UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT B. BERGDAHL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 21-418 (RBW)
	)	
UNITED STATES,	)	
	)	
Defendant.	)	Judge Walton

PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION
TO CROSS-MOTION FOR SUMMARY JUDGMENT

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Introduction

The defendant's brief stresses the plaintiff's guilty pleas and urges the Court to defer to the military courts because they are uniquely positioned to assess specialized aspects of military culture.

The plaintiff's pleas were simply one aspect of a flawed process and cannot be evaluated in a vacuum. What did he actually *do?* He left his post without leave, planning to hike through dangerous terrain and report to a U.S. Forward Operating Base to call attention to what he genuinely perceived as leadership issues. *That's it*. The defendant offered no proof that cowardice, venality, or malice played any role in the plaintiff's ill-fated mission; however immature and imprudent, his motive was to protect his platoon-mates.[1] What happened to him? He was captured and brutalized by a barbaric enemy for five years. He suffered horrible disease. He was entirely alone. They whipped him with cables. They *caged* him. He made heroic, ingenious escape attempts, and at last he was released.

Upon his recovery, by what sort of process was this saga transformed into the stuff of a general court-martial? A political opponent of the President who achieved the plaintiff's release helped whip the issue into a long-running political tempest. A hand-picked convening authority under intense political pressure from the chairman of the Senate Armed Services Committee inflated the plaintiff's AWOL into charges with terrifying potential punishments. A military judge

[1]The defendant does not dispute the accuracy of any fact set forth in the plaintiff's Statement of Material Facts, ECF No. 18-1. Those facts are therefore admitted. *See* D.D.C. Civil R. 7(h)(1); *cf. Oviedo v. Washington Metropolitan Area Transit Authority*, 948 F.3d 386, 391-92 (D.C. Cir. 2020). The defendant's "additional facts," *see* ECF No. 21-4 at 21, are not set forth with particularity, as required by ¶ 13(c) of the Court's April 5, 2021 General Order for Civil Cases (ECF No. 10), and should therefore be disregarded. It has cited no authority for the proposition that this Court's review is confined to the facts specifically found by the military courts, and we know of none.

with hidden objectives of his own allowed those charges to stand. The plaintiff had endured five years of barbaric torture abroad. His fear of further incarceration was both reasonable and overwhelming. To rip his pleas out of that context is to deny the reality against which they were entered. A fully informed observer would be deemed to know all of this as part of the facts and circumstances of the case.

It is also highly pertinent that a plea of guilty does not preclude relief for unlawful command influence (UCI). The defendant's response to the plaintiff's Cross-Motion for Summary Judgment never even cites *United States v. Lewis*, 63 M.J. 405 (C.A.A.F. 2006), a guilty plea case in which the Court of Appeals for the Armed Forces (CAAF) dismissed the charges with prejudice on UCI grounds. *See also* ECF No. 18-2 at 31-32.

The context also explains why, in this unusual case, no deference to the military courts is warranted. A returning POW behaved heroically in captivity, only to find his legal status under persistent scrutiny and the threat of a Senate hearing if he was not punished, coupled with a campaign of vilification by an unprincipled presidential candidate (and later President) bent on using him to whip up admiring crowds. It was obvious then and remains obvious that the prosecution had far more to do with politics than with any military "culture" to which this Court should defer. The astonishing mismatch between the plaintiff's actual conduct and subjective motivation, on the one hand, and the charges, on the other, can be accounted for by only one thing only: the malign willingness of political actors to commandeer the military justice system for political ends, and the inability of Army leadership to withstand the gale-force headwinds those actors created. This was a deeply political prosecution from Day 1. How else to explain why the Army came to assign some 50 [*not a typographical error*] lawyers to the prosecution of a junior enlisted man on two simple charges?

Below we address some of the crucial errors that render the military courts' review neither full nor fair, and summarize why the plaintiff's conviction must be set aside.

Oral argument is respectfully requested.

Argument

I

THE MILITARY COURTS' CONSIDERATION WAS NOT FULL AND FAIR

A

Judicial Independence is Not a Question as to which Deference is Warranted

The defendant concedes that the military courts "may not have special expertise in 'generic due process issues,'" but observes that CAAF's UCI decision "relied primarily on its assessment of matters specific to military life." *See* ECF No. 22 at 6.

"Matters specific to military life" have no bearing on the threshold issue under *Burns v. Wilson*, 346 U.S. 137 (1953). The failure of both the Army Court of Criminal Appeals (ACCA) *and* CAAF to address the merits of the plaintiff's coram nobis petition, the failure by Judge Walker to recuse, and the failure by the military judge to meet governing standards for disclosure, recusal, and disqualification all present straightforward legal questions. None of them is an issue upon which military courts have specialized knowledge. The standards for coram nobis and recusal are familiar grist for both federal and state courts. They in no sense involve "extremely technical provisions of the [UCMJ] which have no analogs in civilian jurisprudence." *See Noyd v. Bond*, 395 U.S. 683, 696 (1969).

