

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF’S OPPOSITION TO DEFENDANT’S MOTION TO DISMISS  
AND MEMORANDUM IN SUPPORT OF CROSS-MOTION  
FOR SUMMARY JUDGMENT

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**Glossary**

ACCA ..... U.S. Army Court of Criminal Appeals

CAAF .....U.S. Court of Appeals for the Armed Forces

R.C.M..... Rules for Courts-Martial

TJAG..... The Judge Advocate General

UCI.....unlawful command influence

UCMJ..... Uniform Code of Military Justice

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## Introduction

This is a case about the flagrant abuse, for obvious political purposes, of the due process rights of a repatriated American POW.

In 2009 the plaintiff left his Army post in Afghanistan to hike to a higher headquarters to complain about conditions and leadership deficiencies in his unit. The enemy quickly captured him and proceeded to hold him under brutal conditions for five years. During all that time, he comported himself in accordance with the Code of Conduct for Members of the Armed Forces of the United States, including making repeated escape attempts. In 2014, he was exchanged for five Guantánamo detainees. Almost immediately, he was made the object of intense hostile attention as politicians and candidates worked to score points against President Obama, whose administration had negotiated the prisoner exchange. A general court-martial followed.

When proceedings of the military courts are not “full and fair,” this Court has jurisdiction to determine whether they satisfied the requirements of the Constitution and other critical legal requirements.<sup>1</sup> We show in Point I that the military courts’ proceedings were neither full nor fair. Because there is no dispute of material fact, summary judgment is proper and warranted. We show in Point II that the plaintiff is entitled to judgment as a matter of law because the proceedings denied him due process of law.

On the merits, two issues leap out. The first is interference by the Legislative Branch and the Commander in Chief. The chairman of the Senate Armed Services Committee – the legislator with almost unique control over military budgets and promotions – demanded that the Army bring

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<sup>1</sup> *Burns v. Wilson*, 346 U.S. 137 (1953).

charges against the plaintiff, furnish regular updates to his office, and ultimately deliver punishment on pain of public hearings. Thereafter, the future Commander in Chief unleashed appalling abuse (unique in American history) of an individual soldier, repeatedly calling for his execution as rally crowds yelled their approval. He explicitly promised to review the plaintiff's case if elected. As Commander in Chief, he reaffirmed his earlier statements, and then publicly faulted the sentence as a "disgrace." When he did so, the statutory post-trial clemency and appellate review processes had not yet been conducted.

The Court of Appeals has rightly observed that whether "extraneous pressure intruded into [an agency decisionmaker's] calculus of consideration" is an important factor in assessing due process,<sup>2</sup> and that a litigant need not prove that such pressure actually caused the result.<sup>3</sup> Legislative meddling in adjudicatory processes has a long history. The Framers, for example, were deeply concerned with the injustices worked by colonial assemblies' intrusion on the judicial function.<sup>4</sup> That concern resulted in Article 1, section 9 of the Constitution, which proscribes all legislative acts, "no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial. . . ."<sup>5</sup> Persistent meddling by the political branches in the plaintiff's case, while not a bill of attainder, created the very "appearance of bias or pressure" to which the Court of Appeals alluded in *D.C.*

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<sup>2</sup> See *D.C. Federation of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1246-47 (D.C. Cir.1971) ("Plaintiff might have prevailed even without showing that the pressure had actually influenced the Secretary's decision. With regard to judicial decisionmaking, whether by court or agency, the appearance of bias or pressure may be no less objectionable than the reality.").

<sup>3</sup> *Id.* (citing *Pillsbury Co. v. FTC*, 354 F. 2d 952, 964 (5th Cir. 1966)).

<sup>4</sup> See generally *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) (discussing background of bill of attainder clause).

<sup>5</sup> *United States v. Lovett*, 328 U.S. 303, 315 (1946).



*Federation.*

The assault on due process had a second, equally disturbing dimension. The military judge who presided at Fort Bragg had a disqualifying personal interest that he had a duty to disclose. He actively dissembled to the litigants, concealing the critical fact that he had a pending application for a position in the Executive Branch. He claimed to be impervious to unlawful command influence, citing among other things his own disingenuous assertion that he was simply going to retire when his time in the Army was up. That a judge in a Court of Law be free of personal interests, and candidly disclose them where they exist, is utterly essential to due process.<sup>6</sup> The Court of Appeals' decision in *In re Al-Nashiri*<sup>7</sup> is dispositive on this score.

This case dramatically shows why politics has no place in the administration of military justice. As the Army's trial counsel (lead prosecutor) belatedly admitted two weeks ago, "the case became politicized very quickly."<sup>8</sup>

- Contrary to settled practice since the Vietnam War,<sup>9</sup> a repatriated American POW whose conduct in captivity was above reproach was prosecuted for an offense committed before he was taken prisoner
- The day after the prisoner exchange, Richard Grenell, who was running "a scrappy media shop," "taped a Fox News interview in which he suggested Bergdahl had intentionally defected to the Taliban"<sup>10</sup>

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<sup>6</sup> *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868 (2009) (due process violation for judge not to recuse when received campaign contributions from litigant); *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (due process violation may arise when the "probability of bias on the part of the judge or decision maker is too high to be constitutionally tolerable"); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927); *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 823-24 (1986).

<sup>7</sup> 921 F.3d 224 (D.C. Cir. 2019).

<sup>8</sup> See Prosecutorial Ethics in Real Life: Justin Oshana, Interview, Sept. 15, 2021, James E. Rogers College of Law, Univ. of Ariz., [https://www.youtube.com/watch?v=OTNJ1E6m7\\_U](https://www.youtube.com/watch?v=OTNJ1E6m7_U), at 23:4714:51. Mr. Oshana is an Assistant United States Attorney in the Eastern District of Pennsylvania.

<sup>9</sup> See Ex. 19.

<sup>10</sup> See generally Michael Ames, *How Trump's New Intelligence Chief Spread Misinformation About Bowe Bergdahl*, Politico, Mar. 11, 2020, <https://www.politico.com/news/magazine/2020/03/11/richard-grenell-smear-against-bowe-bergdahl-125157>; see also MATT FARWELL & MICHAEL AMES, AMERICAN CIPHER: BOWE BERGDAHL AND THE U.S.

- On the “Fox & Friends” television show the next day, Donald J. Trump, at the time a New York real estate developer and television personality, called the plaintiff a traitor<sup>11</sup>
- “In the chaotic weeks of news coverage that followed, Grenell helped weaponize the prisoner swap into a prolonged political attack on the Obama administration”<sup>12</sup>
- The House and Senate Armed Services Committees closely monitored the Army’s decision making regarding the plaintiff, including the status of investigations, the course of the court-martial process, and even his entitlement to back pay and decorations<sup>13</sup>
- Senator John S. McCain threatened to hold a Senate Armed Services Committee hearing if the plaintiff were not punished<sup>14</sup>
- The two-star general who headed the Army’s investigation into the plaintiff’s disappearance traveled across the country to brief the highest military and civilian officials of the Army, as well as the Secretary of Defense, the Chairman and Vice Chairman of the Joint Chiefs of Staff, and House and Senate committee staff members<sup>15</sup>
- The Senate Armed Services Committee demanded and received regular reports on the status of the case<sup>16</sup>
- A House Armed Services Committee report noted that the committee would “remain abreast of the disciplinary process which is underway”<sup>17</sup>
- Presidential candidate Trump conducted a vicious public vendetta against the plaintiff throughout the 2015-16 campaign, repeatedly calling him a traitor and calling for his execution<sup>18</sup>
- The Army hand-picked a general whose North Carolina-based command had no

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TRAGEDY IN AFGHANISTAN 265-66 (2019). Former President Trump later made Grenell the U.S. Ambassador to Germany and acting Director of National Intelligence.

<sup>11</sup> Ames, *supra* note 10.

<sup>12</sup> *Id.*

<sup>13</sup> See Ex. 28 at 149-53, 304-06, 609-41.

<sup>14</sup> See Ex. 28 at 3, 60, 152.

<sup>15</sup> See Ex 37; see also Ex. 28 at 149.

<sup>16</sup> See Ex. 28 at 614-21, 629.

<sup>17</sup> See Ex. 22 at 5.

<sup>18</sup> A DVD collecting many of former President Trump’s outrageous and false public statements about the plaintiff was admitted in evidence. Ex. 1 at 2584-85 (Def. Ex. P). It can be accessed online at <https://www.youtube.com/watch?v=S2MJem950M>.

assigned prosecutors and had never before convened a court-martial<sup>19</sup> to deal with disciplinary action against the plaintiff even though he had never had any connection with that command and was stationed in Texas, over 1200 miles away

- The Army assigned more than 50 lawyers to the team prosecuting the plaintiff<sup>20</sup>
- After taking office, former President Trump publicly ratified his campaign-trail statements vilifying the plaintiff<sup>21</sup>
- Almost immediately after the plaintiff was sentenced (and before the convening authority decided whether to grant clemency and the judges of the Army's intermediate court had an opportunity to review the case), former President Trump denounced the sentence as "a complete and total disgrace to our Military and to our Country"<sup>22</sup>
- While the case was pending appellate review, former President Trump continued to make disparaging remarks about the plaintiff<sup>23</sup>

The Chief Judge of the U.S. Court of Appeals for the Armed Forces (CAAF) correctly observed that "[t]his case is unique in modern American military jurisprudence."<sup>24</sup> Writing in the *Washington Post* a few days later, the lead prosecutor (who had sought a 14-year jail sentence for the plaintiff) admitted that

Bergdahl, like every American, deserved to have his actions judged, not on the campaign trail, not on cable news, but in a court of law. He did not deserve to be condemned by the president before he got his day in court. While the presidency might be the most powerful position on Earth, the responsibility to fair and impartial justice does not wane to score political points.<sup>25</sup>

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<sup>19</sup> See Oshana Interview, *supra* note 8, at 14:51, 15:08. Mr. Oshana also noted that the case was, unusually, sent to a four-star general even though general courts-martial are ordinarily convened by two-star generals.

<sup>20</sup> See Ex. 26 at 9.

<sup>21</sup> See Ex. 28 at 5, 86; *United States v. Bergdahl*, 80 M.J. 230, 238 (C.A.A.F. 2020).

<sup>22</sup> See Ex. 28 at 6, 13, 642; 80 M.J. at 238.

<sup>23</sup> See Ex. 27 at 663-64.

<sup>24</sup> *United States v. Bergdahl*, 80 M.J. 230, 245 (C.A.A.F. 2020) (Stucky, C.J., concurring in part and dissenting in part). Similarly, the trial judge called it "an unusual case, perhaps unique in all the annals of military justice." Ex. 27 at 84.

<sup>25</sup> Justin Oshana, *I Led the Prosecution Against Bowe Bergdahl. Trump Made My Job Much Harder*, WASH. POST, Aug. 31, 2020.

Political interference “inevitably corrupts and taints individual cases, impairing public confidence in the judicial integrity of courts-martial.”<sup>26</sup> The same is true of the military judge’s concealment of a material fact that demanded disclosure to the parties and warranted his disqualification.<sup>27</sup> Both the politicization and the concealment denied the plaintiff due process. Taken together, the case for relief is overwhelming.

### Questions Presented

- I. DID THE MILITARY COURTS AFFORD THE PLAINTIFF’S CLAIMS FULL AND FAIR CONSIDERATION?
- II. WAS THE PLAINTIFF DENIED DUE PROCESS OF LAW?

### Legal Framework

#### I

#### *Governing Constitutional, Statutory, and Regulatory Provisions*

The governing provisions, which are reproduced in the Appendix to this brief, are the Due Process Clause of the Fifth Amendment;<sup>28</sup> Art. 37, UCMJ; Rules for Courts-Martial (R.C.M.) 104(a)(1) and 902; and Rule 2.11 of the Code of Judicial Conduct for Army Trial and Appellate Judges (May 16, 2008) (Army Code of Judicial Conduct).<sup>29</sup> The former versions of Art. 60(c),

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<sup>26</sup> Dan Maurer, *Is Demilitarizing Military Justice an Ethical Imperative for Congress, the Courts, and the Commander-in-Chief?*, 49 HOFSTRA L. REV. 1, 2 (2020).

<sup>27</sup> See pp. 34-44 *infra*.

<sup>28</sup> The Due Process Clause applies to the military justice system. See, e.g., *United States v. Bess*, 75 M.J. 70, 74 n.3 (C.A.A.F. 2016) (citing *Weiss v. United States*, 510 U.S. 163, 165 (1994); *Middendorf v. Henry*, 425 U.S. 25, 43 (1976)).

<sup>29</sup> Ex. 32 App. (Petition for Writ of Error Coram Nobis App. G); MILITARY COURT RULES OF THE UNITED STATES: PROCEDURE, CITATION, PROFESSIONAL RESPONSIBILITY, CIVILITY, AND JUDICIAL CONDUCT § 5.6, at 888-917 (Eugene R. Fidell, Franklin D. Rosenblatt, Jonathan F. Potter & Jocelyn C. Stewart, eds., 7th ed. 2021).

UCMJ and R.C.M. 1107(c) (Discussion) are also pertinent because they authorized the convening authority to disapprove the findings of guilt and the sentence for any reason or no reason.<sup>30</sup>

## II

### *Apparent unlawful command influence*

“Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself.”<sup>31</sup> Consistent with this teaching, unlawful command influence (UCI), a doctrine rooted in due process, is the “mortal enemy of military justice.”<sup>32</sup> At the time of the plaintiff’s court-martial,<sup>33</sup> it could take two forms: “actual UCI,” in which the accused (as the defendant is known in military justice practice) had to show prejudice to his case, and “apparent UCI,” in which the overriding concern is public confidence in the military justice system.<sup>34</sup> Once an accused has presented “some evidence” of UCI,

the burden shifts to the government to prove beyond a reasonable doubt that either: (a) the “predicate facts proffered by the appellant do not exist,” or (b) “the facts as presented do not constitute unlawful command influence.” *Id.* (citing *Salyer*, 72 M.J. at 423; *United States v. Biagase*, 50 M.J. 143, 151 (C.A.A.F. 1999)). If the government cannot succeed at this step, it must prove beyond a reasonable doubt

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<sup>30</sup> The version of the *Manual for Courts-Martial* that was in effect when the plaintiff was tried had no provision regarding the consideration of political pressure in military justice decision making. *See Manual for Courts-Martial, United States* (2012 & 2016 eds.), R.C.M. 306(b) (Discussion) (former versions). This case demonstrates that silence on such a question is not golden. After the convening authority approved the proceedings of the court-martial, the Defense Department issued guidance that “[p]olitical pressure to take or not to take specific actions in the case” is “inappropriate” for commanders, convening authorities, staff judge advocates, and judge advocates to take into account when exercising their duties with respect to the disposition of charges under the UCMJ. *See Manual for Courts-Martial, United States* (2019 ed.), App. 2.1, § 2.7.e, at A2.1-3. As far as the plaintiff’s right to a fair trial is concerned, this was a classic example of shutting the barn door after the horses had bolted.

<sup>31</sup> *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909 (2016).

<sup>32</sup> *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986).

<sup>33</sup> While the court-martial was on direct review, Congress amended the UCMJ to require a showing of prejudice in all cases. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, 133 Stat. 1198 (2019). The amendment is inapplicable because it applies only to cases tried after December 20, 2019. *Id.* § 532(c), 133 Stat. 1361.

