PCA, is subject to the same restriction of other members of the DoD. The Ninth Circuit ruled:

“The regulations define DOD personnel as Federal Military officers and enlisted persons and civilian employees of the DOD 32 C.F.R. §182.3.” and “DOD personnel are prohibited from providing specified forms of direct civilian law enforcement assistance including search or seizure; evidence collection, ... or acting as undercover agent, informants, investigators.” “The new regulations expressly apply to civilian employees of the DOD Components, and to all actions of the DOD personnel worldwide.” 32 C.F.R. § 182.2(e), 182.4(c). The Secretary of the Defense instituted these regulations under express Congressional delegation, 10. U.S.C. § 375, and they unambiguously interpret PCA-like restrictions to apply to civilian employees of the DOD. *U.S. v. Dreyer*, 804 F.3d 1226, 1274 (9th Cir. 2015).

Therefore, these contradicting rulings on PCA violation among the many circuits justify a review by the Supreme Court, especially on the question that if investigation solely and directly conducted by an agency of the DoD without jurisdiction is a jurisdictional defect warrants reversal.

C. Posse Comitatus Act. and Federal statutes, 18 U.S. C. §1385, 10 U.S.C. § 375, 6 U.S.C. §466 are Jurisdiction Removal Rules violation of which strips the jurisdiction of the district court.

The Supreme Court divided "the universe of rules" into only two categories: 1) Claim Process Rules; and 2) Jurisdiction Removal Rules. Arbaugh, at 500, 512. It is held that Claim Processing Rules may be relaxed by courts during the proceedings. However, a Jurisdiction Removing Rule is one that courts have no authority to do anything other than obey the rule. Bowles v. Russell, 551 U.S. 205 (2007). It was further held that "[Courts] are not authorized to create an equitable exception to jurisdictional requirements, the use of the "unique circumstances" doctrine is illegitimate." Id. at 212. A long line of cases have been handed

down regarding Jurisdiction Removal Rules, e.g. *Steel Co. v. Citizens for Better Env.* (1998), *United States v. Cotton* (2002), *Kontrick v. Ryan* (2004), *Arbaugh v. Y & H Corp.* (2006), *Bowles v. Russell* (2007), *John R. Sand & Gravel Co. v. United States* (2008), *United States v. Denedo* (2009), *Reed Elsevier, Inc. v. Muchnick* (2010), *Sebelis v. Auburn Reg. Med. Ctr.* (2013), *Mussachio v. United States* 136 S.Ct. 709 (2016). In each case, the Court looked for "clear indication that Congress wanted that the provision to be treated as having jurisdictional authorities." *Henderson v. Shinseki*, 562 U.S. 428, 436, 439 (2011). As here, the application in this case is apparent, in which the PCA is a jurisdictional law made by Congress, Judges have no authority to make exceptions to the law unless authorized by Congress. Congress banned the use of any member of the military from direct participation of civilian law enforcement and made such violation unlawful and punishable by imprisonment, see Section 1385, 18 U.S.C. Congress never allowed the PCA to be relaxed but further

enhanced it by enacting a series of federal statutes, 18 U.S.C. §1385, 10 U.S.C. §375, and 6 U.S.C. §466.

Known as Domestic Security Act, 6 U.S.C. §466(b), Congress unequivocally stated its Intention:

It is the sense of Congress that nothing in this Act should be construed to alter the applicability of such section to any use of the Armed Forces as a posse comitatus to execute the laws.

Holdings of the Supreme Court demonstrate that the PCA is a jurisdiction-removing rule, when violated by the Government, it removes jurisdiction from the court, because courts cannot lawfully acquire jurisdiction by allowing the government to profit from its own unlawful conduct, violates due process, and undermines the integrity of the criminal justice system. It has long been established that "*nullus commodum capere potest de injuria sua propria;*" no one can benefit from his own wrong." Another reason, all fruit bared shall be suppressed; to permit the government to retain any evidence wrongfully collected by it, in violation of the law, would be to permit such benefits (Giles v. California, 554 U. S. 353, 365 (2008)) and turns the removal-rule

and the PCA on its head. When the law is violated, as in this case, there is no competent court of jurisdiction, as defined by the Supreme Court, a competent court of jurisdiction is a court with "an existing source of subject mater jurisdiction." *Lightfoot v. Cendant Mortgage Corp.* 137 S.Ct.353,196 L.Ed 2d 493(2017) When the Government violated the PCA by using a Military agent of DCIS to directly investigate and prosecute civilians, the law prohibits the court from acquiring subject-matter jurisdiction and there is no competent jurisdiction. It is axiomatic that lack of jurisdiction nullifies ALL proceedings undertaken by the court.