B

What a Member of the General Public Would Know is Not a Question of Military Law

The decision of the narrow CAAF majority was also unfair because it attributed to the notional observer matters that he could not reasonably know, in order to avoid the tidal wave of apparent political influence of which a fully informed person could not be deemed ignorant. *See generally* ECF No. 18-2 at 14 & n.61, 26-30. The specific aspect of UCI at issue here—whether an objective observer, fully informed of the facts and circumstances, would harbor a significant doubt as to the fairness of the proceedings—emphatically does not qualify for deference. This is so because, under CAAF's own jurisprudence, the answer turns on what a member of the general public knows. And *that* is a matter as to which CAAF can claim no special insight.

CAAF's formulation of the government's burden in apparent UCI cases requires, first, identification of the notional observer; second, determination of the pertinent facts and circumstances; and third, appraisal of what the observer would make of them. The first is a settled part of the jurisprudence. The observer "is deemed to be 'a reasonable member *of the public*.'" *See* ECF No. 18-2 at 8 & n.36 (collecting cases) (emphasis added). The defendant does not dispute this.

For the remaining two steps, CAAF is not entitled to deference. The "facts and circumstances" of which the observer is deemed to be aware include those set forth in the record of trial, of course. Beyond that, as counsel for the United States represented at oral argument before CAAF, *see* ECF No. 18-2 at 8 & n.37, only matters of *general* knowledge may be imputed. Only those adjudicative facts and other matters that are so generally settled and understood that the public may fairly be assumed to know them qualify. *See* Mil. R. Evid. 201(b)(1) (matter must be "generally known"). Despite this, CAAF relied on *specialized* knowledge, as the defendant's brief

not only concedes, but stresses. *See* ECF No. 22 at 6 (CAAF "relied *primarily*" on such matters) (emphasis added). This claim is fatal to the government's case.

CAAF was profligate in imputing knowledge to the notional member of the general public when the information was favorable to the government, but not when it was not. *See* ECF No. 18-2 at 14-15; ECF No. 17-15 at 8-23 (Ex. 31). The same flaw is apparent in the defendant's objection to the plaintiff's reference to an *unclassified* but restricted document labelled "For Official Use Only," *see* ECF No. 22 at 9 n.2, while CAAF imputed to the observer knowledge of information known to the convening authority even though it was classified. *See* 23 Tr. 591 (testimony of convening authority). Knowledge of *classified* information is not properly imputable, because members of the general public do not typically hold security clearances. In contrast, the information set forth in the document we cited is freely available from open sources such as news articles and books.[2] Thus, even if the FOUO legend precluded imputation of the information paper itself, most if not all of the information set forth in it was imputable to members of the general public. It is unfair to apply a different imputation yardstick depending on which party's ox is being gored.[3]

The notional observer construct is not a license to sweep in anything and everything that might help the government carry its heavy UCI burden. CAAF may be a specialized court, but it

[2] *E.g.*, Deborah Davis, *Garwood's Trial*, N.Y. TIMES, Sept. 26, 1980; James Brooke, *G.I., 64, Pleads Guilty to Desertion from Duty in Korea in '65*, N.Y. TIMES, Nov. 3, 2004, and books. *E.g.*, VERNON E. DAVIS, THE LONG ROAD HOME: U.S. PRISONER OF WAR PLANNING AND POLICY IN SOUTHEAST ASIA (2000); GARY D. SOLIS, MARINES AND MILITARY LAW IN VIETNAM: TRIAL BY FIRE (1989); WINSTON GROOM & DUNCAN SPENCER, CONVERSATIONS WITH THE ENEMY: THE STORY OF PFC GARWOOD (1983); CHARLES R. JENKINS, THE RELUCTANT COMMUNIST: MY DESERTION, COURT-MARTIAL, AND FORTY-YEAR IMPRISONMENT IN NORTH KOREA (2008).

[3] If the defendant was implicitly faulting the plaintiff for having submitted an FOUO document in this action, we note that the defendant itself submitted such a document in support of its Motion to Dismiss. *See* ECF No. 16-15 (Ex. 3).

remains a *court*. *See generally Ortiz v. United States*, 138 S. Ct. 2165, 2172-80 (2018). Its judges cannot posit public awareness of factual matters plucked out of their imagination or personal experience, any more than Article III judges may properly draw on personal experience when deciding a case. *See, e.g., Gov't of Virgin Islands v. Gereau*, 523 F.2d 140, 147-48 (3d Cir. 1975). Knowledge of military matters is not a job requirement for appointment to CAAF. Indeed, Congress specifically requires that the judges be "appointed from civilian life." 10 U.S.C. § 942(b)(1) (Art. 142(b)(1), UCMJ). There is no requirement to have served in uniform even briefly, and Congress has imposed a lengthy cooling-off period before a retired regular officer may be appointed. *See* 10 U.S.C. § 942(b)(4) (Art. 142(b)(4), UCMJ). This is not to say that the CAAF judges lack military experience or are otherwise ignorant of military life; the reverse is typically true, but they are judges and not fact witnesses.