<sup>34</sup> *United States v. Boyce*, 76 M.J. 242, 247 (C.A.A.F. 2017); *United States v. Proctor*, 81 M.J. 250, 255 (C.A.A.F. 2021).

that the unlawful command influence “did not place an intolerable strain upon the public’s perception of the military justice system and that an objective, disinterested observer, fully informed of all the facts and circumstances, would [not] harbor a significant doubt about the fairness of the proceeding.” *Id.* at 249 (alteration in original) (internal quotation marks omitted) (citation omitted).<sup>35</sup>

The observer is deemed to be “a reasonable member of the public.”<sup>36</sup> At oral argument before CAAF in 2020, the government admitted that the matters imputed to the observer – other than the facts of the particular case – are “things that are in the [*sic*] general knowledge.”<sup>37</sup> Military courts have no special expertise either with regard to what facts are “general knowledge” or as to generic due process issues such as when a judge must disclose a possible ground for recusal.<sup>38</sup>

### Statement of the Case

In 2017, the plaintiff was convicted of desertion and misbehavior before the enemy (the misbehavior being the same absence that gave rise to the desertion charge). The military judge – an Army JAG Corps colonel – sentenced him to a dishonorable discharge, reduction (*i.e.*, demotion) to the lowest enlisted pay grade, and forfeiture of \$10,000.<sup>39</sup> What should have followed was a critical phase of military justice, the “clemency” phase, in which the accused is entitled to careful consideration by the convening authority. A returning POW who had endured barbaric torture and

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<sup>35</sup> *United States v. Bergdahl*, 80 M.J. at 234.

<sup>36</sup> *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006); *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013); *see also Boyce*, 76 M.J. at 252. Apparent UCI will be found if the observer “might well be left with the impression,” *Salyer*, 72 M.J. at 427, that the process had been unfair.

<sup>37</sup> CAAF Hearing Audio, June 2, 2020, at 39:00-40:05, *United States v. Bergdahl*, <https://www.armfor.uscourts.gov/newcaaf/CourtAudio8/20200602.mp3>.

<sup>38</sup> The defendant suggests (at 31) that the Court should “give significant weight to CAAF’s assessment” of the fact that the Obama administration exchanged five Guantanamo detainees for the plaintiff. The CAAF majority never found that the “Taliban 5” had been “released back onto the battlefield.” Rather, that was a claim former President Trump made during the 2015-16 campaign. Worse yet, it was among those the CAAF majority found “inaccurate and inflammatory.” *See United States v. Bergdahl*, 80 M.J. at 236-37. An “assessment” CAAF never made is not entitled to *any* weight, much less “significant weight.”

<sup>39</sup> Ex. 1 at 2704; Ex. 10; *United States v. Bergdahl*, 80 M.J. at 232.

isolation would be a prime candidate for clemency on a host of grounds, such as the preclusion of needed VA healthcare. The clemency phase was corrupted before it began when former President Trump, on *Twitter*, derided the sentence as “a complete and total disgrace to our Country and to our Military.”<sup>40</sup> On June 4, 2018, the convening authority approved the findings and sentence without comment.

On July 16, 2019, a divided panel of the Army Court of Criminal Appeals (ACCA) affirmed.<sup>41</sup> Judge Ewing dissented in part and would have (a) found that the convening authority’s action was not free from UCI and (b) set aside the dishonorable discharge portion of the sentence. Judge Ewing concluded that “the timing, specificity, and unequivocal nature of . . . the tweet make it impossible” to say with the requisite certainty that the government had proved beyond a reasonable doubt that an objective, disinterested observer would not “harbor a significant doubt about the fairness” of the proceedings.<sup>42</sup> Judge Ewing would have found that the convening authority’s post-trial action was not free from apparent UCI, and accordingly would have set aside the dishonorable discharge.<sup>43</sup>

The plaintiff sought CAAF review on four issues. CAAF granted review of one:<sup>44</sup>

WHETHER THE CHARGES AND SPECIFICATIONS SHOULD BE DISMISSED WITH PREJUDICE OR OTHER MEANINGFUL RELIEF GRANTED BECAUSE OF APPARENT UNLAWFUL COMMAND INFLUENCE.<sup>45</sup>

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<sup>40</sup> Ex. 28 at 6, 13, 642; *United States v. Bergdahl*, 80 M.J. at 238.

<sup>41</sup> *United States v. Bergdahl*, 79 M.J. 512 (A. Ct. Crim. App. 2019) (2-1 decision).

<sup>42</sup> *Id.* at 533 (quoting *Boyce*, 76 M.J. at 248) (Ewing, J., dissenting in part).

<sup>43</sup> *Id.* at 534.

<sup>44</sup> The other three were whether the charges were unreasonably multiplied because they charged precisely the same misconduct, whether the military judge misapplied the specific intent element of the desertion charge, and whether the misbehavior charge stated an offense. Ex. 32 at 1.

<sup>45</sup> *United States v. Bergdahl*, 79 M.J. 307 (C.A.A.F. 2019) (order).

On August 27, 2020, by a 3-2 vote, CAAF affirmed ACCA's decision.<sup>46</sup> Chief Judge Stucky and Judge Sparks, concurring in part and dissenting in part, would have dismissed the charges with prejudice on the basis of apparent UCI.

On September 7, 2020, the plaintiff filed a timely petition for reconsideration.<sup>47</sup> On September 15, 2020, he received for the first time a copy of an application the military judge had filed during the trial for appointment as a Justice Department immigration judge,<sup>48</sup> even though he had assured the parties that he was simply going to retire at the end of his Army service. Upon receiving the application, the defense promptly moved to supplement the record.<sup>49</sup> CAAF denied both reconsideration and leave to supplement without explanation but without prejudice to the plaintiff's "right to file a writ of error coram nobis with the appropriate court."<sup>50</sup> He filed such a petition on October 23, 2020,<sup>51</sup> which ACCA denied on the ground that he had failed to provide an adequate explanation for not raising the military judge's job application earlier than he did.

The only explanations provided by petitioner are that "[petitioner's] case was still before the [CAAF] on petition for reconsideration when [petitioner] received [the military judge's] job application from the [DOJ]," and the "FOIA request was filed out of an abundance of caution." These explanations do not clarify why petitioner did not request the military judge's employment application earlier, and why he did not raise this issue at this court on direct appeal.<sup>52</sup>

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<sup>46</sup> *United States v. Bergdahl*, 80 M.J. 230 (C.A.A.F. 2020).

<sup>47</sup> Ex. 31.

<sup>48</sup> Ex. 33 App. (Motion to Supplement the Record).

<sup>49</sup> *Id.*

<sup>50</sup> *United States v. Bergdahl*, 80 M.J. 362 (C.A.A.F. 2020) (order).

<sup>51</sup> Ex. 14.

<sup>52</sup> Ex. 33 App., *Bergdahl v. United States*, Dkt. No. ARMY MISC 20200588, at 4, 2020 WL 7316058, 2020 CCA LEXIS 443 (A. Ct. Crim. App. Dec. 11, 2020) (footnote omitted). ACCA's account of the plaintiff's explanation was highly incomplete. His reasons are set forth on pp. 7-8 of the coram nobis petition; Ex. 14; pp. 3-9 of his reply to the government's answer to that petition, Ex. 16; pp. 12-19 of his writ-appeal petition to CAAF, Ex. 32; and pp. 3-5 of his reply to the government's answer to the writ-appeal petition. Ex. 33.



ACCA explicitly disclaimed ruling on the merits of the plaintiff's claims.<sup>53</sup> He filed a writ-appeal petition<sup>54</sup> which CAAF denied without explanation.<sup>55</sup>

## Argument

### I

#### THE MILITARY COURTS DID NOT AFFORD THE PLAINTIFF'S CLAIMS FULL AND FAIR CONSIDERATION

The Court must determine whether the plaintiff's claims were fully and fairly considered by the military courts before it can reach the merits.<sup>56</sup> They were neither, as we explain in this section. The Court therefore must address the merits, considering the legal sufficiency of the proceedings *de novo*. We discuss the merits in Point II *infra*.

### A

*Where due process is at stake, the degree of deference should not turn on whether the person seeking collateral review is in custody*

The defendant has made two points about the nature of the Court's review that require preliminary comment. First, it implies (at 23) that the Circuit erred in embracing the "full and fair consideration" test over what the defendant refers to as "the properly-applicable 'void' standard." In so doing, it asks this Court to invade that court's province. Unless the *en banc* Court of Appeals

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<sup>53</sup> Ex. 33 App. at 3 n.4.

<sup>54</sup> Ex. 33.

<sup>55</sup> Ex. 35; *Bergdahl v. United States*, 81 M.J. 128 (C.A.A.F. 2021) (order). The plaintiff's conviction was not final when he sought reconsideration and leave to file the military judge's job application, or when he filed his coram nobis petition or his writ-appeal petition. It became final when the time for seeking certiorari expired in March 2020. *See* Art. 60(c)(1)(B)(iii)(1), UCMJ; R.C.M. 1209(a)(1)(B)(iii)(1).

<sup>56</sup> *Burns v. Wilson*, 346 U.S. at 142.

overturns its precedents – or the Supreme Court does so – this Court is bound by the law as articulated in the Court of Appeals’ most recent pronouncement.<sup>57</sup>

Second, the defendant argues (at 22) that collateral review of a court-martial should be more deferential when a plaintiff is not in custody. In *United States ex rel. New v. Rumsfeld*, 448 F.3d 403, 408 (D.C. Cir. 2006) (*New II*), the Court of Appeals admitted to “serious doubt whether the judicial mind is really capable of applying the sort of fine gradations in deference that the varying formulae may indicate.” This case satisfies the test regardless of the level of deference, but “greater deference” is not warranted simply because a plaintiff is not in custody. This is particularly so where, as here, substantial constitutional issues are presented.

In *Schlesinger v. Councilman*, 420 U.S. 738, 753 (1975), the Supreme Court

emphasize[d] that the grounds upon which military judgments may be impeached collaterally are not necessarily invariable. For example, grounds of impeachment cognizable in habeas proceedings may not be sufficient to warrant other forms of collateral relief. Lacking a clear statement of congressional intent one way or the other, the question whether a court-martial judgment properly may be deemed void – i.e., without *res judicata* effect for purposes of the matter at hand – may turn on the nature of the alleged defect and the gravity of the harm from which relief is sought. Moreover, both factors must be assessed in light of the deference that should be accorded the judgments of the carefully designed military justice system established by Congress.

*New II* read more into *Councilman* than is really there when it commented that “non-habeas review is if anything more deferential than habeas review of military judgments.”<sup>58</sup> What Justice Powell *actually wrote* in *Councilman* was that “grounds of impeachment cognizable in habeas proceedings *may not be sufficient* to warrant other forms of collateral relief.”<sup>59</sup> The remainder of

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<sup>57</sup> *E.g.*, *United States v. Torres*, 115 F.3d 1033, 1036 (D.C. Cir. 1997).

<sup>58</sup> 448 F.3d at 408.

<sup>59</sup> 420 U.S. at 753 (emphasis added).

the paragraph in which this careful language appears is highly conditional, noting the absence of “a clear statement of congressional intent” (an absence that persists to this day) and twice employing the loose word “may” rather than the more definitive “shall” or “will” in offering the two factors – “the nature of the alleged defect” and “the gravity of the harm” – that must be assessed. *Councilman* cites no authority for this proposition. We believe it is incorrect and respectfully preserve our position on the point.

As Chief Justice Warren wrote in *Sibron v. New York*, 392 U.S. 40, 52 & n.12 (1968), “[m]any deep and abiding constitutional problems are encountered primarily at a level of ‘low visibility’ in the criminal process – in the context of prosecutions for ‘minor’ offenses which carry only short sentences.” The same kinds of grave issues can arise in courts-martial that lead to a custodial sentence and hence qualify for review on habeas, on the one hand, and those in which no confinement is adjudged, on the other. It is not apparent why a soldier whose sentence includes a year in the stockade following a constitutionally defective trial is entitled to more penetrating collateral review than one who (like the plaintiff) receives a stigmatizing punitive discharge but no confinement following an equally defective trial. Indeed, a joint trial may result in jail for one accused but a non-custodial sentence for a co-accused. It would make no sense for the contentions of an accused whose culpability is presumptively greater to get closer scrutiny than those of a less culpable co-actor when their claims on collateral review are identical.

According to *New II*, the nature of the alleged defects in the court-martial and the gravity of the harm must be examined. Under *Sanford v. United States*, 586 F.3d 28, 32 (D.C. Cir. 2009), that examination entails “(1) a review of the military court’s thoroughness in examining the relevant claims, at least where thoroughness is contested; and (2) a close look at the merits of the

claim, albeit with some degree of deference and certainly more than under *Kauffman*'s<sup>60</sup> *de novo* standard." Whatever measure of deference is warranted in non-habeas cases, the plaintiff easily clears these hurdles. He did not receive the kind of review by the military appellate courts that precludes collateral attack.

## B

### *The military courts' consideration was neither full nor fair*

1. CAAF's consideration of the plaintiff's UCI claim was *unfair* because, in deciding by a 3-2 vote that "a reasonable member of the public," fully informed of the facts and circumstances, would not harbor a significant doubt as to the fairness of the proceedings, it imputed to that observer numerous facts that would not be known to a member of the public.<sup>61</sup> The majority's opinion was also unfair because it relied on the premise that an observer would have understood that clemency was out of the question because the plaintiff had not sought clemency when, in fact, he had made it completely clear that he was seeking clemency.<sup>62</sup>

2. The CAAF majority's UCI analysis was not *full* because it was under-inclusive, failing to take into account a host of matters that tended to detract from the government's claim that an intolerable strain had not been placed on public confidence.<sup>63</sup> A telling example is its dismissal of

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<sup>60</sup> *Kauffman v. Secretary of the Air Force*, 415 F.2d 991 (D.C. Cir. 1969).

<sup>61</sup> See pp. 26-29, 30 *infra*; Ex. 30 at 8-13.

<sup>62</sup> See pp. 29-30 *infra*.

<sup>63</sup> See Ex. 30 at 17-23. Just as an agency has a duty to "take account of anything in the record that 'fairly detracts' from the weight of the evidence supporting" its decision. *General Elec. Co. v. NLRB*, 117 F.3d 627, 630 (D.C. Cir. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)), CAAF had a duty to factor in the evidence that cut against its conclusion, rather than ignore it or give it short shrift.

the fact that the plaintiff's prosecution ran counter to American practice since Vietnam to not prosecute returning POWs unless they were guilty of misconduct while in enemy hands.<sup>64</sup> Others are detailed in his Petition for Reconsideration. If the word "fair" in *Burns* means anything, it demands evenhandedness. CAAF's decision, however, was one-sided, imputing knowledge to the notional member of the public when it supported the majority's conclusion but declining to do so when it had the opposite effect.

3. CAAF's consideration of the plaintiff's UCI claim was also *neither full nor fair* because it denied leave to supplement the record with the military judge's job application, even though that evidence bore on the key question of what a member of the public would have thought about the fairness of the proceedings. Instead, CAAF sent the plaintiff off to another court to seek coram nobis. This was improper because the case was still on direct review when he sought to file the newly-obtained information.<sup>65</sup> It was also unfair because the effect was to stand the burden of proof on its head: rather than requiring the government to continue to carry its UCI burden of proof beyond a reasonable doubt, CAAF remitted the plaintiff to a collateral proceeding in which *he* would have to show that his case was "extraordinary" and presented circumstances that compel

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<sup>64</sup> *United States v. Bergdahl*, 80 M.J. at 239 n.10. The government never disputed our description but claimed that for some reason on which it never elaborated, the policy was inapplicable to the plaintiff. The CAAF majority afforded the practice "little weight" because, among other things, he had not proven that some deserting soldiers were not prosecuted even if others were wounded in rescue attempts. This was unfair because it would have required him to prove a negative on a matter as to which only the government would have had the pertinent information. An Army information paper generated in 2014 sets forth the actual practice. *See* Ex. 19.

