IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	
	)	AMICUS BRIEF
Appellee,	)	in Support of
	)	APPELLANT
v.	)	
	)	
ROBERT B. BERGDAHL	)	
Sergeant (E-5)	)	Crim. App. Dkt. No
United States Army	)	ARMY 20170582
	)	USCA Dkt. No. 19-0406/AR
Appellant,	)	

AMICUS ARGUMENT OF
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SEPTEMBER 25, 2020

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

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TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

PREAMBLE

Amici remain committed to its prior arguments raised to this Court in *United States v. Bergdahl*, No. 19-0406, slip. op. (C.A.A.F. 2020). In particular, the argument that in assessing apparent unlawful command influence in this appeal, a president's vast commander in chief authorities, either alone or in conjunction with the Framers' standing army fears, must be weighed against presidential conduct, with a presumptive result that an intolerable strain on the military justice system has occurred.[1] However, with the recent revelation of Judge Jeffrey Nance's application to become a United States Immigration Judge during the pendency of the court-martial at issue, neither this Court nor the Army Court of Criminal Appeals could have fully assessed whether there was evidence of an intolerable strain on the military justice system, and then fully determine whether Appellant's court-martial was free from the appearance of unlawful command influence. Here, amici highlight the particular nature of the immigration judge position, one in which fealty to the executive branch is a noteworthy duty description. This aspect makes Judge Nance's application to assume such a position during the pendency of

[1] This argument was recently amplified in a forthcoming Hofstra Law Review article. *See*, Joshua E. Kastenberg, *Fears of Tyranny: The Fine Line Between Presidential Authority Over Military Discipline and Unlawful Command Influence Through the Lens of Military Legal History in the Era of Bergdahl*, August 20, 2020, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3676788.

Appellant's court-martial, and failure to disclose that fact, one that raises considerable doubt that Appellant's court-martial was free from apparent unlawful command influence. Indeed, Judge Nance's conduct makes it impossible for the Government to overcome their high burden of proof beyond a reasonable doubt.

INTEREST OF AMICUS

Both amici are law professors and veterans. As former judge advocates, we have over 45 years of active-duty service between us, including combat zone deployments. We each also have deeply studied military law, its history, criminal law, and national security law. We believe the merits of the unlawful command influence at the Appellant's trial and appellate court level have not been properly resolved. We urge this Court to grant both Appellant's motion for reconsideration and motion to supplement the record in order to more comprehensively analyze the "intolerable strain on the military justice system" present in Appellant's court-martial.

ARGUMENT

Significant issues arise from Judge Nance's omission as cited in Appellant's motion to supplement the record.[2] These include not only ethical issues regarding

[2] Amici understand that Government Counsel oppose the Appellant's argument to supplement the record based on the Government's September 23, 2020 filing with this Court. It appears the Government Counsel has confused the timeline as evidenced by the following statement in their reply: "This Court affirmed the judgment on August 27, 2019. United States v. Bergdahl, No. 19-0406, slip. op. (C.A.A.F. 2020)." United States v. Bergdahl was issued in 2020, not in 2019. Regardless, there is no evidence supporting the Government's implied conjecture that Appellant's counsel did not file their Freedom of Information Act request as soon as Judge Nance's Immigration

Judge Nance's basic failure to disclose important information, and the impact of this omission on Appellant's right to an impartial judge. There are also grave implications for the integrity of military justice system itself, or at the very least for the appearance of a fair military justice system for our women and men in uniform, because of Judge Nance's failure to accurately outline his post-military employment objectives. (Indeed, given the timing of his immigration judge application and his ruling on Appellant's renewed motion on apparent unlawful command influence, it is not difficult to understand why some observers may conclude that Judge Nance lied in his judicial capacity.) Judge Nance's seeming prevarications occurred when, while simultaneously failing to disclose his immigration judge application, he emphasized in open court that he was "not going anywhere but the retirement pastures" and "I don't expect to go anywhere but back home as soon as the Army is done with me in a year," statements he made despite knowing that he had just applied for a post-retirement executive branch position only days prior. Such conduct by an Army officer, never-mind a military judge presiding over a court-martial, is disturbing to say the least.

Amici argue that this Court does not need to consider whether Judge Nance's omission was contrary to prevailing rules of judicial ethics, or antithetical

Judge employment came to their attention (it would be ridiculous to impute such knowledge to counsel based on an obscure public announcement made in September, 2018. The latter was a general public announcement, not one sent to appellate counsel or anyone else. Indeed, if such knowledge can be imputed to anyone, it should be imputed to the Government who has an ongoing discovery obligation to make such evidence known to appellate counsel.

to Appellant's right to an impartial and truthful judge. Moreover, Amici argue that this issue can be resolved in favor of the Appellant without an inquiry into governmental misconduct, even though, in this instance, an inquiry by this Court may be merited given the nature of the judicial misconduct at issue. Whether or not such behavior constitutes a flawed omission or deliberate deceitfulness, the additional reasonable doubt Judge Nance's conduct casts on the apparent unlawful command influence issues in Appellant's court-martial alone supports (assuming Appellant's motion to supplement the record is granted) granting Appellant's motion to reconsider. It also supports finding, upon said reconsideration, that Appellant's conviction be reversed with prejudice.