CAAF never purported to take judicial notice of anything, much less afford the plaintiff an opportunity to respond, as required by Mil. R. Evid. 201. *See United States v. Paul*, 73 M.J. 274, 278-79 (C.A.A.F. 2014). And in any event, much of what the CAAF majority relied on would not come close to qualifying for judicial notice even if he had been afforded that important procedural protection.

The CAAF majority repeatedly relied on matters that lay outside the parameters of "the facts and circumstances" of the case and would not have been known to a member of the general public. Reliance on such matters cannot be justified on a claim of specialized knowledge of "matters specific to military life" or any other basis. CAAF's decision is therefore neither entitled to the helping hand of "deference" nor "fair" for purposes of *Burns v. Wilson*.

C

CAAF Should Have Permitted Supplementation of the Record

CAAF refused to permit supplementation of the record with the military judge's job application (ECF No. 22 at 15). The defendant argues that CAAF had already entered a final judgment when the plaintiff moved to supplement the record. CAAF had rendered a *decision* on direct appellate review, but the plaintiff had timely sought reconsideration and the mandate had therefore not issued when he moved to supplement. As CAAF's rules clearly state, "The timely filing of a petition for reconsideration shall stay the mandate until disposition of the petition unless otherwise ordered by the Court." *See* C.A.A.F. R. 43A(a).

Thus the crux of the defendant's argument is mistaken. Until the mandate issued, CAAF's decision was without effect. *United States v. Tanner*, 3 M.J. 924, 925-27 (A.C.M.R.), *pet. denied*, 4 M.J. 169 (C.M.A. 1977). The CAAF mandate issued on October 21, 2020, *see United States. Bergdahl*, 80 M.J. 366 (C.A.A.F. 2020) (issuance of mandate), well after the plaintiff moved to supplement. Hence, his motion to supplement was properly filed, timely, and improperly denied.

As a fallback, the defendant argues (ECF No. 22 at 16) that CAAF "is generally unreceptive" to motions for reconsideration. That is true, as the unofficial guide to its rules states, but the general case does not involve a misrepresentation by the military judge. The very next paragraph of the guide (not quoted by the defendant) advises that "counsel should not be dissuaded from seeking to supplement the record where appropriate; the Court has granted such motions on a number of occasions." *See* EUGENE R. FIDELL & DWIGHT H. SULLIVAN, GUIDE TO THE RULES OF PRACTICE AND PROCEDURE FOR THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES § 30A.03[1] at 324 (19th ed. 2020) (collecting cases). The section concludes with the observation

that "here, as in several other contexts, it is difficult to detect a pattern in the Court['s] actions, which are invariably unexplained."[4]

That CAAF has denied supplementation in other cases involving other issues does not make it fair to have denied the plaintiff's well-founded motion to supplement with newly discovered evidence of a judicial misrepresentation. The unfairness is obvious.

D

ACCA's Denial of Coram Nobis was Flagrantly Wrong

The failure of both CAAF or ACCA to address the merits of the plaintiff's petition for a writ of error coram nobis, *see Bergdahl v. United States*, 2020 WL 7316058 at 3 n.4 (A. Ct. Crim. App. Dec. 11, 2020), standing alone, shows that those courts' consideration was neither full nor fair.

1

The defendant mistakes the standards for coram nobis. ACCA set forth the six standards in its decision on the plaintiff's petition. *Bergdahl v. United States*, *supra*, 2020 WL 7316058 at 4. Of these, only the third and fourth are relevant, and in each instance the plaintiff met the test.

The third standard asks whether "valid reasons exist for not seeking relief earlier." The reasons here could not be more valid: the plaintiff sought relief from CAAF only three days after he received the military judge's job application. He knew before that the military judge *represented* that he had no conflict at the time of trial, and later that he had been employed as an immigration judge. But this was the first time he learned that the judge had in fact (1) submitted a job application *while trying the plaintiff's case* (and pretending to plan to just go into retirement), (2) referred to

[4] *Id*. at 315; *see also* EUGENE R. FIDELL, BRENNER M. FISSELL & DWIGHT H. SULLIVAN, GUIDE TO THE RULES OF PRACTICE AND PROCEDURE FOR THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES § 30A.03[1] at 324-25 (20th ed. 2021) (collecting cases).

the plaintiff's case in his application, and (3) attached a major UCI ruling favorable to former President Trump as his writing sample to an executive branch agency that reports to the President and is responsible for advancing one of his signature policies.