<sup>65</sup> "Claims that could have been raised by direct appeal are outside the scope of the writ." *United States v. Keane*, 852 F.2d 199, 202 (7th Cir. 1988) (quoting *United States v. Mayer*, 235 U.S. 55, 69 (1914)), *quoted in United States v. Catano*, 906 F.3d 458, 464 (9th Cir. 2018). Coram nobis is classically intended to address matters that arise after finality. Consistent with that principle, the writ will be denied where some alternative remedy is available. *See generally United States v. Denedo*, 556 U.S. 904, 911 (2009); *United States v. Morgan*, 346 U.S. 502, 512 (1954). Since the plaintiff's case was not final when CAAF relegated him to coram nobis, other remedies were available – the very ones he sought to invoke (leave to supplement the record and reconsideration by CAAF). CAAF should have granted leave to file the job application in support of the petition for reconsideration. The Court could properly send the case back to CAAF on this basis, but we believe the better course at this point is for it to simply decide the merits. *See also* note 71 *infra* (discussing deficiencies in ACCA's consideration of the plaintiff's coram nobis petition).

issuance of the writ.<sup>66</sup> That burden is far more onerous than the *de novo* review CAAF applies on direct appellate review of UCI issues.<sup>67</sup>

4. The unfairness was compounded by the makeup of the ACCA panel. The case obviously raised substantial legal and policy issues, and appellate review proceeded under the continuing cloud of the Commander in Chief's denunciation. Yet one of the ACCA judges was married to the head of the Army's Criminal Law Division.<sup>68</sup> That Division "advises TJAG [the Judge Advocate General] and the Army staff on military justice programs, policy, legislation, opinions, high profile criminal cases, and related criminal law actions," among other functions.<sup>69</sup> It was imprudent to assign that judge to ACCA while her husband headed the Criminal Law Division (or *vice versa*). She should have recused when the plaintiff objected to her participation.<sup>70</sup> Her failure to do so in a case that concerns, *of all things*, a recusal issue is baffling (as is ACCA's failure to explain its denial of the recusal motion).<sup>71</sup>

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<sup>66</sup> *Morgan*, 346 U.S. at 511; *Denedo*, 556 U.S. at 911. *See also Denedo v. United States*, 66 M.J. 114, 126 (C.A.A.F. 2008) (a coram nobis petitioner must show a "clear and indisputable right" to relief), *aff'd & remanded*, 556 U.S. 904 (2009).

<sup>67</sup> *See United States v. Bergdahl*, 80 M.J. at 234 (citing *United States v. Barry*, 78 M.J. 70, 77 (C.A.A.F. 2018) (citing *Salyer*, 72 M.J. at 423)).

<sup>68</sup> *See* Ex. 33 App. (Motion to Recuse).

<sup>69</sup> *See* [https://www.americanbar.org/content/dam/aba/administrative/armed\\_forces\\_law/lis-scafl-annual-report-2021-army.pdf](https://www.americanbar.org/content/dam/aba/administrative/armed_forces_law/lis-scafl-annual-report-2021-army.pdf) (at 20); *see generally* Army Regulation 27-10, *Legal Services: Military Justice* (Nov. 20, 2020).

<sup>70</sup> As the plaintiff pointed out to CAAF, "[a] reasonable member of the general public would find the circumstances too close for comfort, especially because the underlying merits themselves squarely implicate R.C.M. 902." Ex. 33 at 10 n.3. ACCA denied the plaintiff's motion to recuse without explanation. *See* Ex. 33 App. (Motion to Recuse) (notation order).

<sup>71</sup> It makes no difference that ACCA is a multimember court. *Williams v. Pennsylvania*, 136 S. Ct. at 1909-10; *In re Al-Nashiri*, 921 F.3d 224, 240 (D.C. Cir. 2019). The Court could send the case back for reconsideration of the plaintiff's coram nobis petition by a properly constituted ACCA panel. Given the time the case has already consumed on its complicated path, and the fact that adjudication of the due process and other legal issues does not call for special military expertise, we urge the Court not to do so, but to reach and decide the merits itself. *See also* note 65 *supra*.

5. ACCA's coram nobis decision was not *full* because it expressly declined to rule on the merits.<sup>72</sup> This "precludes the application of the full and fair consideration standard to these *coram nobis* issues."<sup>73</sup> When "the military courts manifestly refuse[]" to consider claims, the district court is "empowered to review them *de novo*."<sup>74</sup> An *explicit* refusal to rule is as "manifest" as it gets.

6. CAAF's denial of the plaintiff's writ-appeal petition was unexplained. It never addressed the merits, there being no "convincing grounds to believe the silent court had a different basis for its decision than the analysis followed by the previous court."<sup>75</sup> This is not "full consideration."

### C

#### *The military courts' denial of coram nobis was flagrantly wrong*

ACCA denied coram nobis solely on the theory that the plaintiff had not explained why he did not complain sooner about the military judge's concealment of his job application.<sup>76</sup> This was mistaken. Litigants must be able to rely on judges' representations. It happens that we did not know that the military judge had misrepresented his situation. When the defense learned of it, we acted extremely promptly. ACCA's decision suggests that every defense counsel in a court-martial must now undertake an independent investigation to probe the veracity of trial judges' factual assertions. That is preposterous.

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<sup>72</sup> Ex. 33 App. at 3 n.4.

<sup>73</sup> *Gray v. Gray*, Civil No. 08-3289-JTM, 2015 WL 5714260 at \*33 (D. Kan. Sept. 29, 2015), *rev'd & remanded on other grounds*, 645 Fed. Appx. 624 (10th Cir. 2016) (per curiam).

<sup>74</sup> *Burns v. Wilson*, 346 U.S. at 142.

<sup>75</sup> See *Wilson v. Sellers*, 138 S. Ct. 1188, 1197 (2018) (applying a "look through" presumption that imputes to a silent higher state court the ground set forth in its lower court's reasoned opinion).

<sup>76</sup> The defendant claims (at 34) that ACCA "effectively found that the issue [concerning the military judge] had been waived." If that is a fair summary of ACCA's rationale, ACCA erred because "waiver is the 'intentional relinquishment or abandonment of a known right.'" *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). But ACCA neither used the term waiver nor found an intentional relinquishment or abandonment of a known right on the part of the plaintiff.

The plaintiff received the military judge’s job application on September 15, 2020, and almost immediately submitted it to CAAF in support of his pending petition for reconsideration of CAAF’s August 27, 2020, decision. CAAF denied both reconsideration and leave to supplement the record without prejudice to his seeking coram nobis on October 14, 2020, and he submitted such a petition only nine days later.<sup>77</sup> He moved with extreme dispatch once he received the job application. ACCA’s insistence that he should have raised the issue sooner is not well-taken because “sound” or “valid” reasons exist for not having done so.<sup>78</sup>

1. The military judge never revealed that he had applied for a Justice Department job.<sup>79</sup> The Department’s press release (which did not even mention him until 10 pages in), the EBaY *amicus* brief and the decision in *In re Al-Nashiri*, and CAAF’s decision on direct review all came before September 15, 2020, when the plaintiff learned for the first time that he had provided misleading information about his future plans. That was 20 days after CAAF’s 3-2 decision.

2. The plaintiff was unaware that the military judge had applied for a Justice Department job until long after the trial. Indeed, he was unaware until after ACCA’s and CAAF’s decisions on the merits that the military judge had applied *during* the trial, that his application had cited the plaintiff’s own court-martial, and that he had selected as his sole writing sample the opinion in

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<sup>77</sup> Ex. 14.

<sup>78</sup> *United States v. Morgan*, 346 U.S. at 512 (“sound reasons”); *United States v. Hansen*, 906 F. Supp. 688, 692 (D.D.C. 1995) (“valid reasons”). “The sufficiency of the reasons bears an inverse relationship to the length of the delay – the longer the delay, the more compelling must be the reason.” *Tocci v. United States*, 178 F. Supp. 2d 176, 181-82 (N.D.N.Y. 2001) (finding “sound reasons” for a two-and-a-half-year delay). Depending on which “start date” is employed, the delay here was *at absolute worst* less than two years, and the reasons are unquestionably substantial.

<sup>79</sup> Under Army Code of Judicial Conduct R. 2.11 and R.C.M. 902, he had a duty to do so. *See pp. 34-44 infra*. The case therefore contrasts with *United States v. Faison*, 956 F. Supp. 2d 267, 270 (D.D.C. 2013), where Chief Judge Roberts observed that Faison “has not shown that either *the court* or Faison’s trial counsel bore any obligation to explain to Faison that, if he were to commit a subsequent offense after serving his sentence for his 1999 guilty plea, his guilty plea could be used to enhance a future sentence” (emphasis added).



which he had denied the plaintiff's Inauguration Day UCI motion – a ruling that favored former President Trump. As the coram nobis petition stated, the plaintiff

exercised reasonable diligence in relying on [the military judge's] assertions that he was impervious to UCI because he was going to retire. The defense had a right to assume he would comply with the [Army Code of Judicial Conduct] and that his assurances would be accurate. He had no way of knowing that when [the military judge] made those representations he had already submitted an application to the Department of Justice.<sup>80</sup>

It remained reasonable to continue to take the military judge at his word even after the defense became aware that he had been hired by the Justice Department. There was still no indication that he had applied for the job *during the trial*, had cited the plaintiff's court-martial, or had attached his earlier Trump-favorable UCI ruling. Until September 15, 2020, the plaintiff lacked a substantial evidentiary basis for raising an issue about the military judge's lack of candor. A claim that lacks a substantial evidentiary basis is not a claim that "can be reasonably raised." ACCA's reliance on *Ragbir v. United States*, 950 F.3d 54, 65 (3d Cir. 2020), is thus misplaced. "To have raised the issue without a basis would have been unfair to the military judge and an abuse of the appellate process."<sup>81</sup>

3. The plaintiff had no duty to turn over every conceivable rock in order to see if a member of the Army Trial Judiciary had lied in open court about his future plans. Consistent with military precedent that discourages parties from investigating the personal affairs of military judges,<sup>82</sup> the

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<sup>80</sup> Ex. 14 at 7-8.

<sup>81</sup> See Ex. 32 at 12. Even if the plaintiff had obtained the job application while the case was on direct review at ACCA, it would likely have been futile to seek leave to file it because it did not relate to "any issue that [was] raised, but not fully resolved by evidence in the record." *United States v. Willman*, 81 M.J. \_\_\_, \_\_\_, 2021 WL 3138660 at \*2 (C.A.A.F. 2021); *United States v. Jessie*, 79 M.J. 437, 443 (C.A.A.F. 2020). Nothing in the record of trial or allied papers raised an issue of recusal as to the military judge. And even if the job application the plaintiff later obtained had been otherwise proper for submission to ACCA, it was outside Rule 23(b) of the Joint Rules of Appellate Procedure of the service Courts of Criminal Appeals, which is limited to affidavits and unsworn declarations made under penalty of perjury under 28 U.S.C. § 1746. See *United States v. Green*, No. ACM S32607, 2021 WL 1941617 \*5 (A.F. Ct. Crim. App. May 13, 2021).

<sup>82</sup> See *Salyer*.

government advised ACCA that it “is unaware of an unending *duty* to independently investigate every facet of a military judge’s life.”<sup>83</sup> We know of no authority for the proposition that a party must not only presume that a trial judge has been disingenuous but also employ FOIA in an effort to unearth evidence to that effect – on pain of later being found not to have exercised reasonable diligence. If that is to be the rule, the plaintiff had no notice of it, and it was unfair for ACCA to apply it to him after the fact.<sup>84</sup> This is especially so where the effect is to insulate substantial due process violations from review in the Article III courts.

4. Without explicitly invoking the doctrine of inquiry notice,<sup>85</sup> ACCA claimed that “the issue of the military judge’s employment as an immigration judge was a known appellate issue at either the date of the [Executive Office for Immigration Review]’s press release [September 28, 2018], or at least when Al-Nashiri submitted his pleadings challenging the judge in his case.”<sup>86</sup> This was grasping at straws. For one thing, the press release did not reveal *when* the military judge had applied. As a result, even if the plaintiff had known about it in real time,<sup>87</sup> it would have been reasonable to assume, given the military judge’s representations in 2017 about his future plans, that he had not applied until after the plaintiff’s trial. Equally clearly, Al-Nashiri’s pleadings were

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<sup>83</sup> Ex. 15 at 7 n.5 (emphasis added). The government never responded to the plaintiff’s repeated complaints that it had not disclosed when *it* first learned that the military judge had applied for a Justice Department position, *see* Ex. 16 at 9-10 & n.6; Ex. 18 at 3-5; Ex. 32 at 4; Ex. 33 at 18-19; never proffered a statement from him; and, importantly, never claimed that its ability to litigate the recusal issue had been adversely affected by the timing. *See United States v. Jackson*, 371 F. Supp. 3d 257, 265 (E.D. Va. 2019).

<sup>84</sup> *Cf. Bouie v. City of Columbia*, 378 U.S. 347 (1964) (due process precludes a *post hoc* decisional-law change in the definition of a state crime); *Hanratty v. F.A.A.*, 780 F.2d 33, 35 (Fed. Cir. 1985) (characterizing “after-the-fact switches” as “inherently unfair”).

<sup>85</sup> *See Merck & Co. v. Reynolds*, 559 U.S. 633, 650-53 (2010).

<sup>86</sup> The *Al-Nashiri* mandamus petition was filed on October 4, 2018.

<sup>87</sup> He didn’t. The plaintiff had no reason to monitor Justice Department press releases, which, as news items, are not printed in the *Federal Register*. *See* 1 C.F.R. § 5.4(b).

not a proper triggering event for inquiry notice purposes. The mandamus petition and briefs in the Court of Appeals made no reference to the military judge, much less disclose when he had applied or whether he had made any reference to the plaintiff's court-martial in his job application.<sup>88</sup> There was of course a "known appellate issue" as to the job application submitted by the judge in *Al-Nashiri*, but there was no such issue *as to the military judge in this case*. That a recusal issue has arisen as to one judge obviously does not warrant an inference that one has also arisen as to other judges in unrelated cases. Just as there is no such thing as "negligence in the air,"<sup>89</sup> there is no such thing as "judicial disqualification in the air."

There being no basis for ACCA's claim that facts imputable to the plaintiff at the time imposed a duty to investigate the military judge's veracity, its denial of coram nobis was erroneous.

#### D

*The required "close look" shows that the plaintiff has a strong case on the merits*

*Sanford* requires the Court to take a "close look at the merits."<sup>90</sup> That principle is particularly apt here because of the location of the military courts within the federal government, the Senate Armed Services Committee's power over military officer promotions, the President's power over the judges of the military courts, and the fact that personal actions by and a signature program of former President Trump play a profound role in the plaintiff's claims.

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<sup>88</sup> ACCA noted (at 4 n.6) that counsel for the plaintiff had filed an *amicus* brief for a student legal clinic in *Al-Nashiri*. See Brief of the Ethics Bureau at Yale [EBaY] as Amicus Curiae in Support of Petitioner's Petition for a Writ of Mandamus and Prohibition, *In re Al-Nashiri*, 2018 WL 5994080 (D.C. Cir. 2019). Neither that brief, which was filed on November 14, 2018, nor the Court of Appeals' April 16, 2019, decision in *Al-Nashiri* made any reference to the military judge in the plaintiff's case. At the time EBaY's brief was filed, counsel was unaware that the plaintiff's military judge had become an immigration judge, much less *when* he had applied or that his application referred to the plaintiff's case and attached a key ruling that was favorable to former President Trump.

<sup>89</sup> *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 341, 162 N.E. 99 (1928) (Cardozo, C.J.).

<sup>90</sup> *Sanford*, 586 F.3d at 32.

ACCA and CAAF are located within the Executive Branch.<sup>91</sup> They do not exercise “the judicial power of the United States.”<sup>92</sup> Article II, section 1, of the Constitution makes the President the head of the Executive Branch. As such, he has a duty under Article II, section 3, to “take Care that the Laws be faithfully executed.”<sup>93</sup> He supervises the Attorney General, who serves at the President’s pleasure and appoints, supervises, and may remove immigration judges. The President is also the Commander in Chief of the Armed Forces.<sup>94</sup> All of the ACCA judges who sat on the plaintiff’s case were commissioned officers whose future promotions would have to come before the Senate Armed Services Committee. Those officers are also barred, under pain of criminal sanctions, from speaking contemptuously of the President and Congress,<sup>95</sup> even if what they say is true.<sup>96</sup> CAAF judges are civilians but subject to removal by the President.<sup>97</sup>

The plaintiff’s due process claims directly and personally implicate both former President Trump and the late Senator McCain, who chaired the powerful Senate Armed Services Committee. The UCI claim arose from words they personally uttered or – in former President Trump’s case – tweeted, while the *Tumey*<sup>98</sup> and non-disclosure claims arose from the military judge’s desire to

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<sup>91</sup> Arts. 66, 141, UCMJ.