I. THE TOTALITY OF THE CIRCUMSTANCES WERE NOT CONSIDERED BY ANY APPELLATE COURT IN APPELLANT'S COURT-MARTIAL REGARDING APPARENT UNLAWFUL COMMAND INFLUENCE

A military judge's retirement plans do not provide a shield against the effects of unlawful command influence. *See e.g*. *United States v. Boyce*, 76 M.J. 242, 250 C.A.A.F. 2017). Indeed, "no showing of knowledge or intent on the part of government actors is required in order for an appellant to successfully demonstrate that an appearance of unlawful command influence arose in a specific case." *Id*. In *United States v. Bergdahl*, Judge Nance's post-retirement efforts were not, apparently, considered by him, nor by the United States Army Court of

Criminal Appeals, nor by this Court as a part of any analysis regarding apparent unlawful command influence.

In determining whether there was an intolerable strain on military justice, it is important for this Court to not only assess Judge Nance's omission of his employment interviews and negotiations with the Department of Justice, but also to assess the unique nature of the job he was applying to. Given that an immigration judge is appointed by the Attorney General and is "subject to such supervision and shall perform such duties as the Attorney General shall prescribe," 8 U.S.C. § 1101(b)(4) (2012), Judge Nance was applying for a position in which he would be expected to uphold the administration's policies.

A. Rules of Disclosure and Recusal Apply to the Motion For Reconsideration

Although judicial ethics are not the primary thrust of this brief, it is important to recognize that there are established rules of ethics requiring a judge to recuse from a trial when they are seeking employment with a party appearing before the judge.[3] In *In re al-Nashiri*, 921 F. 3d 224 (CA DC 2019) the Court of Appeals for the District of Columbia made clear that the Executive Branch of the United States Government is, in relevant respects, a singular entity, and therefore a

[3] FN 1: See e.g., Scott v. US, 559 A. 2d 745 (DC App 1989); and Michigan Code of Judicial Conduct, Opinion JI-35 at https://www.michbar.org/opinions/ethics/numbered_opinions/ji-035.

military judge who seeks employment with another federal agency must disclose this fact on the record where the judge's neutrality could be questioned. *Id*., at 236.

While Judge Nance did not have the benefit of *al-Nashiri* as a guiding decision, he was a military judge at a time in this *al-Nashiri* rule could, and should, have been reasonably been inferred. *See e.g*., *DeNike v. Cupo*, 196 N.J. 502, 958 A.2d 446, 449 (2008) (holding that judge's negotiation for future employment with plaintiff's counsel created an appearance of impropriety that required disqualification); *see also Scott v. United States*, 559 A.2d 745, 746-50 (D.C. 1989) (en banc) (noting that the United States conceded that the presiding judge violated the canon that "[a] judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned" in a case in which the judge was negotiating for employment with the Department of Justice while presiding over a criminal case being prosecuted by the United States Attorney's Office). A reasonable observer therefore would conclude that Judge Nance's failure to conform to case law and the rules of judicial ethics, when coupled with the nature of the position he had applied to, provide ample evidence that there was an intolerable strain on the military justice system in this particular case.

B. Immigration Judge Position Unique in Upholding Presidential Authority

The nature of the position Judge Nance sought is one in which judicial officers – immigration judges – possess far less discretion to question executive branch decisions than does a military judge, or, for that matter, less than even an administrative law judge. *See e.g*., 8 C.F.R. § 1003.1(h)(1); *see also* Catherine Y. Kim, *The President's Immigration Courts*, 68 Emory Law Journal 1, 21 (2018) [pointing out that an immigration judge is essentially an attorney for the Attorney General of the United States].[4] Immigration judges are expected to apply and uphold executive branch policy. *See, e.g*., *In re Castro-Tum,* 27 I & N. Dec. 271 (2936, May 17, 2018); citing, *In re Roussis*, 18 I & N, Dec. 256, 258 (BIA 1982) [holding that "[i]t has long been held that when enforcement officials of the Immigration and Naturalization Service [now DHS] choose to initiate proceedings against an alien and to prosecute those proceedings to a conclusion, the immigration judge is obligated to order deportation if the evidence supports a finding of deportability on the ground charged"]. *Id*. Thus, an immigration judge's authority to conduct an independent inquiry on other grounds, even to prevent a wrongful or misguided government action, is considered to be non-existent by the Attorney General. *Id*.