There is no better reason "for not seeking relief earlier" than not having the information. The plaintiff thus met the third coram nobis standard.

The fourth coram nobis standard asks whether "the new information presented in the petition could not have been discovered through the exercise of reasonable diligence prior to the original judgment." Here again, the plaintiff satisfied the test. As our cross-motion explained, litigants *should* rely on a military judge's representations, and should *not,* as the defendant seems to suggest, pursue discovery requests premised on the notion that those representations cannot be trusted. Military law disfavors litigants' investigation into judges' affairs. This Court should not rule that it was the plaintiff's duty to checking to see if the judge had misrepresented his plans (plans that, if successful, would involve him with implementing former President Trump's signature policy initiative to check undocumented immigration). Rather, the duty was one of disclosure on the judge's part. As the Seventh Circuit has explained, "a party does not have an obligation to discover any potentially disqualifying information that is in the public record. The onus is on the judge to ensure any potentially disqualifying information is brought to the attention of the litigants." *Listecki v. Official Comm. of Unsecured Creditors*, 780 F.3d 731, 750 (7th Cir. 2015).

The plaintiff was never on notice that the military judge had applied for a Justice Department job *during the trial*. The Justice Department's press release was not inquiry notice because (a) it did not reveal *when* the new immigration judges had applied for the job and (b) the plaintiff was entitled to presume the military judge had been truthful. Nor was the Court of

Appeals' decision in *Al-Nashiri*, 921 F.3d 224 (D.C. Cir. 2019), which involved a different military judge who had nothing to do with the plaintiff's case. Hence, the plaintiff did not fail to exercise reasonable diligence. That he later made a FOIA request that yielded shocking proof of an *Al-Nashiri* violation cannot be used as a *post hoc* basis for erecting a duty he did not have.

Only 10 months elapsed between the Justice Department press release and ACCA's decision on direct review, and only 16 from the *Al-Nashiri* decision to CAAF's decision. Delays that brief are not a sufficient ground for denying coram nobis.[5] Nor, importantly, has the defendant ever even claimed, much less proven, that its ability to respond to the coram nobis petition was prejudiced by the timing of the plaintiff's FOIA request.

2

ACCA's coram nobis panel offered no explanation for denying the plaintiff's well-founded motion to recuse Judge Walker.

The defendant has not disputed our contention (ECF No. 18-2 at 16 n.71) that the participation of a single disqualified judge is fatal to the decision of a collegial court. Under *Williams v. Pennsylvania*, 579 U.S. 1 (2016), Judge Walker's participation was "an error that affected [ACCA's] whole adjudicatory framework," *id*. at 16, on the coram nobis petition. Rather, the defendant argues that the Criminal Law Division that her spouse headed had some responsibilities that were neutral. *See* ECF No. 22 at 19 (Criminal Law Division's "work is not *solely* oriented towards the prosecution side") (emphasis added).

That is no answer. Whatever *other* responsibilities it had, the Criminal Law Division had a host of military-justice-related functions that align it with the government, as the Army's report

[5] *See generally* ECF No. 17-17 at 16-18 (collecting cases) (Ex. 33); *e.g., Blanton v. United States*, 94 F.3d 227, 232-32 (6th Cir. 1996) (three-year delay not unduly long).

to the ABA indicates. *See* ECF No. 18-2 at 16 n.60. "High profile" cases were specifically included, and the plaintiff's court-martial fit that category like a glove. It is among the highest-profile courts-martial in decades.[6]

Faced with this difficulty, the defendant seeks comfort in Judge Walker's later vote to disqualify a military judge in an unrelated case. *See* ECF No. 22 at 19 n.6. This is hardly responsive. That the judge voted to disqualify a different judge, in a different case, involving different facts, does not make it appropriate for that judge not to recuse *herself* in this case.[7] Even those who are clear-eyed as to the missteps of others may be less alert when their own behavior is under scrutiny.

Judge Walker's failure to apply the normal rules of recusal *when one of her own relationships was at issue* is a matter of record from an Army case the defendant does not cite. In *Hasan v. U.S. Army Court of Criminal Appeals*, 79 M.J. 292 (C.A.A.F. 2019), CAAF summarily granted a petition seeking her disqualification in another case. Her spouse had been the III Corps Chief of Military Justice, a capacity in which he functioned on aspects of the high-profile Fort Hood capital murder case. Thereafter, he had become Deputy Chief of the Army's Criminal Law Division. Hasan argued that "[i]ssuance of the writ is appropriate as to Judge Walker because a reasonable person would lose confidence in the military justice system upon knowing that an

[6] The Army's online FOIA Reading Room highlights only three courts-martial: this case, the Hasan capital case, and the case of Chelsea (Bradley) Manning. *See* https://www.rmda.army.mil/readingroom/index.aspx.