D. The Prosecutor and the district court have no subject matter jurisdiction without a formal referral from the FEC who has the exclusive jurisdiction over Political Campaign Contribution Regulations.

Political contribution is a fundamental right protected by the First Amendment of the Constitution. *Id. McCusheon* 752 US, 134 S.Ct., 188 L.Ed 2d 468 The Federal Election Commission (FEC) has the exclusive jurisdiction over federal election activities under the FEC Act enacted by Congress. Only FEC has the authority to

initiate an investigation of political contribution irregularity and send a formal Referral to the DOJ, not the military, for prosecution of a criminal violation of the FECA. In this case, the Agent of the DCIS is not a civilian law enforcement officer, and cannot and did not obtain an official approval or referral from the FEC, and therefore, did not have the jurisdiction in investigating a campaign contribution violation and bringing charges against the civilian to the DOJ for prosecution.

Furthermore, the agent of DCIS is not an authorized law enforcement officer under Fed R Crim. P 41(2)(C) and has no authority to obtain a warrant against civilians in a federal court for violations that have no nexus to military operations as defined by the law. For obvious reasons, the agent did not present any probable cause under oath, did not sign any affidavit, but falsely claimed his authority in civilian law enforcement. Therefore, the warrant is void at the time of its issuing.

These are, yet, additional reasons that the prosecutor does not have the jurisdiction of the prosecution. As the result, the district

court does not have a competent subject matter jurisdiction, and "the only authority left [to the district court] is to announce the dismissal of the case in its entirety," and "all proceedings undertaken by the court nullified." *Id.* in *Re Bonner*, 151 U.S. 242, 14 S. Ct. 323, 38 L.Ed. 149, 151 (1983)

II .The appellant failed to correct the substantial error that the district court deprived Appellant's substantial Due Process entitlement assured by the Fourth, Fifth and Sixth Amendment of the Constitution.

A. The Prosecutor and the district court constructively amended the indictment in violation of the Appellant's Constitutional entitlements.

In this case, both the prosecutor and the judge changed the essential elements of the statutes 18 U.S.C. §371, 441(f) and 441(e), and impermissibly broadened the possibility of a conviction, and therefore, constructively amended the indictments. One of the more obvious examples is that the prosecutor altered the essential element of "knowingly and willfully violate the Federal Election Campaign Act" to knowingly contribute over the limits. The Supreme Court explained that "there is no right more

basic in our democracy than the right to participate in election our political leaders," "and regulations must instead target what the Court has called 'quid pro quo' corruption or its appearance;"

"there are compelling reasons not to define the boundaries of the First Amendment.... The whole point of the First Amendment is to afford individuals protection against such infringements. The First Amendment does not protect the Government..." *McCutcheon v. FEC* 572 US __, 134 S.Ct __, 188 L Ed 2d 468, (2014).

To make political contribution a criminal violation, the most essential element is knowingly and willfully to defeat the FEC Act. Because political contributions, over limit or not, are not intrinsically evil, but protected by the First Amendment, the law specifically requires the proof of intent to defeat the law, "knowingly and willfully to violate the FECA." Rather than giving gifts to others for political contribution, the law requires Dr. Dong to have "knowingly and willfully violated the Federal Election Campaign Act", and must know his conduct is expressly prohibited by the FECA to intentionally defeat the law. 2 U.S.C. 437g(d)(1)(D)(i).

Applying §371, conspiracy to defraud the United States Government, to a campaign contribution violation is a unprecedented misapplication of the law. Even if §371 were applicable to campaign contribution violation, the element of knowingly and willfully would also require the same standard; making an agreement among two or more persons knowingly and willfully to defeat the FECA. However, the record clearly show that Dr. Dong believed it was his privilege to support a leader of his choice, and believed giving gifts to help others to exercise their political rights was "a good thing." No one, including Dr. Dong knew it was wrong to make such contribution, and no one who made the contribution had raised any concern to Dr. Dong or had an agreement to do anything wrong. Certainly, no one knew anything about FECA and intended to violate it. There is simply no proof of intent.