<sup>92</sup> U.S. Const. art. III, § 1; *see generally Ortiz v. United States*, 138 S. Ct. 2165, 2176-78 (2018).

<sup>93</sup> *See Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2191 (2020).

<sup>94</sup> U.S. Const. art. II, § 2, cl. 1.

<sup>95</sup> Art. 88, UCMJ.

<sup>96</sup> *Manual for Courts-Martial* ¶ 14.c.

<sup>97</sup> Art. 142(c), UCMJ.

<sup>98</sup> *Tumey v. Ohio*, 273 U.S. 510 (1927).

gain Executive Branch employment as an immigration judge — immigration being one of Mr. Trump’s signature issues throughout his four years in office.<sup>99</sup>

Given Senator McCain’s ability to make good on his threat to hold a hearing if the plaintiff were not punished; former President Trump’s publicly-expressed animus towards the plaintiff and disparagement of the sentence as “a disgrace”; and the critical role judicial candor and impartiality play in fostering public confidence in the administration of justice, the plaintiff’s claims merit the most searching scrutiny.

1. The plaintiff was denied a fair trial because the case was politicized from the start. The right to an adjudication free of UCI is of constitutional dimension.<sup>100</sup> That the sources of the UCI here were the Commander in Chief of the Armed Forces and the Chairman of the Senate Armed Services Committee (with authority over military promotions) makes the claim especially compelling. It is a violation of both due process and the *Manual for Courts-Martial*<sup>101</sup> for a sitting President to fault as “a complete and total disgrace to our Country and to our Military” the sentence in a specific court-martial, *especially* before the convening authority (who enjoyed unfettered discretion to disapprove the findings and sentence), or ACCA (which also could disapprove or mitigate the sentence) had performed their important and highly discretionary functions.

2. The plaintiff was denied a trial before an impartial judge. The military judge had secretly applied for a job as an immigration judge and misled the plaintiff about his post-Army retirement plans. This lulled him into a false sense of security when, had the facts been known, he could have demanded an additional opportunity to voir dire the military judge, “suss out any actual or apparent

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<sup>99</sup> *E.g.*, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

<sup>100</sup> *See, e.g.*, *United States v. Bergdahl*, 80 M.J. at 246-47 (Sparks, J. concurring in part & dissenting in part).

<sup>101</sup> *See* R.C.M. 104(a)(1).

partiality,”<sup>102</sup> challenge him for cause, voir dire any other judge who would have been named in his place, refuse a bench trial, change his plea, and exercise all of the other options that would have been open to him as a matter of right. That the Court of Appeals took the extraordinary step of granting mandamus in a similar setting in *Al-Nashiri* underscores the gravity of these defects.

3. The military judge’s job application was especially pertinent because it concerned one of former President Trump’s signature issues: immigration control. The military judge conveniently selected as his sole writing sample a ruling in which he had denied a motion to dismiss the charges with prejudice based on candidate Trump’s vilification of the plaintiff during the 2016 campaign.

4. Trial before an impartial judge – one who is not subject to a conflict of interest – is a constitutional right.<sup>103</sup> Moreover, as the Court of Appeals pointed out in *Al-Nashiri*,

the “Due Process Clause demarks only the outer boundaries of judicial disqualifications,” *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 828 (1986), and various statutes and codes of conduct, in service of their essential function “to maintain the integrity of the judiciary and the rule of law,” “provide more protection than due process requires,” *Caperton*, 556 U.S. at 889–90.<sup>104</sup>

The Army has such a code. The affirmative duty of a military judge to disclose possible grounds for disqualification is prescribed in Rule 2.11 and is critical to affording military personnel a fair trial and maintaining public confidence in the administration of justice.

As Judge Sparks wrote, “the facts of this case raise a serious due process issue.”<sup>105</sup> They implicate not only the plaintiff’s right to an impartial judge and to conduct voir dire to ensure that

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<sup>102</sup> See *In re Hawsawi*, 955 F.3d 152, 162 (D.C. Cir. 2020).

<sup>103</sup> E.g., *Tumey*; *Caperton*, 556 U.S. at 876-77.

<sup>104</sup> 921 F.3 at 234.

<sup>105</sup> *United States v. Bergdahl*, 80 M.J. at 246 (Sparks, J., concurring in part and dissenting in part).

that judge is in fact impartial, but also the important broader interest in fostering public confidence in the administration of justice. That interest is reflected both in the doctrine of “apparent UCI” and in the broader teaching of the third factor in *Liljeberg v. Health Svcs. Acquisition Corp.*<sup>106</sup> If questions such as these are not fundamental, nothing is.<sup>107</sup>

*New II* calls for an appraisal of the harm from which relief is sought. Here the harm is substantial. Unless relief is granted, the plaintiff will suffer the lifetime stigma of a federal conviction, a dishonorable discharge that materially harms his reputation and employment prospects, and the loss of eligibility for the VA benefits he needs because of psychological and physical injuries sustained or aggravated during his five years in captivity. To this day, more than seven years since he was liberated, ignorant, gullible, and mean-spirited individuals casually refer to him as a traitor.<sup>108</sup> Former President Trump’s repeated description of him as a traitor has left an indelible mark on his reputation. A judgment declaring that he was denied due process and setting aside the court-martial would not be a complete remedy, but it would be a start.

For these reasons, the case qualifies for collateral review.

## II

### THE PLAINTIFF WAS DENIED DUE PROCESS OF LAW

Under Rule 56(a) of the Federal Rules of Civil Procedure, summary judgment must be granted when “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” We are aware of no genuine issues of material fact. The intrusions

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<sup>106</sup> 486 U.S. 847, 862 (1988).

<sup>107</sup> See *Sanford*, 586 F.3d at 32; *New II*, 448 F.3d at 406.

<sup>108</sup> E.g., Steve Piet, *Trump Made Him Do It?*, IDAHO FALLS POST-REGISTER, Aug. 25, 2021, [https://www.postregister.com/opinion/guest\\_column/opinion-trump-made-him-do-it/article\\_321d8517-f66e-5a17-a7d6-b2eb9c337476.html](https://www.postregister.com/opinion/guest_column/opinion-trump-made-him-do-it/article_321d8517-f66e-5a17-a7d6-b2eb9c337476.html) (“Bergdahl is a traitor and should have been left to rot.”).

of the Commander in Chief and of a crucial Senator into a specific criminal prosecution and the military judge's misrepresentations combined to make a mockery of due process.

Even if CAAF was right to find that the prosecution had carried its UCI burden, that determination cannot stand in light of the military judge's improper concealment of his application for a job with the Justice Department. Due process affords every person who is charged with a criminal offense the right to an impartial judge, a fair trial in accordance with settled rules of judicial disclosure, a strict prohibition on political considerations, and the fair application of the reasonable observer standard. The plaintiff received none of these.

A

*The prosecution did not carry its heavy UCI  
burden of proof in the court-martial*

The UCI doctrine represents the military justice system's effort to ensure that due process rights are protected. CAAF's narrow majority decision construing that doctrine to somehow excuse what happened in the plaintiff's case was egregiously wrong. Invoking a potpourri of considerations that the prosecution had never suggested, the CAAF majority purported to find beyond a reasonable doubt<sup>109</sup> that a member of the public would not harbor a significant doubt about the fairness of the proceedings. To do this, it imputed to the observer arcane facts that would not be known by a member of the public, such as an obscure congressional report from decades earlier that neither side had cited. The majority went even further and imputed to the observer knowledge of what would have been known to the convening authority.

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<sup>109</sup> Despite the UCI cases' repeated reference to proof beyond a reasonable doubt on the ultimate issue, it is a question of law. See *United States v. Bergdahl*, 80 M.J. at 236 n.7.



Like the two dissenting CAAF judges, the plaintiff submits that had CAAF applied UCI doctrine correctly, his due process rights would have been secured. To start with the simplest point: the majority concluded that a member of the public would not harbor a significant doubt about the trial of a soldier, when his ultimate commander had regaled political mobs with demands for that soldier's execution.

A member of the public would have noted not only that it was unusual to refer charges at all against a returning POW whose conduct in captivity was blameless, but that the convening authority's choice of the charges was remarkable. That observer would know that the reported cases reveal no precedent for charging a soldier under Article 85, UCMJ, when it was undisputed that his objective in leaving his post was to reach another U.S. installation and in the process expose himself to greater danger than if had he remained with his unit. That observer would also know that the reported cases reveal no precedent for preferring charges under Article 99(3), UCMJ, under similar circumstances. The convening authority's discretionary decision to refer two grave charges for a single act, as opposed to a single simple charge of unauthorized absence (which is the gravamen of this entire matter), further contributed to the appearance of UCI. Finally, that observer would be aware of the longstanding military justice principle favoring the disposition of allegations at the lowest level, R.C.M. 306(b), a policy of lenity that one would think would apply with special force to a returned POW whose behavior in enemy hands had been above reproach.

With imputed knowledge of matters such as these, there was no way the government could have carried its UCI burden beyond a reasonable doubt. The *coup de grâce* is the fact that the notional observer – a member of the general public – would know that the official at the very pinnacle of the chain of command said and did things calculated to chill the exercise of discretion by military subordinates. It is startling that the defendant would claim that a member of the public

would not harbor a significant doubt about the fairness of the proceedings when the Commander in Chief publicly ratifies his own earlier slander and demands for an execution, and dismisses a court-martial sentence as so fantastically inadequate as to be a disgrace not only to the United States armed forces but to the country itself – doing so before his military subordinates (the convening authority and the ACCA judges) completed their review of the case.

Obvious of the demands of due process and fundamental fairness, former President Trump waved a bloody shirt. The CAAF majority, on the other hand, examined the capillaries. It imputed to the hypothetical observer arcane knowledge of facts that would not be known by a member of the public, such as an obscure congressional report from decades earlier that neither side had cited. It even imputed to that observer knowledge of what would have been known to the convening authority.

In contrast, the CAAF majority became picky about what knowledge could be imputed where it was helpful to the plaintiff, such as America's longstanding practice of prosecuting returning POWs only if they had misbehaved in captivity. The government never disputed that this was indeed the policy, but claimed, without elaboration, that it somehow did not apply to him. The CAAF majority resolved the question against the plaintiff, even though the government had both the burden and unique access to the pertinent records. Rummaging for arguments to aid the government, the majority lost sight of the fact that the entire case played out in the context of Mr. Trump's intolerable slanders and Senator McCain's improper demands.

The CAAF majority theorized about what the preliminary hearing officer and the convening authority, respectively, *would have known* about the subject of casualties. But there is no clear record of what the convening authority knew, and it asks too much of the putative general-public observer that they *would* know that General Abrams *did* know of the casualties. To impute to that

observer “recogni[tion] that [General] Abrams had ready access to this casualty information at the time he decided to send [the plaintiff]’s case to a general court-martial rather than to the more limited special court-martial recommended by the Article 32, UCMJ, preliminary hearing officer”<sup>110</sup> is to stretch the inquiry beyond the breaking point.

Then there is the matter of clemency. Judge Ewing, dissenting in part at ACCA, got this right. Clemency review is a significant post-judgment phase in military justice. Just as that phase should have begun, the Commander in Chief publicly denounced the sentence as a “disgrace.” Thereafter clemency was denied by another subordinate of the Commander in Chief, without explanation. Struggling to explain how the government could account for this, CAAF engaged in pure error – claiming that the plaintiff had not asked for clemency. He had objected to the post-trial involvement of the convening authority and his staff judge advocate because they would have to rule on the lawfulness of their own role in the destruction of the numerous letters the convening authority had received concerning the case – letters they never bothered to disclose, much less share with the defense.<sup>111</sup> The two officers refused to recuse.<sup>112</sup> Preserving his objection, the plaintiff made it clear that he wished to seek clemency, setting forth with particularity a host of circumstances that made him a viable candidate for it.<sup>113</sup> He carefully explained that clemency is the accused’s “best hope” for relief, noted that he “has a right to a clemency determination by officials who are not disqualified,” and identified 13 “grounds for clemency,” adding that “[o]ther grounds for clemency come from the government’s legal errors in the processing of this case.”<sup>114</sup> The staff

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<sup>110</sup> *Id.* at 241 & n.15. *See also* Ex. 30 at 12-13.

<sup>111</sup> Ex. 28 at 645-47.

<sup>112</sup> *Id.* at 648.

<sup>113</sup> *Id.* at 643.

<sup>114</sup> *Id.* at 643-44.

judge advocate was fully aware that the plaintiff wanted clemency, advising the convening authority that “in my opinion, *clemency is not warranted.*”<sup>115</sup> Signing off on her recommendation, the convening authority affirmed that he had “personally considered the matters listed in the preceding paragraphs before taking action in this case.”<sup>116</sup> Against this irrebuttable contemporaneous documentary backdrop, CAAF’s suggestion that the plaintiff had not sought clemency in connection with its larger conclusion that a reasonable observer would understand that clemency was out of the question rests on a key premise that was obviously mistaken.

The CAAF majority claimed that “any observer of the military justice system would realize that it is not uncommon for a [general court-martial convening authority] to refer a case to a court-martial in a manner contrary to the recommendation of the Article 32, UCMJ, preliminary hearing officer, even in those instances where there is not a scintilla of unlawful command influence.”<sup>117</sup> It cited no authority for the assertion, which is military justice arcana utterly unknown to the overwhelming majority of Americans, including veterans, and indeed, even to non-lawyer military personnel. This element of the majority’s analysis is also called into question by changes Congress made in Article 32 in 2013 and 2016. However few Americans know about the old Article 32, even fewer conceivably know about the new one — much less the likelihood under either that a convening authority would reject the investigating or preliminary hearing officer’s recommendation. As a result, to permit any proposition about the shifting ins and outs of Article 32 to play a role in a matter as to which the government had the burden of proof beyond a reasonable doubt was indefensible.

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<sup>115</sup> *Id.* at 657.

<sup>116</sup> *Id.*

<sup>117</sup> *United States v. Bergdahl*, 80 M.J. at 240.

That the plaintiff pleaded guilty and argued for a dishonorable discharge, as the defendant stresses (at 10-11, 33), does not save the CAAF majority's decision. First, he did so unaware that the military judge had misled him. And second, a plea of guilty does not preclude a finding of apparent UCI.<sup>118</sup> More broadly, the hypothetical observer would know that, in light of the military judge's rulings on pretrial motions, the plaintiff's dilemma was plain. There was no dispute that he had left his post seeking to travel overland to a forward operating base and make a report. But after that went awry, he was left deeply scarred by nearly five years of isolation and brutal confinement. He pleaded only after the military judge had rejected challenges to the legal sufficiency of the charges, his claim that the charges were redundant, and three UCI motions.<sup>119</sup> His plea actually cuts *against* any claim that a reasonable observer would not harbor a significant doubt about the fairness of the proceedings. Because it was entered without the protection of a pretrial agreement, the plea itself was a substantial basis for clemency. And of course the guilty plea does nothing to cure the UCI that former President Trump committed thereafter.

The plaintiff's request for a dishonorable discharge is equally easy to understand given the terrifying prospect of prolonged incarceration by his own country on the heels of five years' brutal captivity in enemy hands. Expert testimony at trial made it clear that confinement would exacerbate the plaintiff's diagnosed psychiatric condition.<sup>120</sup> In addition, seeking a punitive discharge is a recognized way of reducing the chances or duration of a sentence to confinement in military practice. The required plea colloquy made it clear that the plaintiff's desire was "to be discharged

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<sup>118</sup> See, e.g., *Lewis* (dismissing charges in a UCI case with prejudice despite guilty pleas).