[7] ACCA was right to disqualify the trial judge in *United States v. Rudometkin*, 2021 WL 5235100 (A. Ct. Crim. App. Nov. 9, 2021), but the defendant's reliance on it is surprising, for the government disagrees with it so vehemently that it sought panel and *en banc* reconsideration only two weeks before filing its opposition here. Both were denied. *United States v. Rudometkin*, Dkt. No. 20180058 (A. Ct. Crim. App. Dec. 9, 2021) (order). It is not every day that a litigant relies on a ruling in one federal court while simultaneously attacking it in another.

appellate judge was effectively grading her spouse's homework from his previous job, and then also reviewing her spouse's organization's decisions in his current job." Petition for Extraordinary Relief in the Nature of a Writ of Mandamus and Brief in Support at 14, *Hasan v. U.S. Army Court of Criminal Appeals*, *supra*. CAAF flatly disqualified her.

The defendant protests (ECF No. 22 at 19) that a ruling that Judge Walker had a duty to recuse would mean she should not have sat on ACCA at all while her husband was assigned to the Criminal Law Division. That question is not before the Court. The only question the Court needs to decide concerning Judge Walker is whether, when combined with the other indicia of unfairness, her refusal to recuse in a high-profile case presenting the institutional policy question of how to address apparent UCI exerted by political actors at the highest levels of the government would have raised a red flag for the notional observer. The recusal order in *Hasan* confirms that it would have done so.

ACCA's stated reasons for denying coram nobis and the participation of a blatantly conflicted judge in that decision denied the plaintiff full and fair consideration.

III

ON THE MERITS, THE PLAINTIFF IS ENTITLED TO RELIEF

A

Al-Nashiri *Aside, the Plaintiff is Entitled to Relief*

In his 2021 Year-End Report on the Federal Judiciary, https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf, Chief Justice Roberts highlighted issues that are pertinent here. Invoking Chief Justice Taft (who wrote *Tumey v. Ohio*, 273 U.S. 510 (1927)), he called for special vigilance against political influence:

> Decisional independence is essential to due process, promoting impartial decision-making, free from political or other extraneous influence. But Taft recognized that

> courts also require ample institutional independence. The Judiciary's power to manage its internal affairs insulates courts from inappropriate political influence and is crucial to preserving public trust in its work as a separate and co-equal branch of government. [P. 1]

The Chief Justice focused on three contemporary concerns. The first was "financial disclosure and recusal obligations." He wrote (at 3) that the federal bench's overall high compliance rate and other circumstances are aspects of the context, but added: "We are duty-bound to strive for 100% compliance because public trust is essential, not incidental, to our function. Individually, judges must be scrupulously attentive to both the letter and spirit of our rules, as most are." He also referred to "a culture of compliance." *Id*. at 3-4.

Unfortunately, the military judge fell short in the plaintiff's case. Far from scrupulously adhering to settled standards for disclosure of potential grounds for disqualification, he misled the plaintiff. He should have disclosed his job application rather than lulling the plaintiff into a false sense of his independence (from then-President Trump, his commander in chief) on the notion that he was simply going to "retire on 30." Had he made forthright disclosure instead, the plaintiff would have had the opportunity to conduct additional voir dire, decide afresh whether to waive trial by jury, and reconsider his pleas. Even if the military judge was the fairest in the land, the plaintiff had a right to be tried by a judge who would disclose a potential conflict rather than conceal a material fact.

The gist of the defendant's argument on the merits is that public confidence in the administration of justice was unaffected by Senator McCain's and former President Trump's meddling in and politicization of the plaintiff's prosecution and the military judge's failure to meet basic standards of judicial conduct. The claim is a particularly tall order given the undisputed facts and the government's duty under settled UCI case law to prove the *absence* of an apparent conflict and, what is more, do so *beyond a reasonable doubt*. *United States v. Bergdahl*, 80 M.J. 230, 234

(C.A.A.F. 2020). Even if the government had carried that burden when the question split CAAF 3-2 on direct review, once evidence of the military judge's misrepresentation regarding his own conflict is added to the other evidence, as it must be, it becomes impossible to sustain the court-martial proceedings, especially given the CAAF majority's emphasis on the notion that he was "notably impervious" to "outside forces." *See id.*, 80 M.J. at 244. Far from being "a testament to the strength and independence of the military justice system," *id*., his conduct is the polar opposite. His failure to disclose his job application was a clear violation of R.C.M. 902 and Rule 2.11 of the Army Code of Judicial Conduct, neither of which the defendant even cites. More important, even standing on its own, it is powerful evidence that would lead a member of the general public to harbor a significant doubt as to the fairness of the proceedings. The military judge's disregard of basic norms of judicial conduct would unquestionably have a powerful adverse effect on the views of an informed member of the public.