[4] *See also* Margaret H. Taylor, Midnight Agency Administration: Attorney General Review of Board of Immigration Appeals Decisions, 102 IOWA L. REV. BULL. 18, 21, 23 (2016–2017) (describing political exercises of refer-and-review power).

Because of this position's unique required deference to executive authority, it is therefore worth noting that when applying for such an immigration judge position, Judge Nance highlighted only one of his career judicial decisions. Unsurprisingly in retrospect, it was the one in which he, as a military judge, upheld the same President's authority as the President to whom he was ultimately seeking employment – employment for a position which places a premium on adherence by the immigration judge to such authority. That Judge Nance later sentenced Appellant to a sentence less than desired by the President is scarcely relevant. What Judge Nance highlighted to the Attorney General (and now to all disinterested, objective observers), in using his ruling denying apparent presidential UCI, was his willingness to shield the President's actions – actions that were either intended to deprive Appellant of a fair trial, or simply ignored the fact that Appellant's right to a fair trial should not be sacrificed on the altar of electorate support. Put another way, Judge Nance's omission appears to give credence to Postmaster General Montgomery Blair's observation on the prosecution's conduct in the court-martial of General Fitz-John Porter in 1862: "[i]t is no new thing to sacrifice a soldier to serve a political turn."[5]

[5] Hon Montgomery Blair, Postmaster General during President Lincoln's Administration to Maj. Gen. Fitz-John Porter, January 26, 1874 (1883).

Immigration judges have less discretion and are expected to hew more closely to executive branch policy than other non-Article III judges. In immigration courts – the exclusive venue for proceedings to remove an alien from the United States, 8 U.S.C. §§ 1229(a)(1) & (3) – immigration judges act as both the trier of fact and law, and issue decisions which result in detention pending removal from the United States. *See, e.g.*, *Parlak v. Baker*, 374 F. Supp. 2d 551 (ED MI 2005). While both federal administrative law and military judges have the authority to place counsel in contempt or otherwise discipline counsel who fail to comply with ethics rules, *see, e.g., Roadway Express v. Piper*, 447 U.S. 752, 766-67 (1980) (expressing that the power of a court over the members of its bar is as least as great as the power over litigants), immigration judges lack this power. *See* 8 U.S.C. § 1003.

Furthermore, immigration judges have less authority than federal administrative law judges because it is the Attorney General of the United States who appoints immigration judges, and immigration law judges are bound to follow the policy directives of the Attorney General.[6] In contrast, the Office of Personnel

[6] On the powers and duties of immigration judges, *see* 8 U.S.C. /§ 1003.10 - Immigration judges.

> In conducting hearings under section 240 of the Act and such other proceedings the Attorney General may assign to them, immigration judges shall exercise the powers and duties delegated to them by the Act and by the Attorney General through regulation. In deciding the individual cases before them, and subject to the applicable governing standards, immigration judges shall exercise their independent judgment and discretion and may take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases. Immigration judges shall administer oaths, receive evidence, and interrogate, examine, and cross-examine aliens and any witnesses. Subject to §§ 1003.35 and 1287.4 of this chapter, they may issue administrative subpoenas for the attendance of

Management appoints administrative law judges.[7] The independence of administrative law judges is statutorily protected, unlike that of immigration judges.[8] Furthermore, immigration judges are on a comparatively lower pay-scale then administrative law judges.[9] In terms of security in position, administrative law judges are protected by the Merit Systems Protection Act which requires a full hearing before the Merit Systems Protection Board.[10] This is true in regard to immigration judges, but the difference between the two is that the Attorney General may seek to dismiss an immigration judge, while administrative law judges are independent of their agency chiefs, and it is the Office of Personnel Management that must act to remove an administrative law judge.[11]

Immigration judge determinations are reviewed by the Board of Immigration Appeals, but the immigration judges on that board are appointed and controlled by the Attorney General in the same manner as the immigration judges conducting the hearings.[12] The Ninth Circuit has determined that it would only reverse the

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> witnesses and the presentation of evidence. In all cases, immigration judges shall seek to resolve the questions before them in a timely and impartial manner consistent with the Act and regulations.

Id.

[7] Mahoney v. Donovan, 721 F.3d 633 (CA DC 2013).

[8] *See e.g.*, 5 U.S.C.S. § 3105. Although administrative law judges are agency employees, the Office of Personnel Management determines their compensation. 5 U.S.C.. § 5372. Administrative law judges are exempt from agency performance-appraisal systems. 5 U.S.C. §§ 4301(2)(D). Administrative law judges are protected by the merit systems Protection Act. 5 U.S.C. § 7521.

[9] *Compare* immigration judge pay scale at, https://www.justice.gov/eoir/page/file/1236526/download, *with* the administrative judge pay scale at, https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2020/ALJ_LOC.pdf.