<sup>119</sup> Exs. 5, 8, 11.

<sup>120</sup> See Ex. 1 at 2519-20.

from the service with either a bad conduct discharge or a dishonorable discharge if, as your counsel indicated, it will preclude you from going to confinement.”<sup>121</sup>

We do not contend that the plaintiff’s plea or his request for a punitive discharge were involuntary, but the context for each is among the “facts and circumstances of the case” that must be taken into account in deciding whether a member of the public would harbor a significant doubt about the fairness of the proceedings.

The defendant claims (at 45) that the military judge’s failure to sentence the plaintiff to prison shows his independence. Rather, it suggests a careful effort to thread a political needle, hoping not to provoke an excitable Commander in Chief. An observer would see in the sentence echoes of both the charged political environment and the military judge’s post-Army job aspirations. That he did not send the plaintiff to Leavenworth is hardly the point when the Defense Department’s longstanding policy is not even to charge, let alone confine, returning POWs for misbehavior prior to capture.<sup>122</sup>

That the military judge did not send the plaintiff to prison is thus scant evidence of independence. He also sentenced the plaintiff to forfeit \$10,000, a crushing penalty for a soldier in the lowest pay grade. Moreover, contrary to the defendant’s assertion (at 45), the plaintiff did not receive “the very sentence [he] requested”: he never suggested a five-figure financial sanction. Nor did he suggest that he be demoted to the lowest enlisted pay grade.

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<sup>121</sup> Ex. 1 at 2696-97.

<sup>122</sup> Charles R. Jenkins, a real-life Army defector who collaborated with North Korea, was sentenced to only 30 days’ confinement upon his repatriation in 2004. *See* Ex. 30 at 5. In sharp contrast to the plaintiff’s half-decade in brutal isolation, he had been treated well by his captors for nearly 40 years, and even permitted to marry and have children.

The defense implored the military judge to state with particularity whatever sentencing discount he was applying in response to former President Trump's comments.<sup>123</sup> In the end, he ignored the request,<sup>124</sup> thereby thwarting any scrutiny of whether and to what extent he had in fact applied a discount. The Court is left to rely on his mere say-so, even though his representations as to his retirement plans proved to be decidedly unreliable.

Although the military judge made a few rulings that were favorable to the defense, those on key motions were overwhelmingly adverse. His kid-glove treatment of the convening authority showed him to be anything but independent. Also, he refused to permit the defense to examine Major Oshana about his collaboration with the Trump White House<sup>125</sup> or to examine the staff judge advocate concerning the spoliation of letters the convening authority had received.<sup>126</sup> Contrary to the defendant's submission (at 13, 45), acquitting the plaintiff of all but the first day of the five-year desertion the prosecution charged is no evidence of independence: Major Oshana's attempt to prove the longer period without calling a single witness was perfunctory. The military judge deserves no credit for that partial acquittal; he had no alternative.

Nor did the military judge's offer to direct that the convening authority and the ACCA judges read the Trump White House press office's Statement on Military Justice evidence of his independence.<sup>127</sup> That statement was utterly generic, making no reference to the plaintiff or his case. It was already in the record of trial, where it would be read by the convening authority and

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<sup>123</sup> Ex. 1 at 1734.

<sup>124</sup> *See id.* at 2704.

<sup>125</sup> *See* Ex. 1 at 1543-44.

<sup>126</sup> Trial Appellate Ex. 21, *noted at* Ex. 1 at xxi.

<sup>127</sup> Ex. 27 at 505.

the ACCA judges. And the military judge could no more order those judges around than this Court can give orders to the Court of Appeals.<sup>128</sup>

Because the facts and circumstances fell far short of proof beyond a reasonable doubt that a member of the public would not harbor a significant doubt about the fairness of the proceedings, the plaintiff was denied due process.

B

*Even if CAAF was right that the prosecution had carried its UCI burden of proof, the plaintiff's conviction cannot stand once the military judge concealment of his job application is taken into account*

As we have shown, the matters CAAF cited were insufficient to support its conclusion. But even if they passed muster, CAAF's decision cannot survive the later-obtained evidence of the military judge's concealed job application. This is so for two reasons. First, separate and apart from UCI, the application gave him a pecuniary interest that he had a duty to disclose. Second, his concealment of the application materially alters the facts and circumstances on which a UCI judgment must rest. It both detracts from the evidence, such as it was, on which the CAAF majority relied and adds to the plaintiff's evidence on the ultimate legal issue of whether an informed member of the public would harbor a significant doubt about the fairness of the proceedings.

1. The military judge had a duty to disclose his job application

The military judge's job application gave him an impermissible pecuniary interest he had a duty to disclose. He had a financial interest in post-retirement employment at the Justice Department. The job pays well. The hiring decision is made by the Attorney General. It takes little imagination to recognize that an application from someone who had publicly put the Attorney General's

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<sup>128</sup> See Ex. 1 at 2705; Ex. 28 at 30 n.14.



immediate superior (the President) in the embarrassing position of having caused the dismissal of the highest-profile court-martial in decades would not be looked on with favor. Whether the military judge personally saw the matter this way is immaterial; the question is what a reasonable observer might think.

In *Tumey*, Chief Justice Taft wrote:

Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.<sup>129</sup>

The military judge's direct, personal, substantial, pecuniary interest in being hired as an immigration judge triggers this test.<sup>130</sup> He was therefore unquestionably disqualified. By continuing to preside after he submitted his job application and by failing to disclose it to the defense, he deprived the plaintiff of the due process right to be tried by an impartial judge.

Rule 2.11 of the Army Code of Judicial Conduct provides: "Army judges shall disqualify themselves from a proceeding when required by R.C.M. 902 or other provision of law." R.C.M. 902(a), which is a binding provision of the *Manual for Courts-Martial*, sets forth the general rule that, unless the issue has been waived,<sup>131</sup> "a military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned." R.C.M. 902(b)(5)(B) specifies five additional grounds for mandatory disqualification. Among these are situations "[w]here the military judge . . . is known by the military judge to have an

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<sup>129</sup> 273 U.S. at 532. See also *Ward v. City of Monroeville*, 409 U.S. 57, 59-60 (1972).

<sup>130</sup> *Tumey*, 273 U.S. at 523.

<sup>131</sup> Since the plaintiff was unaware of the military judge's job application until years after the trial, he could not move for disqualification and the exception for cases of waiver is inapplicable. Waiver applies only if "it is preceded by a full disclosure on the record of the basis for disqualification." R.C.M. 902(e); see also *Al-Nashiri*, 921 F.3d at 237. There was no such disclosure here.

interest, financial or otherwise, that could be substantially affected by the outcome of the proceeding.” Both the general rule and the fifth specific additional ground required the military judge to recuse.

The general rule requires recusal because an observer “might reasonably . . . question[]” the judge’s impartiality in light of his pending job application. Obviously, the military judge was interested in securing a position as an immigration judge; the fact that he decided to apply is dispositive on that score, although it is also pertinent that the position is highly compensated. Additionally, an observer would be aware that —

- (1) immigration control was one of former President Trump’s personal signature issues;
- (2) immigration judges rule on asylum applications and other sensitive immigration matters;
- (3) former President Trump’s personal conduct was at issue in connection with the plaintiff’s UCI claims;
- (4) the plaintiff had sought dismissal of the charges with prejudice based on, among other things, former President Trump’s words and deeds; and
- (5) The military judge had attached as his sole writing sample a ruling in which he had denied a motion the plaintiff had made on Inauguration Day, 2017, to dismiss on apparent UCI grounds.

“[A]ll that must be demonstrated to compel recusal” is “a showing of an appearance of bias . . . sufficient to permit the average citizen reasonably to question a judge’s impartiality.”<sup>132</sup> Armed with the facts noted above, that “average citizen” “might reasonably” infer that a decision dismissing the charges on the basis of former President Trump’s words and deeds would have become an object of public attention given the sustained attention the news media had given to the plaintiff’s case for years and would have been a likely source of embarrassment for Mr. Trump. An observer

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<sup>132</sup> *United States v. Heldt*, 668 F.2d 1238, 1271 (D.C. Cir. 1981) (quoted in *Al-Nashiri*, 921 F.3d at 234).

“might reasonably” further infer that the military judge never disclosed his job application because he feared that doing so could harm his chances of being hired.<sup>133</sup> Recusal was thus also required under the specific additional ground set forth in R.C.M. 902(b)(5)(B). The military judge therefore had a *sua sponte* duty to disclose, offer further voir dire, and decide whether to recuse under R.C.M. 902(d)(1).

Disclosure “plays an unusually important role in ensuring that military judges act with dispassion and independence.”<sup>134</sup> The Comment to Rule 2.11 of the Army Code of Judicial Conduct recognizes that role. It states:

A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

But the military judge did not disclose his pending job application. Instead, he affirmatively misled the defense by claiming that he was simply planning to retire when he hit the 30-year mark for mandatory retirement. He cited that as evidence that he was impervious to UCI, in response to the plaintiff’s renewed UCI motion. It is an understatement to call the failure to disclose “troubling,” as a respected former military judge has done.<sup>135</sup>

*Al-Nashiri* is instructive as to whether the military judge had a duty of disclosure:

First, in his job application, Spath chose to emphasize his role as the presiding judge over Al-Nashiri’s commission. He boasted that he had been “handpicked by the top lawyer of the Air Force to be the trial judge” on “the military commissions proceedings for the alleged ‘Cole bombing’ mastermind,” Reply Attachments B-2, and he even supplied an order from Al-Nashiri’s case as his writing sample,

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<sup>133</sup> The record is barren concerning the military judge’s subjective state of mind. The government never proffered a statement from him after the plaintiff moved to supplement the record.

<sup>134</sup> Michel Paradis, *Judicial Disclosure and the Judicial Mystique*, 49 HOFSTRA L. REV. 125, 145 (2020).

<sup>135</sup> See Joshua 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*, 49 HOFSTRA L. REV. 11, 60 n.338 (2020).

*see id.* at B-11. Spath thus affirmatively called the Justice Department’s attention to his handling of Al-Nashiri’s case, making his performance as presiding judge a key point in his argument for employment.

Second, while Spath made sure to tell the Justice Department about his assignment to Al-Nashiri’s commission, he was not so forthcoming with Al-Nashiri. At no point in the two-plus years after submitting his application did Spath disclose his efforts to secure employment with the Executive Office for Immigration Review. Indeed, perhaps most remarkably, less than twenty-four hours after receiving his July 2018 start date, Spath indefinitely abated commission proceedings, musing on the record that “over the next week or two” he would decide whether “it might be time . . . to retire.” Commission Tr. 12374 (Feb. 16, 2018); *see also supra* at 230–31. Given this lack of candor, a reasonable observer might wonder whether the judge had done something worth concealing. *Cf.* Rule for Military Commissions 902(e) (permitting, in some circumstances, “the parties to [a] proceeding” to waive judicial disqualification but only if the waiver “is preceded by a full disclosure on the record of the basis for disqualification”).<sup>136</sup>

These circumstances — the reference to Al-Nashiri’s case in Judge Spath’s job application, the inclusion of a pertinent ruling from that case as the judge’s writing sample, the misleading reference to retirement — all bear a striking resemblance to the plaintiff’s case and easily meet the “average citizen” standard for concern over partiality, and therefore plainly require disqualification, as the Court of Appeals ordered in *Al-Nashiri*.

The defendant insists (at 40-41) that *Al-Nashiri* is distinguishable because “DOJ played no institutional role in these proceedings, and DOJ attorneys were not detailed to” the trial. The first assertion is incorrect; the second is immaterial. Justice Department attorneys were involved in the case, and that involvement was not limited to the activity the defendant acknowledges in a footnote (41 n.19).

In 2016, Major Oshana threatened to subpoena a California-based journalist, filmmaker and producer for the production of recordings the prosecution sought to use as evidence against

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<sup>136</sup> 921 F.3d at 237.

the plaintiff. The filmmaker sued to block its issuance.<sup>137</sup> The defendants included both the convening authority and Major Oshana. Major Oshana provided an affidavit in support of the defendants' opposition to the filmmaker's application for a TRO. He and the other defendants were represented by attorneys from the Justice Department (including opposing counsel in this Court). An Army JAG lawyer participated in a hearing before the district judge and Major Oshana participated in the settlement conference.<sup>138</sup> The litigation was settled on terms that gave the prosecution meaningful access to a portion of what the threatened subpoena sought, although in the end Major Oshana elected not to offer the recordings in evidence. Far from being a stranger to the case, the Justice Department played a significant role in the prosecution's efforts to obtain evidence.<sup>139</sup>

In addition, as Major Oshana disclosed in a submission in the course of the trial, “[a] Department of Justice attorney was involved in assisting with the discovery process for documents in the possession of the National Security Council. He continued to provide similar advice after the change in administration.”<sup>140</sup> Judge advocates from the Army's Government Appellate Division (appellate prosecutors) engaged in “multiple conversations” with Department attorneys over “several weeks” in connection with an interlocutory appeal by the trial-level prosecutors regarding the plaintiff's right to discovery of classified information. The appellate prosecutors had received training at the Department.<sup>141</sup>

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<sup>137</sup> *Boal v. United States*, Civil No. 2:16-5407 (C.D. Cal.).

<sup>138</sup> *See* Oshana Interview, *supra* note 8, at 39:20 *et seq.*

<sup>139</sup> *See generally* Ex. 36.

<sup>140</sup> Ex. 39 at 2 n.1.

<sup>141</sup> *See* Ex. 24 at 4 & n.1; *see also* Ex. 23 at 3.

In short, the Justice Department had an active and recurring role in the plaintiff's court-martial.

The case is far more disturbing than *Al-Nashiri*. Which poses the greater threat to public confidence in the administration of justice: the presence of a Justice Department attorney in the military commission courtroom at Guantánamo or a President who makes no secret of his consuming hatred for a specific accused whose legal fate is in the hands of the President's military subordinates?

Unlike Judge Spath, whom the Court of Appeals disqualified in *Al-Nashiri*, the plaintiff's military judge provided affirmatively misleading information about his future plans. But *emphatically like Judge Spath*, the plaintiff's military judge referred to his role in a specific high-profile case *and*, worse yet, relied on his own ruling *in former President Trump's favor* on the plaintiff's Inauguration Day UCI motion. Nothing remotely like this was present in the unreported Air Forces cases on which the defendant relies. Nor is the case at all like *Hawsawi*, where the Court of Appeals rejected a contention that recusal was required simply because a military commission judge had not ruled out the possibility of future DOJ employment. He had "affirmatively stated that he had no plans to seek employment with the DOJ, or anywhere else in the federal government for that matter, after his retirement,"<sup>142</sup> and there was no suggestion that he – unlike the plaintiff's military judge – was in covert communications about a specific employment opportunity.

The military judge's writing sample is pertinent not only because the submission of such a sample was one of the very grounds that led to Judge Spath's disqualification on a rare writ of mandamus in *Al-Nashiri*, but also because it related to a specific matter that the Trump White House had closely followed only a few months before. Thus, former President Trump's National

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<sup>142</sup> 955 F.3d at 162.

Security Council staff had received reports on the military judge's ruling on the Inauguration Day UCI motion from Major Oshana, who even visited the White House to work with them.<sup>143</sup> That a trial-level court-martial motion in what should have been a routine case was the object of such intense interest to the Executive Office of the President or called for the trial counsel to visit in person, is unheard of – and speaks volumes.