The third *Liljeberg* factor concerns the risk of undermining the public's confidence in the judicial process.[8] The Court of Appeals referred to it in *Al-Nashiri. See* 921 F.3d at 235. It does the same work as the observer test that CAAF purported to apply. As a result, the military judge's concealment of his job application not only mandates relief under *Al-Nashiri* but deals a fatal blow to CAAF's UCI conclusion.

B

Al-Nashiri *is Not Distinguishable*

Because the plaintiff is entitled to prevail based on R.C.M. 902 and Rule 2.11, the Court could decide this case without regard to *Al-Nashiri*. But the Court of Appeals' decision is a powerful precedent here. The defendant tries to distinguish it on the basis that no Justice

[8] *See Liljeberg v. Health Svcs. Acquisition Corp*., 486 U.S. 847, 860-61 (1988).

Department attorney was formally assigned to the 50-lawyer team assembled to prosecute the plaintiff. *See* ECF No. 22 at 27-28. But our cross-motion pointed out how Justice Department lawyers repeatedly played active supporting roles, *see* ECF No. 18-2 at 38-40, and that evidence is unrebutted. There is no material difference between the detail of a single attorney to the *Al-Nashiri* prosecution and the behind-the-scenes support provided by several Justice Department attorneys to the plaintiff's prosecution.

The defendant would limit *Al-Nashiri* to cases in which the judge whose recusal is at issue has applied for a job with a federal agency whose personnel are formally appearing before him or her. That cramped reading is unwarranted, as indicated by the Navy's judicial screening regulation. As amended after *Al-Nashiri*, it requires aspiring and sitting Navy and Marine Corps military judges to disclose job applications they file or intend to file with *any* federal agency. *See* Dep't of the Navy, JAG Instruction 5817.1K, Judicial Screening Board (July 14, 2021), at 6 (¶ 6.c.(8)(b), *available at* https://www.jag.navy.mil/library/instructions/JAGINST_5817.1K_JSB.pdf.):

> Have you sought out or do you intend on seeking employment with *any* federal governmental agency after military service? If so, please specify the agency and the extent of your interaction. If you decide to pursue such employment while sitting as a trial or appellate judge, you must notify the Chief Judge of the Court on which you sit. [Emphasis added.]

But even if the defendant's cramped reading of *Al-Nashiri* were correct, the military judge's conduct was, if anything, more objectionable in the plaintiff's case. Thus, while Judge Spath disclosed in *Al-Nashiri* that he was going to retire, the military judge who tried the plaintiff used his misleading claim that he would be retiring as evidence that he was invulnerable to influence by the then Commander in Chief, and hence that there was no danger of UCI. UCI was not an issue in *Al-Nashiri*; it was emphatically an issue in the plaintiff's case.

Citing to two unreported decisions of the Air Force Court of Criminal Appeals, the defendant also seeks to limit *Al-Nashiri* to the military commission context. *See* ECF No. 22 at 28-29. The point is not well-taken. Military commission judges are simply military judges detailed to duty with the Military Commissions Trial Judiciary. Judge Spath and the military judge who presided over the plaintiff's court-martial were members of the same pool of military judges. It makes no difference that the former served in the Air Force and the latter in the Army[9]—except of course that the judge who tried the plaintiff was, importantly, subject to the Army's Code of Judicial Conduct.

In *United States v. Snyder*, 2020 WL 1896341 (A.F. Ct. Crim. App. Apr. 15, 2020), *pet. denied*, 80 M.J. 399 (C.A.A.F. 2020),[10] as in *Al-Nashiri*, there was no suggestion that Judge Spath had affirmatively misled the defense. *Snyder* purports to distinguish *Al-Nashiri* on the ground that "there is no reason to believe that a DoJ hiring official would hear about [a ruling that implicated the Justice Department because it concerned the Sex Offender Registration and Notification Act, 34 U.S.C. § 20901 *et seq*.] and be pleased or displeased, or that Judge Spath believed a DoJ hiring official would be aware of his ruling or that it would be any matter of consequence." *Id*. at 21. Here, in contrast, the military judge not only highlighted his role in this specific high-profile case, but attached as his one writing sample a ruling that just happened to concern the very official to whom the Attorney General reports: the President. Thus, *Snyder* rests on a distinction that makes *Al-Nashiri* more, rather than less, pertinent.

[9] Military judges may try cases in service branches other than their own. R.C.M. 201(e)(4).

[10] Denial of a petition for review does not imply that CAAF agrees with a service court's decision. *United States v. McGriff*, 78 M.J. 487 (C.A.A.F. 2019) (per curiam).