[10] *See* 5 CFR § 930.211; and Jennings v. SSA, 407 Fed. Appx. 467 (Fed Cir 2011)

[11] *See, e.g.*, Kent Barnett, Against Administrative Judges, 49 UC. Davis L. Rev, 1644, 1648 (2016) [noting that Congress has not accorded immigration judges the same protections as administrative law judges].

[12] *See, e.g.*, Nasrallah v. Barr, 140 S. Ct. 1683, 1687-88 (2020).

decisions of an immigration judge – following an administrative appellate review by the Board of Immigration Appeals – if the decision is unsupported by substantial evidence or, as a matter of due process, the immigration proceeding was "so fundamentally unfair that the alien was prevented from reasonably presenting his case." *Mendoza Rizo v. Lynch*, 810 F.3d 688, 693 (CA 9, 2016) citing to *Platero-Cortez v. INS*, 804 F.2d 1127, 1132 (CA 9, 1986).

After President Trump took office, his Attorney General challenged the veracity of the so-called "Flores Settlement" regarding the separation of children from their biological parents in the custody of federal immigration authorities. Flores v. Barr, 934 F.3d 910, 912 (CA 9, 2019). At the time that Judge Nance applied for his position, there was an expectation by the President through the Attorney General that immigration judges would not consider the Flores settlement in their rulings. *See, e.g.,* Ms. L. v. Immigration & Customs Enforcement, the United States District Court for Southern California, 415 F. Supp. 3d 980 (SD CA, 2020); Ms. L. v. United States Immigration & Customs Enforcement (ICE), 310 F. Supp. 3d 1133 (SD CA, 2018); Ms. L. v. Immigration & Customs Enforcement, the United States District Court for Southern California, 330 F.R.D. 286, 287 (SD CA 2019); and Citizens for Responsibility & Ethics in Wash. v. United States Department of Homeland Security, 387 F. Supp. 3d, 33, 36-37 (DC, 2019). Thus, Judge Nance's initial ruling on the highly politicized issue of presidential unlawful

command influence (UCI) in Appellant's court-martial could be taken as indicative that he would adhere to the Attorney General's controversial policies regarding family separations if hired – which made it a great choice for Judge Nance to supply as his sole exemplar of legal writing in his immigration judge application. His subsequent failure to disclose such application, coupled with his concomitant emphasis on his (untrue) lack of future employment possibilities when denying Appellant's renewed presidential apparent UCI motion, raises considerable reasonable doubt as to both the fairness, and appearance of fairness, of Appellant's court-martial.

CONCLUSION

Even without considering judicial ethics violations, a reasonable person with knowledge of the facts in United States v. Bergdahl would conclude that Judge Nance's repeated UCI rulings finding no apparent unlawful command influence by the President were part and parcel of his employment effort to work for that very President as an immigration law judge. Particularly in the context of the politicization of immigration judge hiring during the Trump Administration, Judge Nance's omissions would lead a reasonable person to conclude that that Judge Nance desired to become a part of that politicized process by showing his fealty to the executive branch by his continued rulings finding that President Trump's

egregious comments regarding Appellant did not constitute apparent unlawful command influence (UCI).[13]

In making his second UCI ruling regarding the President, just days after applying for the immigration judge position, Judge Nance not only bragged about his impartiality, he overtly premising it on the fact that he was going nowhere but to green retirement pastures. His ruling upheld a significant assertion of presidential authority to direct or influence the outcome of a court-martial, and it supplemented his earlier ruling on presidential UCI, one that he had used as the centerpiece in his employment campaign for a judicial position which uniquely depends on judicial obeisance to executive branch policy. Judge Nance's second UCI decision, therefore, to an outside impartial observer, was tainted by his personal desire to become an immigration judge. The appearance of unlawful command influence here certainly presents an intolerable strain on the military justice system.

CERTIFICATE OF COMPLIANCE WITH RULES

We certify that this brief complies with the maximum length authorized by Rule 26(f) because this brief contains 3,248 words not including front matter and certificates. This brief complies with the typeface and type style requirements of

[13] Letter from Elijah E. Cummings, Lloyd Doggett, Joaquin Castro, and Donald S. Beyer Jr., Members of Cong., to Jeff Sessions, U.S. Att'y Gen., U.S. Dep't of Justice (Apr. 17, 2018), https://cummings.house.gov/sites/cummings.house.gov/files/Dems%20to%20DOJ%20re.%20EOIR%20Politicization.pdf.

Rule 37 because it was prepared using Microsoft Word with Times New Roman 14-point font.

Respectfully Submitted

//electronically signed//

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CERTIFICATE OF FILING AND SERVICE

We certify that a copy of the foregoing was transmitted by electronic means on September 25, 2020, to the Clerk of the Court; Government Appellate Division, and Counsel for Appellant.

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