Disclosure would have exposed the military judge to uncomfortable midstream voir dire on a personal matter in open court, in a case the media were closely covering, on an issue as explosive as apparent UCI committed by the incumbent President. For competitive appointment to a management position,<sup>144</sup> any breath of controversy could have spoiled his chances. He thus had a personal reason to keep the plaintiff in the dark about his actual future employment plans. A member of the public not only *could*, but almost certainly *would* so conclude. The military judge also had a motive for not coming down too hard on former President Trump by dismissing a high-profile case, as the plaintiff had repeatedly moved him to do in the run-up to the trial. The delicate terms he used – “troubling,” “disturbing,” “disappointing,” “inaccurate,” “inappropriate,” “ill-advised,”<sup>145</sup> – were the merest of pinpricks instead of the full-throated condemnation and decisive remedial action that were warranted.<sup>146</sup>

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<sup>143</sup> Ex. 38 at 5-17.

<sup>144</sup> Immigration judges are management officials. *U.S. Dep't of Justice, Executive Office for Immigration Review v. Nat'l Ass'n of Immigration Judges*, 71 FLRA 1046, 1049 (Nov. 2, 2020) (No. 207).

<sup>145</sup> See *United States v. Bergdahl*, 80 M.J. at 244 & nn.17-22.

<sup>146</sup> The military judge's softball language predictably had no effect on former President Trump, who soon after illegally described the sentence as a national disgrace and continued to make disparaging comments about the plaintiff even while the case was awaiting review by his uniformed subordinates: the convening authority and the ACCA judges. See *id.* at 238; Ex. 28 at 6, 13, 659, 660, 663-64.

Immigration was a (arguably, *the*) signature issue for former President Trump.<sup>147</sup> As Judge Tatel observed in *Al-Nashiri*, “it is enough to decide this case to know that the Attorney General himself is directly involved in selecting and supervising immigration judges.” The defendant nonetheless claims (at 42) that the military judge’s reassuring comments about his future plans “are most reasonably understood as explaining why he was not subject to any unlawful influence while he was in the military.” But that is precisely the point. By failing to disclose his job application while claiming that he was impervious to UCI because he was retiring, the military judge deprived the plaintiff of the opportunity to conduct midstream voir dire as provided in R.C.M. 902(d)(2), to move for recusal, and to decide whether to elect bench trial before whichever judge was assigned to the case in his place.

The military judge’s conduct also denied the plaintiff an opportunity to seek a new trial. “[W]illful concealment of a material ground for challenge of the military judge” may constitute a fraud on the court for purposes of the right to seek a new trial when (as here) “the basis for challenge or disqualification was not known to the defense at the time of trial.”<sup>148</sup> By the time the plaintiff learned that the military judge had applied for the immigration position *during the trial*, the then-applicable deadline for seeking a new trial (June 4, 2020) had passed.<sup>149</sup>

Although prejudice is not required,<sup>150</sup> the plaintiff was clearly prejudiced by the military judge’s failure to disclose a possible ground for disqualification. That failure “deprived the parties

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<sup>147</sup> 921 F.3d at 235.

<sup>148</sup> R.C.M. 1210 (Discussion).

<sup>149</sup> See Art. 73, UCMJ (former version); R.C.M. 1210(a) (2012 ed.).

<sup>150</sup> *Tumey* and *Nashiri* issues, being structural, are not tested for prejudice. See, e.g., *Neder v. United States*, 527 U.S. 1, 8 (1999) (collecting cases); *Johnson v. United States*, 520 U.S. 461, 468-69 (1997); *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991).



of an adequate foundation for their decisions on whether or not to request recusal” and made it harder for the plaintiff to evaluate “those facts crucial to determining whether there was a conflict or appearance of conflict requiring disqualification.”<sup>151</sup> He is therefore entitled to relief without regard to the UCI issue.

2. The military judge’s concealed job application materially alters the evidence and precludes a finding that an informed member of the public would not harbor a significant doubt about the fairness of the proceedings

Whether or not the CAAF majority was justified in concluding on direct review that the prosecution had carried its heavy UCI burden, additional information thereafter emerged that rendered the earlier determination untenable: the military judge had submitted his job application during the court-martial and concealed it from the defense. Separate and apart from the clear violation of Rule 2.11 of the Army Code of Judicial Conduct and R.C.M. 902, this is fatal to the prosecution’s case because the military judge had explicitly buttressed his denial of the plaintiff’s renewed UCI motion with a claim that he was immune to improper influence because he was retiring. “I’m what’s referred to as a terminal Colonel, which means I’m not going anywhere but the retirement pastures,” he stated, “[a]nd that’s in almost a year from now.” Regarding his susceptibility to outside influence, he said: “So that’s a long way of saying, ‘No, no effect on me whatsoever.’ I don’t expect to go anywhere but back home as soon as the Army is done with me in a year.”<sup>152</sup> When he made those statements, the ink was barely dry on the job application he had filed only days before.

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<sup>151</sup> *United States v. Quintanilla*, 56 M.J. 37, 79–80 (C.A.A.F. 2001).

<sup>152</sup> Ex. 1 at 1724.

A reasonable member of the public would have enormous difficulty reconciling the military judge's words with his deeds. Such an observer would have good reason to harbor a significant doubt about the fairness of the proceedings. He or she would know that the military judge had (1) concealed his job application from the defense, (2) affirmatively stated that he was UCI-proof because he was fixing to go home and retire, (3) cited his role in this very case in his application, and (4) attached as his sole writing sample one that happened to *reject* a claim of UCI leveled against the then-incumbent Commander in Chief.

CAAF strained to find that the government carried its UCI burden on the record that was before it when it decided the case on direct review. The job application, coupled with the military judge's disingenuous account of his post-retirement plans as an explicit basis for denying the plaintiff's renewed UCI motion, is substantial evidence that, taken together with everything that had mistakenly produced a 3-2 decision for the government on UCI, plainly raised a reasonable doubt. It should have impelled CAAF to accept the new information and reconsider, instead of sending the plaintiff off on a coram nobis obstacle course in which he, rather than the government, would have the burden of proof. This was fundamental error.

When the governing standard is reasonable doubt, even a modest change in circumstances can be dispositive. The change here is anything but modest. Concealment of the job application materially reduced whatever force, if any, that CAAF's grab bag of questionable factors may have deserved. Conversely, the concealment added to the body of evidence that would tend to lead a member of the public to harbor a significant doubt about the fairness of the proceedings. Whether CAAF's UCI determination was right or (as we have shown) wrong *when made*, it cannot survive when the military judge's concealed job application is taken into account.

### Conclusion

For the foregoing reasons, the Court should deny the defendant's Motion to Dismiss, grant the plaintiff's Cross-Motion for Summary Judgment, and set aside his conviction and sentence.

Respectfully submitted,

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October 4, 2021

## Appendix

### Governing Provisions

#### Fifth Amendment

No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

#### Article 37, UCMJ (applicable version)

##### §837. Art. 37. Unlawfully influencing action of court

(a) No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. The foregoing provisions of the subsection shall not apply with respect to (1) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial, or (2) to statements and instructions given in open court by the military judge, president of a special court-martial, or counsel.

(b) In the preparation of an effectiveness, fitness, or efficiency report, or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced, in grade, or in determining the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person subject to this chapter may, in preparing any such report (1) consider or evaluate the performance of duty of any such member as a member of a court-martial, or (2) give a less favorable rating or evaluation of any member of the armed forces because of the zeal with which such member, as counsel, represented any accused before a court-martial.

#### Rules for Courts-Martial

##### Rule 104. **Unlawful command influence**

(a) General prohibitions.

(1) *Convening authorities and commanders.* No convening authority or commander may censure, reprimand, or admonish a court-martial or other military tribunal or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court-martial or tribunal, or with respect to any other exercise of the functions of the court-martial or tribunal or such persons in the conduct of the proceedings.

(2) *All persons subject to the UCMJ.* No person subject to the UCMJ may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or

any member thereof, in reaching the findings or sentence in any case or the action of any convening, approving, or reviewing authority with respect to such authority's judicial acts.

#### **Rule 902. Disqualification of military judge**

(a) *In general.* Except as provided in subsection (e) of this rule, a military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned.

(b) *Specific grounds.* A military judge shall also disqualify himself or herself in the following circumstances:

(1) Where the military judge has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding.

(2) Where the military judge has acted as counsel, preliminary hearing officer, investigating officer, legal officer, staff judge advocate, or convening authority as to any offense charged or in the same case generally.

(3) Where the military judge has been or will be a witness in the same case, is the accuser, has forwarded charges in the case with a personal recommendation as to disposition, or, except in the performance of duties as military judge in a previous trial of the same or a related case, has expressed an opinion concerning the guilt or innocence of the accused.

(4) Where the military judge is not eligible to act because the military judge is not qualified under R.C.M. 502(c) or not detailed under R.C.M. 503(b).

(5) Where the military judge, the military judge's spouse, or a person within the third degree of relationship to either of them or a spouse of such person:

(A) Is a party to the proceeding;

(B) Is known by the military judge to have an interest, financial or otherwise, that could be substantially affected by the outcome of the proceeding; or

(C) Is to the military judge's knowledge likely to be a material witness in the proceeding.

#### **Discussion**

A military judge should inform himself or herself about his or her financial interests, and make a reasonable effort to inform himself or herself about the financial interests of his or her spouse and minor children living in his or her household.

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(c) *Definitions.* For the purposes of this rule the following words or phrases shall have the meaning indicated—

(1) "Proceeding" includes pretrial (to include prereferral), trial, post-trial, appellate review, or other stages of litigation.

(2) The "degree of relationship" is calculated according to the civil law system.

#### **Discussion**

Relatives within the third degree of relationship are children, grandchildren, great grandchildren, parents, grandparents, great grandparents, brothers, sisters, uncles,

aunts, nephews, and nieces.

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(d) *Procedure.*

(1) The military judge shall, upon motion of any party or *sua sponte*, decide whether the military judge is disqualified.

#### **Discussion**

There is no peremptory challenge against a military judge. A military judge should carefully consider whether any of the grounds for disqualification in this rule exist in each case. The military judge should broadly construe grounds for challenge but should not step down from a case unnecessarily.

Possible grounds for disqualification should be raised at the earliest reasonable opportunity. They may be raised at any time, and an earlier adverse ruling does not bar later consideration of the same issue, as, for example, when additional evidence is discovered.

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(2) Each party shall be permitted to question the military judge and to present evidence regarding a possible ground for disqualification before the military judge decides the matter.

#### **Discussion**

Nothing in this rule prohibits the military judge from reasonably limiting the presentation of evidence, the scope of questioning, and argument on the subject so as to ensure that only matters material to the central issue of the military judge's possible disqualification are considered, thereby, preventing the proceedings from becoming a forum for unfounded opinion, speculation or innuendo.

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(3) Except as provided under subsection (e) of this rule, if the military judge rules that the military judge is disqualified, the military judge shall recuse himself or herself.

(e) *Waiver.* No military judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b) of this rule. Where the ground for disqualification arises only under subsection (a) of this rule, waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

Rule 1210. **New trial**

**Discussion**

*Examples of fraud on a court-martial which may warrant granting a new trial are: confessed or proved perjury in testimony or forgery of documentary evidence which clearly had a substantial contributing effect on a finding of guilty and without which there probably would not have been a finding of guilty of the offense; willful concealment by the prosecution from the defense of evidence favorable to the defense which, if presented to the court-martial, would probably have resulted in a finding of not guilty; and willful concealment of a material ground for challenge of the military judge or any member or of the disqualification of counsel or the convening authority, when the basis for challenge or disqualification was not known to the defense at the time of trial (see R.C.M. 912).*

[Emphases added.]

Rules of Judicial Conduct for Army Trial and Appellate Judges  
(May 16, 2008)

Rule 2.11 *Disqualification*

Army judges shall disqualify themselves from a proceeding when required by R.C.M. 902 or other provision of law. Army appellate judges shall disqualify themselves from hearing a case for the same reasons that Army trial judges must disqualify themselves under R.C.M. 902.

COMMENT

*See R.C.M. 902 for the rules and procedures regarding disqualification of Army judges. A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification. In addition, the Court of Appeals for the Armed Forces has held that 28 U.S.C. §455, which governs disqualification of federal judges, applies to judges of the Courts of Criminal Appeals. See *United States v. Lynn*, 54 M.J. 202, 205 (2000). Appellate judges, however, are not subject to voir dire by counsel regarding potential grounds for challenge.*



80 M.J. 230

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U.S. Court of Appeals for the Armed Forces.

UNITED STATES, Appellee

v.

Robert B. BERGDAHL, Sergeant,  
United States Army, Appellant

No. 19-0406

Crim. App. No. 20170582

Argued June 2, 2020

Decided August 27, 2020

Synopsis

**Background:** Accused was convicted, consistent with his pleas, by military judge sitting as general court-martial, of one specification of desertion to shirk hazardous duty and one specification of misbehavior before the enemy. Accused appealed. The Army Court of Criminal Appeals, 79 M.J. 512, affirmed. Accused appealed and moved to dismiss charges and specifications against him with prejudice, or in the alternative, to grant other meaningful relief such as approving sentence of no punishment.

**Holdings:** The Court of Appeals for the Armed Forces, Ohlson, J., held that:

[1] Chairman of Senate Armed Services Committee was capable of committing unlawful command influence;

[2] sitting president of United States was capable of committing unlawful command influence;

[3] public threat by Chairman of Senate Armed Services Committee provided “some evidence” of appearance of unlawful command influence;

[4] President's public reference to, and ratification of, his views that he publicly made as candidate for President provided “some evidence” of appearance of unlawful command influence;

[5] investigation and preferral stages of accused's case were not affected by appearance of unlawful command influence;

[6] guilty plea phase of court-martial proceedings was not affected by appearance of unlawful command influence; and

[7] sentencing phase of court-martial proceedings was not affected by appearance of unlawful command influence.

Affirmed.

Stucky, Chief Judge, filed opinion concurring in part and dissenting in part.

Sparks, J., filed opinion concurring in part and dissenting in part, in which, Stucky, Chief Judge, joined.

Maggs, J., filed opinion concurring in part and concurring in the judgment.

West Headnotes (14)

[1] Military Justice 🔑 Command influence

An “appearance of unlawful command influence” arises in a case when an intolerable strain is placed on the public's perception of the military justice system because an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding.

7 Cases that cite this headnote

[2] Military Justice 🔑 Scope of review in general

Allegations of unlawful command influence are reviewed de novo. UCMJ, Art. 37, 10 U.S.C.A. § 837.

[3] Military Justice 🔑 Command influence

To make a prima facie case of apparent unlawful command influence, an accused bears the initial burden of presenting some evidence that unlawful command influence occurred; this burden on the defense is low, but the evidence presented must consist of more than mere

allegation or speculation. UCMJ, Art. 37, 10 U.S.C.A. § 837.

4 Cases that cite this headnote

[4] **Military Justice** 🔑 Command influence

On an allegation of apparent unlawful command influence, once the accused meets the “some evidence” threshold, the burden shifts to the government to prove beyond a reasonable doubt that either the predicate facts proffered by the appellant do not exist, or the facts as presented do not constitute unlawful command influence; if the government cannot succeed at this step, it must prove beyond a reasonable doubt that the unlawful command influence did not place an intolerable strain upon the public's perception of the military justice system and that an objective, disinterested observer, fully informed of all the facts and circumstances, would not harbor a significant doubt about the fairness of the proceeding. UCMJ, Art. 37, 10 U.S.C.A. § 837.

7 Cases that cite this headnote

[5] **Military Justice** 🔑 Command influence

Chairman of Senate Armed Services Committee was capable of committing unlawful command influence, since he was retired member of United States Navy, and thus he was subject to Uniform Code of Military Justice (UCMJ), at time of his public comments regarding accused's case. UCMJ, Arts. 22, 37, 10 U.S.C.A. §§ 822, 837.

[6] **Military Justice** 🔑 Command influence

Sitting president of United States was capable of committing unlawful command influence, since sitting president was convening authority. UCMJ, Arts. 22, 37, 10 U.S.C.A. §§ 822, 837.