The defendant also cites *United States v. Wilson*, 2021 WL 2390367 (A.F. Ct. Crim. App. June 10, 2021), which also involved Judge Spath. But *Wilson* is merely a rerun of *Snyder* and is the only case to cite it. *Wilson* itself has itself never been cited by any court. Whether or not they were correctly decided on their own facts, these unreported rulings are readily distinguishable and should not be followed.

C

The Government Did Not Carry its UCI Burden of Proof

Would a reasonable objective observer harbor significant doubts about the fairness of the plaintiff's court-martial proceedings? The government had the burden of *disproving* that beyond a reasonable doubt. The fact that two CAAF judges out of five (and one out of three at ACCA) thought the circumstances merited relief in itself suggests that the proof did not rise to that level. The defendant asks the Court to defer to CAAF's narrow majority because, it insists, the matter is so wrapped up in military culture that only military courts can understand. This is fallacious, as we have explained. *See* pp. 3-6 *supra*.

1

The defendant argues that the offenses to which the plaintiff pleaded are "anathema to the military and its mission," ECF No. 22 at 6, and that "as a direct and foreseeable consequence of [his] misconduct, other members of the armed forces were injured—some severely—while seeking to find and rescue [him]." *Id.* at 14. The defendant says these two points would, in the eyes of a member of the public, overwhelm the evidence of political interference and conflict of interest that leaps from the record, from the inception of the military proceedings and continuing through trial and appellate review at ACCA. But, as the notional observer would understand, the "desertion" charged here was that a soldier exposed himself to increased personal danger *in an effort to reach*

a U.S. Forward Operating Base. That observer would also understand that the defendant could muster no examples of similar conduct being charged as desertion at all (as opposed to simple AWOL). In any event, if everything charged as "desertion" were "anathema," the Army would not have agreed to a pretrial agreement in the case of Sergeant Jenkins, who was a defector and collaborator (the absolute worst kind of deserter), that put him behind bars for 30 days (letting him go for good behavior in 25). *See* Austin Ramzy, *Charles Jenkins, 77, U.S. Soldier Who Regretted Fleeting to North Korea, Dies*, N.Y. TIMES, Dec. 12, 2017; *see also* ECF No. 17-15 at 5 (Ex. 31); ECF No 18-2 at 32 n.122.

The notional observer would also know that in open court the plaintiff had expressed deep regret for his actions, and in particular for the injuries others sustained in search and recovery efforts. That soldiers were injured searching for him seems thin gruel in the face of the government's duty to prove *beyond a reasonable doubt* that a member of the general public would not harbor a significant doubt about the fairness of the proceedings in the teeth of the UCI committed by Senator McCain and former President Trump and the five years of hell the plaintiff endured at the hands of the enemy.

2

The defendant has not meaningfully rebutted the demolition job former President Trump performed on the clemency phase of the plaintiff's court-martial.

In military justice, a convening authority is subordinate to the President. At the time of the plaintiff's trial, the convening authority had complete and unfettered discretion to disapprove the findings or sentence in whole or in part. Here the convening authority granted no clemency and offered no explanation. Before the convening authority's review could even begin, former

President Trump, addressing millions of his Twitter "followers," denounced the plaintiff's lack of confinement as "a complete and total disgrace."

The notion that this statement could have had no effect on an objective observer's view of the fairness of clemency review—much less that that was clear beyond a reasonable doubt—is simply absurd. Mr. Trump, as Commander in Chief, was in a position to influence the convening authority's future assignments. The "disgrace" tweet would lead any reasonable observer to question whether it would affect the convening authority's willingness to exercise his post-trial discretion in a manner that was favorable to the plaintiff. The government had the burden of disproving that concern beyond a reasonable doubt. It didn't. It couldn't.[11]

As we previously explained, *see* ECF No. 18-2 at 29, a long list of considerations furnished a substantial basis for the exercise of clemency by the convening authority:

> (1) SGT Bergdahl's contrition; (2) his acceptance of responsibility with guilty pleas entered into without a pretrial agreement; (3) cruel treatment at the hands of the enemy alone for nearly five years; (4) his laudable behavior in captivity including continued escape attempts to resist his captors; (5) his complete cooperation with the government after captivity, including numerous intelligence debriefings and a full interview with the Army's AR 15-6 [investigating] officer; (6) his ongoing efforts to assist the government with captivity education, training, and doctrine; (7) his age at the time of the offenses; (8) his otherwise clean disciplinary record; (9) his documented physical and mental injuries; (10) the Army's error in enlisting him without the psychological evaluation recommended after he was removed from Coast Guard basic training; (11) the campaign of vilification against him; (12) the destruction of over 100 letters about SGT Bergdahl by the CA [convening authority] at the advice of the SJA [staff judge advocate]; and ([13]) apparent unlawful command influence by President Trump, who tweeted that SGT Bergdahl's sentence was "a complete and total disgrace to our Country and to our Military."