However, not being able to show any evidence that Dr. Dong or anyone knowingly violated FECA, the Government altered the most essential element of the statute, knowingly and violate the

FECA, to that Dr. Dong knew the limits but gave the gifts to others to make contributions over the limits. The judge did not believe such "lower standard" was correct, but agreed to instruct the jury with the lower standard first, and promised that "if the verdict came back 'guilty', I would instruct the jury again with the correct, heightened standard." However, the judge did not re-instruct the jury after the verdict, but concluded the trial, and stated: "the campaign regulations are so complicated, and I would need to do some studies myself before I can make a ruling."

In this case, both Government and the district court constructively amended the indictment where

"the indictment is altered to change the elements of the offense charged, such that the defendant is actually convicted of a crime other than that charged in the indictment." *United States v. Malloy* 568 F.3d 166, 177-78 (4th Cir. 2009) (quoting *United States v. Randall*, 171 F.3d, 195, 203 (4th Cir. 1999)).

When the government, through its presentation of evidence or its argument, or the district court, through its instruction to the jury, or both, broadens the basis for conviction beyond those charged in the

indictment, a constructive amendment occurs, *Id.*, at 178; See *United States v. Redd*, 161 F.3d 793, 795 (4th Cir. 1998); *United States v. Floresca*, 38 F.3d706, 710 (4th Cir. 1994) (*en banc*). When a constructive amendment is found, the error is fatal and reversible *per se*, even when not preserved by objection. *United States v. Whitfield*, 695 F.3d 288, 307 (4th Cir. 2012); *Floresca*, 38 F.3d at 714.

B. It is unconstitutional, and violates the substantial due process rights of the Petitioner to increase his penalty by adding the amount of campaign contribution made by another person.

The Fourth Circuit erred in confirming the illegal sentence of Dr. Dong for conspiracy to make illegal contributions for the amount of \$16,000 under the statutes of 18 U.S.C §371, conspiracy to defraud the government; and 18 U.S.C. §441(f), making contributions in the name of others. However, the \$16,000 is the combined total amount of contributions made by two parties; Dr. Wang at \$8,000 and Dr. Dong at \$8,000. Dr. Wang plead guilty in exchange for a non-prison sentence. The prosecutor erroneously

added Dr. Wang's contribution to that of Dr. Dong's in order to push the amount of illegal contribution over the threshold of \$10,000 for a felony offense punishable by up to 2 year imprisonment, in contrast to a misdemeanor offense with a maximum of 1 year imprisonment for under \$10,000.

Furthermore, the district Judge sentenced Dr. Dong to 18 months imprisonment and 3 years of supervised release based on an erroneous Pre-sentencing Report (PSR) which incorrectly recommended for a term of 5 year imprisonment, 3 year supervised release and not qualified for probation on each violation of §371 or §441(f). Upon Dr. Dong's Brief, the circuit court ordered the Appellant to submit a Supplemental Brief to address the sentence issue because of the clearly erroneous guidelines in the PSR. The government quickly conceded that the sentence was incorrect and the correct term should be maximum 2 year imprisonment. Even though the law does not prescribe a supervised release for a FECA violation, the Government claimed that because other crimes punishable for two year imprisonment may also include 1 year of

supervised release, therefore, the sentence should be 18 months imprisonment and 1 year supervised release. The Fourth Circuit court agreed with the government without reviewing the facts and the laws, and inter alia, affirmed the unconstitutional sentence of Dr. Dong for the amount of "illegal contributions" made by others, and a misdemeanor for a felony.

IN SUMMARY, the Agent of military solely conducted the investigation and prosecution of a political layman for a honest mistake made in a political contribution is without jurisdiction and in violations of the Constitutional entitlements of the Petitioner, and because of the inconsistent and contradicting rulings on the jurisdictional and constitutional meaning of PCA among nearly all Federal Circuit Courts on numerous cases, and because of the disastrous consequence to the Constitution by giving the prosecutors the extraordinary power of using military for law enforcement, the Petitioner respectfully pleads to this Court for a review of this Certiorari and grant a reversal of the conviction of

Dr. Dong for an honest mistake he made in excising his political right protected by the First Amendment of the Constitution.

CONCLUSIONS

The petition for a writ of certiorari should be granted.

Dated: Aug 20th, 2018

Respectfully submitted, pro se



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