1 Cases that cite this headnote

[7] **Military Justice** 🔑 Command influence

Public threat by Chairman of Senate Armed Services Committee to hold hearing if accused did not suffer any punishment for admitted desertion to shirk hazardous duty and

misbehavior before the enemy had potential to appear to coerce or influence outcome of accused's court-martial, and therefore provided “some evidence” of appearance of unlawful command influence, particularly since Chairman made them after learning that preliminary hearing officer in accused's case recommended those charges to be referred to special court-martial not empowered to adjudge bad-conduct discharge, and before general court-martial convening authority (GCMCA) made referral decision. UCMJ, Arts. 22, 37, 10 U.S.C.A. §§ 822, 837.

1 Cases that cite this headnote

[8] **Military Justice** 🔑 Command influence

President's public reference to, and ratification of, his inaccurate and inflammatory views that he publicly made as candidate for President that accused was deserter and traitor who should be severely punished provided “some evidence” of appearance of unlawful command influence. UCMJ, Arts. 22, 37, 10 U.S.C.A. §§ 822, 837.

[9] **Military Justice** 🔑 Presumptions and burden of proof

All accused are afforded a presumption of innocence. U.S. Const. Amend. 5.

[10] **Military Justice** 🔑 Command influence

Prohibitions against unlawful command influence did not apply to comments that presidential candidate made, no matter how inaccurate or unfair those statements were. UCMJ, Art. 37, 10 U.S.C.A. § 837.

[11] **Military Justice** 🔑 Command influence

Objective, disinterested observer clearly would have expected Army to court-martial accused for his conduct of engaging in misbehavior before the enemy and deserting his unit with intent to shirk hazardous duty which resulted in his fellow servicemembers being wounded while trying to rescue him from enemy, and therefore

investigation and preferral stages of accused's case were not affected by appearance of unlawful command influence, since offenses were severe and government's evidence was strong. UCMJ, Arts. 22, 32, 37, 10 U.S.C.A. §§ 822, 832, 837.

[1 Cases that cite this headnote](#)

**[12] Military Justice**  **Command influence**

Guilty plea phase of court-martial proceedings for admitted desertion to shirk hazardous duty and misbehavior before the enemy was not affected by appearance of unlawful command influence that occurred before general court-martial convening authority (GCMCA) referred accused's case to general court-martial that was empowered not only to adjudge dishonorable discharge but also to impose far longer term of imprisonment; although preliminary hearing officer recommended case to be referred to special court-martial not empowered to adjudge bad-conduct discharge which would have precluded dishonorable discharge that actually was imposed, government's evidence was strong and military judge offered opportunity to accused to withdraw his plea of guilty but he declined to do so. UCMJ, Arts. 22, 32, 37, 10 U.S.C.A. §§ 822, 832, 837.

[1 Cases that cite this headnote](#)

**[13] Military Justice**  **Command influence**

Sentencing phase of court-martial proceedings for admitted desertion to shirk hazardous duty and misbehavior before the enemy was not affected by appearance of unlawful command influence; although accused presented significant mitigation evidence, accused specifically recognized that he was deserving of punishment and asked to have dishonorable discharge imposed upon him, offenses to which he admitted were serious, and military judge did not impose any prison time on him. UCMJ, Arts. 22, 37, 10 U.S.C.A. §§ 822, 837.

**[14] Military Justice**  **Command influence**

Clemency and appellate stages of court-martial proceedings for admitted desertion to shirk hazardous duty and misbehavior before the enemy were not affected by appearance of unlawful command influence, since accused pleaded guilty, American servicemembers were injured searching for accused after he chose to desert his post in combat zone, United States government was required to exchange five members of Taliban who had been held at U.S. detention facility in Guantanamo Bay, Cuba, in order to secure his release, and yet military judge imposed only dishonorable discharge as sentence, reduction in rank, and partial forfeitures of pay after accused specifically asked to receive dishonorable discharge. UCMJ, Arts. 22, 37, 10 U.S.C.A. §§ 822, 837.

**\*232 Military Judges:** Christopher T. Fredrikson and Jeffery R. Nance

For Appellant: Eugene R. Fidell, Esq. (argued); Major Matthew D. Bernstein, Sean T. Bligh, Esq., Christopher L. Melendez, Esq., Stephen A. Saltzburg, Esq., and P. Sabin Willett, Esq. (on brief).

For Appellee: Captain Allison L. Rowley (argued); Lieutenant Colonel Wayne H. Williams and Major Jonathan S. Reiner (on brief); Major Catharine M. Parnell.

Amicus Curiae for Appellant: Joshua E. Kastenber, Esq., and Rachel E. VanLandingham, Esq. (on brief).

Judge OHLSON delivered the opinion for a unanimous Court with respect to Part I, and the opinion of the Court with respect to Parts II.A. and II.B., in which Chief Judge STUCKY, Judge SPARKS, and Senior Judge RYAN, joined, and the opinion of the Court with respect to Parts II.C. and III, in which Judge MAGGS and Senior Judge RYAN joined. Judge MAGGS filed an opinion concurring in part and concurring in the judgment. Chief Judge STUCKY filed an opinion concurring in part and dissenting in part. Judge SPARKS filed an opinion concurring in part and dissenting in part, in which Chief Judge STUCKY joined.

Judge OHLSON delivered the opinion of the Court.

On June 30, 2009, in Paktika Province, Afghanistan, Appellant, who was then a soldier in the United States Army, intentionally walked away without authority from his combat observation post which it was his duty to defend. Appellant's decision to leave his post can be attributed, at least in part, to the state of his mental health. *See infra* Part II.C. Specifically, Appellant erroneously came to believe that poor leadership in his battalion put his platoon at risk of being sent on a suicide mission. In order to report his concern, Appellant decided to abandon his post and walk approximately twenty miles through hostile territory to reach an American forward operating base. Appellant correctly surmised that upon his disappearance the military would launch a massive search effort. Appellant further believed that when he arrived at his destination he would be presented to the commanding general as the missing soldier for whom the military was searching, and he then would have the opportunity to discuss directly with the general the supposed plight of Appellant's platoon. However, the actual consequences of Appellant's desertion were far different from what he had imagined. Soon after abandoning his post, Appellant was captured by the Taliban, held captive for five years under abominable conditions, exchanged for five members of the Taliban who were detainees at Guantanamo Bay, and prosecuted for his misconduct.

At court-martial, Appellant pleaded guilty to desertion with intent to shirk hazardous \*233 duty and to misbehavior before the enemy in violation of Articles 85 and 99, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 885, 899 (2012). The military judge sentenced Appellant to a dishonorable discharge, reduction to the grade of E-1, and forfeiture of \$1,000 per month for ten months.

[1] During his court-martial and then on appeal, Appellant argued that public comments made by President Donald Trump, both when Mr. Trump was a candidate for president and after he became Commander in Chief, and by the late Senator John McCain when he served as chairman of the Senate Armed Services Committee, resulted in an appearance of unlawful command influence. An appearance of unlawful command influence arises in a case when an “intolerable strain” is placed on the public's perception of the military justice system because “an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding.” *United States v. Boyce*, 76 M.J. 242, 249 (C.A.A.F. 2017) (internal quotation marks omitted) (quoting *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006)).

Appellant asks this Court to dismiss with prejudice the charges and specifications against him, or in the alternative, to grant other meaningful relief such as approving a sentence of no punishment.<sup>1</sup> We decline to do so.

To be sure, at sentencing Appellant submitted substantial mitigating evidence for consideration. *See infra* Part II.C. However, it is essential to note that the conduct Appellant engaged in, and the charges to which he pleaded guilty, were very serious offenses for which either a life sentence or the death penalty were authorized punishments. *See* Articles 85(c), 99(9), UCMJ. Moreover, these offenses were anathema to the military and its mission. And importantly, as a direct and foreseeable consequence of Appellant's misconduct, other members of the armed forces were injured—some severely—while seeking to find and rescue Appellant. *See infra* Part II.C. In light of these facts, it is wholly unrealistic to believe there was any scenario where: (1) upon his return to the United States, Appellant would not have been held accountable at a general court-martial for his offenses (to which he voluntarily pleaded guilty); and (2) Appellant would not have received the dishonorable discharge he himself subsequently requested.

Thus, simply stated, it was the totality of the circumstances surrounding Appellant's misconduct rather than any outside influences that foreordained the Army's handling and disposition of this case. Therefore, an objective, disinterested observer would not harbor any significant doubts about the ultimate fairness of these court-martial proceedings. Accordingly, we hold that there was no appearance of unlawful command influence in this case, and we affirm the decision of the United States Army Court of Criminal Appeals.

### I. Applicable Law

Both Article 37, UCMJ, 10 U.S.C. § 837 (2012), and Rule for Courts-Martial (R.C.M.) 104(a), prohibit unlawful command influence. Specifically, Article 37(a), UCMJ, states in pertinent part:

No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence



the action of a court-martial ... or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts ....

Similarly—yet not identically—R.C.M. 104(a) provides:

(1) *Convening authorities and commanders*. No convening authority or commander \*234 may censure, reprimand, or admonish a court-martial ... or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court-martial ..., or with respect to any other exercise of the functions of the court-martial ... or such persons in the conduct of the proceedings.

(2) *All persons subject to the code*. No person subject to the code may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case or the action of any convening, approving, or reviewing authority with respect to such authority's judicial acts.

There are two types of unlawful command influence that may arise in the military justice system: actual unlawful command influence and apparent unlawful command influence. Here, Appellant only raises the issue of apparent unlawful command influence and thus we examine the facts of this case solely in that context.

[2] [3] This Court reviews allegations of unlawful command influence de novo.<sup>2</sup> *United States v. Barry*, 78 M.J. 70, 77 (C.A.A.F. 2018) (citing *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013)). To make a prima facie case of apparent unlawful command influence, an accused bears the initial burden of presenting “some evidence” that unlawful command influence occurred. *Boyce*, 76 M.J. at 249 (internal quotation marks omitted) (quoting *United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002)). “This burden on the defense is low, but the evidence presented must consist of more than ‘mere allegation or speculation.’ ” *Id.* (quoting *Salyer*, 72 M.J. at 423).

[4] Once the accused meets the “some evidence” threshold, the burden shifts to the government to prove beyond a reasonable doubt that either: (a) the “predicate facts proffered by the appellant do not exist,” or (b) “the facts as presented do not constitute unlawful command influence.” *Id.* (citing *Salyer*, 72 M.J. at 423; *United States v. Biagase*, 50 M.J. 143, 151 (C.A.A.F. 1999)). If the government cannot succeed at this step, it must prove beyond a reasonable doubt

that the unlawful command influence “did not place an intolerable strain upon the public's perception of the military justice system and that an objective, disinterested observer, fully informed of all the facts and circumstances, would [not] harbor a significant doubt about the fairness of the proceeding.” *Id.* at 249 (alteration in original) (internal quotation marks omitted) (citation omitted).

## II. Analysis

### A. Ability to Commit Unlawful Command Influence

[5] As a threshold matter, based squarely on the plain language of Article 22, UCMJ, 10 U.S.C. § 822 (2012), Article 37, UCMJ, and R.C.M. 104, we hold that Senator McCain was capable of committing unlawful command influence and that a sitting president of the United States is also capable of committing unlawful command influence.

#### 1. Senator McCain

Article 37(a), UCMJ, prohibits any “person subject to [the UCMJ]” from “attempt[ing] to ... influence the action of a court-martial.” At the time of his public comments regarding Appellant's case, Senator McCain was a retired member of the United States Navy, and thus he was subject to the UCMJ pursuant to Article 2(a)(4), UCMJ, 10 U.S.C. § 802(a)(4) (2012).<sup>3</sup> We therefore hold that \*235 Senator McCain was capable of committing unlawful command influence.

#### 2. A President of the United States

[6] We hold that a sitting president of the United States is also capable of committing unlawful command influence. R.C.M. 104(a)(1) provides in part: “No convening authority ... may censure, reprimand, or admonish a court-martial ....” Under the terms of Article 22(a)(1), UCMJ, a sitting president is a convening authority.<sup>4</sup> Thus, the plain language of R.C.M. 104(a)(1) encompasses any convening authority, and unlike Article 37, UCMJ, is not limited to the individual who convened the specific court-martial at issue.

In this regard, compare R.C.M. 104(a)(1) which states: “No convening authority ... may censure, reprimand, or admonish a court-martial” (emphasis added), with Article 37(a), UCMJ, which states: “No authority *convening* a ... court-martial may censure, reprimand, or admonish *the court*” (emphasis added).<sup>5</sup> Far from creating ambiguity, this difference in syntax signals a difference in meaning. *See, e.g., Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17

(1983) (“We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.”).

Any suggestion that we should interpose additional language into a rule that is anything but ambiguous is the antithesis of textualism.<sup>6</sup> See *Black’s Law Dictionary* 1779 (11th ed. 2019) (defining “textualism” as “[t]he doctrine that the words of a governing text are of paramount concern and that what they fairly convey in their context is what the text means”); Neil Gorsuch, *A Republic, If You Can Keep It* 132 (2019) (“The text of the statute and only the text becomes law. Not a legislator’s unexpressed intentions, not nuggets buried in the legislative history, and certainly not a judge’s personal policy preferences.”); Brett M. Kavanaugh, Book Review, *Fixing Statutory Interpretation Judging Statutes*, 129 *Harv. L. Rev.* 2118, 2118 (2016) (“The text of the law is the law.”); Elena Kagan, The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes, at 8:28 (Nov. 17, 2015), <http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation> (“We’re all textualists now.”). Indeed, the conclusion that the words of R.C.M. 104(a)(1) necessarily differ in meaning from the different words employed in Article 37, UCMJ, is wholly in line with the norm that courts adhere to the plain meaning of any text—statutory, regulatory, or otherwise. See, e.g., *Lomax v. Ortiz-Marquez*, — U.S. —, 140 S. Ct. 1721, 1725, 207 L.Ed.2d 132 (2020) (explaining that courts “may not narrow a provision’s reach by inserting words Congress chose to omit”); *Kisor v. Wilkie*, — U.S. —, 139 S. Ct. 2400, 2415, 204 L.Ed.2d 841 (2019) (“If uncertainty does not exist, ... [t]he regulation then just means what it means—and the court must give it effect, as the court would any law.”); *Star Athletica, LLC v. Varsity Brands, Inc.*, — U.S. —, 137 S. Ct. 1002, 1010, 197 L.Ed.2d 354 (2017) (stating that it is a “basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written”).

Consequently, the clear language of R.C.M. 104(a)(1) provides that any sitting president, to include President Trump, has the ability to commit unlawful command influence.

Although we hold that Senator McCain and President Trump *could* commit unlawful command influence, it does not necessarily follow that they *did* so. We must still determine whether their conduct resulted in the \*236 appearance

of unlawful command influence based on the facts of this particular case.

**B. “Some Evidence” of Unlawful Command Influence**

We hold that Appellant has satisfied his low burden of presenting “some evidence” of unlawful command influence in this case. *Boyce*, 76 M.J. at 249 (internal quotation marks omitted) (citation omitted).

**1. Senator McCain**

[7] In October 2015 while Appellant’s case was pending a referral decision, Senator McCain told a reporter: “If it comes out that [Appellant] has no punishment, we’re going to have to have a hearing in the Senate Armed Services Committee.” Senator McCain was not just a member of the Senate who was subject to the UCMJ, he was the chairman of the Senate Armed Services Committee. This leadership position gave him unique sway over the military. For example, he could delay or block assignments or promotions of senior military personnel. See Standing Rules of the Senate, S. Doc. No. 113-18, Rule XXV, at 20 (2013). Further, Senator McCain did not make this public comment in the context of conducting congressional oversight of the armed forces regarding military justice issues generally, or the disposition of certain categories of cases, or even the disposition of a particular case that was already final. Rather, Senator McCain made his public threat to hold a hearing in a specific case *that was currently pending* if the sentence imposed in that specific case was not to his liking. This situation is altogether different from standard congressional oversight, and the quid pro quo nature of Senator McCain’s threat entitles Appellant to cite to it as “some evidence” that could cause an “objective, disinterested observer ... [to] harbor a significant doubt about the fairness” of Appellant’s court-martial. *Boyce*, 76 M.J. at 248–49 (internal quotation marks omitted) (citations omitted).