See ECF No. 17-12 (Ex. 28 at 643-44).

[11] These observations also apply to ACCA, which also had sweeping power as to what findings and sentence it wished to approve. All of the ACCA judges were military officers.

It has always been crystal clear that the plaintiff desired clemency. Indeed, he was so interested in it that he objected that the convening authority was in no position to render a fair clemency decision because he would have to judge his own conduct in secretly destroying some 100 letters concerning the case. The defendant's persistence in the face of the record is startling and, like the thirteenth stroke of a clock, casts doubt on its case as a whole. *See, e.g., United States v. Marchena-Silvestre*, 802 F.3d 196, 203 (1st Cir. 2015).

3

CAAF thought a member of the public would give little weight to the fact that prosecution of a repatriated POW who had behaved well in captivity was a departure from policy set in the Vietnam era. *See United States v. Bergdahl*, 80 M.J. at 239 n.10. The government never denied that there was such a policy. Since it had both the burden of proof and complete access to its own records, it was incumbent on it to show either that there was no such policy, that there once was but it had been abandoned, or that it had not been abandoned but included a "Bergdahl exception" where the pre-capture offense was an AWOL that caused searchers to be injured. It never did any of these.

If there were no cases in the intervening years that called for application of the policy, that is not evidence that the policy had been abandoned. A member of the public would thus count the policy set during the Vietnam War as yet another factor that, taken with everything else, would raise a significant question about the fairness of the proceedings in light of the two-front UCI war Senator McCain and former President Trump waged on the administration of justice in the plaintiff's case.

4

In a footnote, *see* ECF No. 22 at 7 n.1, the defendant seeks to sidestep its own earlier reference to CAAF's "assessment" of the fact that the Obama administration had exchanged five Guantanamo detainees for the plaintiff. According to the defendant, "the CAAF was highlighting the fact that, as a result of Plaintiff's offense, five members of the enemy force were released back onto the battlefield during an armed conflict." *See* ECF No. 16-1 at 31. Our brief pointed out that, on the contrary, former President Trump's repeated assertions that those detainees had returned to the battlefield were among those CAAF actually found to be "inaccurate and inflammatory." *See* ECF No. 18-2 at 8 n.38. CAAF's decision makes this clear. *See United States v. Bergdahl*, 80 M.J. at 236-37.

The argument is one that, if anything, cuts in favor of relief. It amounts to the proposition that it is fair to scapegoat our own POWs criminally for decisions of politicians and behavior of the enemy. A fair-minded member of the public would hardly consider it fair to prosecute a returning American POW because of the later conduct of enemy detainees for whom he was fortunate enough to be exchanged. Those detainees were exchanged by our country's highest official, with responsibility for both military decision making and the conduct of foreign affairs, regarding a pathway to peace in Afghanistan. They were exchanged when the plaintiff was still a prisoner of the Haqqani network and in no position to influence anyone about anything. Trying to justify his prosecution on the basis of that exchange might accord with Haqqani "justice," but it is remarkable for the defendant to suggest, even obliquely, that it accords with our own.

Conclusion

For the foregoing reasons and those previously stated, the plaintiff's Cross-Motion for Summary Judgment should be granted.

Respectfully submitted,

/s/ *Eugene R. Fidell*
EUGENE R. FIDELL
D.C. Bar No. 112003
Feldesman Tucker Leifer Fidell LLP
1129 20th St., N.W., Suite 400
Washington, DC 20036
(202) 256-8675 (mobile)
efidell@feldesmantucker.com

/s/ *Franklin D. Rosenblatt*
FRANKLIN D. ROSENBLATT
D.C. Bar No. 1600851
151 E. Griffith St.
Jackson, MS 39201
(202) 793-0005
frosenblatt@mc.edu

/s/ *Matthew D. Bernstein*
MATTHEW D. BERNSTEIN
D.C. Bar No. 1013815
Shook, Hardy & Bacon L.L.P.
201 S. Biscayne Blvd., Suite 3200
Miami, FL 33131
(305) 755-8941
mbernstein@shb.com

/s/ *Stephen A. Saltzburg*
STEPHEN A. SALTZBURG
D.C. Bar No. 370949
2000 H St., N.W.
Washington, DC 20052
(202) 994-7089
ssaltz@law.gwu.edu

/s/ *Stephen I. Vladeck*
STEPHEN I. VLADECK
D.C. Bar No. 988509
727 E. Dean Keeton St.
Austin, TX 78705
(512) 475-9198
svladeck@law.utexas.edu

/s/ *P. Sabin Willett*
P. SABIN WILLETT
Morgan, Lewis & Bockius LLP

One Federal St.
Boston, MA 02110-1726
(617) 951-8775
sabin.willett@morganlewis.com

Attorneys for the Plaintiff

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