Senator McCain’s comment was especially problematic because of the timing of his remarks. He made them after learning that the preliminary hearing officer in Appellant’s case recommended that the charges be referred to a special court-martial not empowered to adjudge a bad-conduct discharge, and before the general court-martial convening authority (GCMCA) made a referral decision. Thus, Senator McCain’s public threat to hold a hearing provides “some evidence” of an appearance of unlawful command influence because it had the potential to appear to “coerce or ... influence” the outcome of Appellant’s court-martial under

Article 37, UCMJ.<sup>7</sup> *Boyce*, 76 M.J. at 249, 253 (internal quotation marks omitted).

## 2. President Trump

[8] Appellant also has presented “some evidence” of unlawful command influence with respect to President Trump. Several of the public comments made about Appellant by Mr. Trump at campaign rallies while he was a candidate for president were both inaccurate and inflammatory. For example, Mr. Trump made comments such as the following:

Take Sergeant Bergdahl, does anybody remember him? (Crowd boos). So, so this is the way we think. So we get a traitor named Bergdahl, a dirty, rotten traitor (crowd applauds [sic]), who by the way when he deserted, six young, beautiful people were killed trying to find him, right? And you don't even hear about him anymore! Somebody said the other day, “Well he had some psychological problems.” You \*237 know, you know in the old days (mimics shooting a rifle), bing, bong! (Crowd cheers). When we were strong, when we were strong. So we get Bergdahl, a traitor, and they [the Taliban] get five of the people that they most wanted anywhere in the world, five killers that are right now back on the battlefield doing a job. That's the kind of deals we make! That's the kind of deals we make, right? Am I right?

Def. Appellate Ex. No. 56, Compendium of Trump Campaign Comments about Sergeant Bergdahl, at 30–31 [hereinafter Def. Appellate Ex.], and:

We get a dirty, rotten, no-good traitor named Bergdahl. Sergeant Bergdahl. And they [the Taliban] get, they get, five of the greatest people that they know. The biggest killers and believe me they're back out there and [President Obama] says[,] “Oh they're not back in the battle,” but believe me folks, they're back on the battlefield and they want to kill everybody here and they want to kill everybody there. So we get this dirty, rotten, no-good traitor who 20 years ago would've been shot, who 40 years ago they would've done it within the first hour, and who now might not, maybe nothing's going to happen. Don't forget, with Bergdahl we lost at least five people and I watched the parents on television, I've seen the parents, I've met one of the parents, who're devastated, ruined, destroyed. And they were killed going out to try and bring him back, and they lost five people, probably six, by the way. But at least five people. ... And everybody in the platoon, everybody was saying he walked off, he's a traitor. They said he's a whack job but we made this deal knowing. Now I would've said[,] “Oh really? He's a traitor? Pass! Let 'em [the Taliban] have

him, he's done.” Frankly, frankly, I would take that son of a bitch, I'd fly him back, I'd drop him right over the top, I'm telling you. I'm telling you.

Def. Appellate Ex., at 45.

To begin with, “[t]he term ‘traitor’ is particularly odious, particularly in the military community.” *United States v. Barrazamartinez*, 58 M.J. 173, 176 (C.A.A.F. 2003). And importantly, the record does not support the contention that Appellant was a traitor. Appellant was neither charged with nor convicted of either the federal crime of treason, 18 U.S.C. § 2381 (2012) (“Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason ....”), or the military offense of aiding the enemy, a violation of Article 104, UCMJ, 10 U.S.C. § 904 (2012) (criminalizing aiding or attempting to aid the enemy, or knowingly harboring the enemy, giving intelligence to the enemy, or communicating with the enemy). Indeed, there is simply no evidence that Appellant sought to defect to or to otherwise aid the Taliban. Rather, throughout his captivity Appellant complied with the Code of Conduct for Members of the Armed Forces of the United States<sup>8</sup> by attempting to escape at least a dozen times. On one occasion he broke free for eight days before the Taliban recaptured him. When asked how he stayed motivated to live despite the escalating torture and abuse, Appellant testified: “Trying to find a way to escape, ... trying to learn as much intel as I could so that I could get that back out if I made it out .... And not letting them [the Taliban]—not letting them win.”

Likewise, the record does not support the assertion that six (or even five) people were killed trying to find Appellant. However, as explained in detail below, a number of military members were injured—some seriously—while searching for Appellant.

[9] In other comments he made on the campaign trail, Mr. Trump opined—prior to Appellant's court-martial conviction—that Appellant was indeed a deserter.<sup>9</sup> Such a \*238 proclamation is antithetical to the presumption of innocence the Constitution affords all accused. See *Coffin v. United States*, 156 U.S. 432, 453, 15 S.Ct. 394, 39 L.Ed. 481 (1895) (“The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”).

[10] And yet, we underscore the fact that as a presidential candidate, Mr. Trump was neither a person “subject to the [C]ode” as a retiree or otherwise, nor a convening authority. See Articles 2, 22, UCMJ. Consequently, by their terms, neither Article 37, UCMJ, nor R.C.M. 104(a)(1), applied to comments that Mr. Trump made as a presidential candidate, no matter how inaccurate or unfair those statements were.

However, by the time Appellant pleaded guilty at his court-martial, Mr. Trump had become President of the United States. On the same day that Appellant entered his guilty pleas, President Trump made the following remarks during a press conference in the Rose Garden:

Well, I can't comment on Bowe Bergdahl because he's—as you know, they're—I guess he's doing something today, as we know. And he's also—they're setting up sentencing, so I'm not going to comment on him. But I think people have heard my comments in the past.

President's News Conference With Senate Majority Leader A. Mitchell McConnell, 2017 Daily Comp. Pres. Doc. 12 (Oct. 16, 2017). The last sentence of this statement was a ratification of, and served to incorporate by reference, the comments Mr. Trump had previously made on the campaign trail regarding Appellant's case, which are referenced above. See supra pp. 237–38 & n.9. As the military judge succinctly noted:

While somewhat ambiguous, the plain meaning of the President's words to any reasonable hearer could be that in spite of knowing that he should not comment on the pending sentencing in this case[,] he wanted to make sure that everyone remembered what he really thinks should happen to the accused.

And while he was a candidate, Mr. Trump made “what he really thinks” very clear: Appellant was a deserter and a traitor who should be severely punished. See generally supra pp. 236–38. This public reference to, and ratification of, these views after Mr. Trump became President had the potential to appear to “censure, reprimand, or admonish a court-martial ... or any member, military judge, or counsel thereof, with respect ... to any other exercise of the functions of the court-martial ... or such persons in the conduct of the proceedings.” R.C.M. 104(a)(1).

Similarly, President Trump later posted to the social networking website Twitter a comment in which he referred to the military judge's sentencing decision in Appellant's case as “a complete and total disgrace to our Country and to our Military.” Donald J. Trump (@realDonaldTrump), Twitter

(Nov. 3, 2017, 11:54 AM). This statement appeared both to “censure” the court-martial with respect to the sentence, and had the potential to appear to influence other subsequent “functions of the court-martial,” such as the convening authority's review and action, along with the later appellate phases of this case. R.C.M. 104(a)(1).

**C. No Intolerable Strain on the Military Justice System**

[11] As noted above, a sitting president of the United States can commit both apparent and actual unlawful command influence. The same held true for the late Senator McCain. Therefore, statements by such persons about a pending case are perilous. Because of their capacity to influence decision makers in a court-martial, comments about a pending criminal matter pose a grave risk to the goal of ensuring that justice is done in every case. Specifically, improper statements could cause an innocent accused to suffer adverse criminal consequences such as a wrongful conviction or an increased sentence, or could cause a guilty accused to walk free—despite the commission of heinous crimes—if the actual or apparent unlawful command influence results in the dismissal of \*239 charges. See, e.g., Barry, 78 M.J. at 80 (dismissing sexual assault charge with prejudice for actual unlawful command influence); United States v. Riesbeck, 77 M.J. 154, 167 (C.A.A.F. 2018) (dismissing charges of making a false official statement, rape by force, and communicating indecent language with prejudice for actual unlawful command influence); Boyce, 76 M.J. at 253 (dismissing charges of rape and assault consummated by a battery without prejudice for apparent unlawful command influence).

In this particular case, however, we conclude that a finding of apparent unlawful command influence is not warranted because there was no intolerable strain on the military justice system. This conclusion is predicated on all of the relevant facts of this case, regardless of whether the various stages of the court-martial proceedings are viewed individually or cumulatively.

To begin with, compelling evidence was presented at a hearing held pursuant to Article 32, UCMJ, 10 U.S.C. § 832 (2012), that Appellant deserted his unit with intent to shirk hazardous duty and that he engaged in misbehavior before the enemy. Make no mistake—these offenses are very serious. In fact, the Manual for Courts-Martial, United States (MCM) categorizes misbehavior before the enemy as an offense that can be punishable by death, and categorizes desertion as an offense punishable by death, or by any punishment other than



death, depending on whether it was committed during a time of war. *See* Articles 85(c), 99(9), UCMJ; *MCM* pt. IV, para. 23.e. (2012 ed.). In light of both the severity of these offenses and the strength of the Government's evidence, an objective, disinterested observer clearly would have expected the Army to court-martial Appellant for this conduct regardless of any public comments by President Trump or Senator McCain.<sup>10</sup> Indeed, every official involved in this case—including the Army Regulation 15-6 investigating officer<sup>11</sup> and the Article 32, UCMJ, preliminary hearing officer—recommended that Appellant's case be sent to some type of court-martial. Thus, there was no appearance of unlawful command influence during the investigation and preferral stages of this case.

[12] In regard to the next stage of the court-martial proceeding, Appellant emphatically—and understandably—underscores the fact that although the Article 32, UCMJ, preliminary hearing officer recommended that this case be referred to a special court-martial not empowered to adjudge a bad-conduct discharge—which would have precluded the dishonorable discharge that was actually imposed here—the GCMCA in this case, General (GEN) Robert B. Abrams, ultimately referred Appellant's case to a general court-martial that was empowered not only to adjudge a dishonorable discharge but also to impose a far longer term of imprisonment. We acknowledge that this aspect of the case is a close question and it has given us great pause. At first blush it raises the question of whether an objective, disinterested observer would harbor a significant doubt about the \*240 fairness of the GCMCA's referral decision and whether it was affected by Senator McCain's public comment. Nevertheless, after long consideration, we answer this question in the negative.

To start, GEN Abrams stated unequivocally in a sworn affidavit that his decisions in this case were “not impacted by any outside influence.” Further, GEN Abrams characterized the statements made by Senator McCain as “inappropriate” and he testified that he “absolutely [did] not” consider them in making his referral decision, demonstrating a denunciation of and disassociation from these comments. Although these two points are not dispositive of the issue in a case involving the appearance of unlawful command influence, *see Boyce*, 76 M.J. at 251 (holding that the military judge erred by relying on the GCMCA's personal assurances that he was not improperly influenced), they are factors that an objective, disinterested observer would appropriately consider in conjunction with the additional supporting facts discussed below.

Next, there is no requirement that a convening authority adopt the recommendations of an Article 32, UCMJ, preliminary hearing officer. *See R.C.M. 601*. Indeed, any observer of the military justice system would realize that it is not uncommon for a GCMCA to refer a case to a court-martial in a manner contrary to the recommendation of the Article 32, UCMJ, preliminary hearing officer, even in those instances where there is not a scintilla of unlawful command influence. But beyond this general point, there also are specific facts in the record that would allay the concerns of an objective, disinterested observer in this particular case.

For example, in properly analyzing this issue, it is vitally important to bear in mind that the Article 32, UCMJ, preliminary hearing officer who recommended a special court-martial in this case noted in his report that he did not have information regarding casualties. He also explained that the “strongest factor” in causing him to make a recommendation for a special court-martial was the fact that the Government failed to submit before him any evidence “demonstrating that anyone was killed or wounded” during the military's search and recovery efforts related to Appellant's disappearance. Moreover, he specifically opined in his preliminary hearing report that “the issue of casualties should be conclusively addressed prior to a final decision on the disposition of[f] SGT Bergdahl's case.” And, as detailed immediately below, it later was shown by the Government at sentencing that several American servicemembers were indeed injured, some severely, while on missions primarily designed to locate Appellant.

When Appellant's platoon discovered that he was missing in June 2009, they immediately began searching for him and promptly updated his duty status to DUSTWUN (Duty Status Whereabouts Unknown).<sup>12</sup> *United States v. Bergdahl*, 79 M.J. 512, 518 (A. Ct. Crim. App. 2019). Consequently, thousands of United States soldiers, sailors, airmen, and Marines conducted an intensive search of the region spanning thirty to forty-five days and delaying and deferring many other military operations in an attempt to locate Appellant. *Id.* One witness testified, “Everybody in Afghanistan was looking for Bergdahl.” The increased presence of American troops precipitated increased interactions with the enemy, which ultimately increased the level of risk to those searching for Appellant.

Throughout the DUSTWUN search, there were numerous American casualties, at least three of which required extensive medical treatment. During a July 8, 2009, rescue

mission to retrieve Appellant, Retired Navy SEAL Senior Chief Petty Officer James Hatch was shot in the leg, requiring eighteen surgeries over several years to treat his injuries. Remco, a military dog, was also killed during the mission. On a different rescue mission during the same time frame, at \*241 least two Army specialists came under rocket-propelled grenade fire. As a result, former Specialist Jonathan Morita sustained serious injuries to his right hand, continues to experience physical pain, and has not fully regained the use of his hand despite surgery. Additionally, during the same mission, Master Sergeant (MSG) Mark Allen was shot through the head. Following his injury, MSG Allen was in a “vegetative state,” severely disabled, unaware of his surroundings, unable to speak, and rarely able to recognize those around him. Despite undergoing fifteen to twenty surgeries which included the removal of both his frontal lobes, MSG Allen continued to experience ninety to one-hundred percent paralysis, suffered from seizures, and required around-the-clock medical care.<sup>13</sup>

This is precisely the type of casualty information that the Article 32, UCMJ, preliminary hearing officer said must be ascertained before a final disposition was made in Appellant's case.<sup>14</sup> And although the preliminary hearing officer was not aware of these casualties, GEN Abrams served in military positions where he would be privy to such information. After Appellant's desertion but before his rescue, GEN Abrams became the Commanding General of the Third Infantry Division. He deployed to Afghanistan in that capacity where he received briefings concerning the Army's efforts to rescue Appellant. Later, GEN Abrams served as the Senior Military Assistant to the Secretary of Defense, during which time he was present for briefings regarding Appellant, was aware of negotiations taking place to effect Appellant's return from Taliban captivity, and provided daily reports to the Secretary of Defense concerning Appellant's health and welfare following his eventual return to the United States. And when GEN Abrams served as the convening authority in Appellant's case, he held the position of Commanding General of the United States Army Forces Command (FORSCOM), one of the highest command posts in the military. Thus, an objective and disinterested observer pondering the fairness of the disposition of this case would recognize that GEN Abrams had ready access to this casualty information at the time he decided to send Appellant's case to a general court-martial rather than to the more limited special court-martial recommended by the Article 32, UCMJ, preliminary hearing officer.<sup>15</sup>

Any lingering doubts an objective, disinterested observer might have about the reasons behind GEN Abrams's decision to refer Appellant's case to a general court-martial would be allayed by the following essential point. As noted above, at the time of his referral decision, as well as at the time of his clemency decision, GEN Abrams was the commander of FORSCOM. In that position, his mission was to protect and enhance the war fighting capabilities of our armed forces. See, e.g., *Military Construction Appropriations for 1974: Hearings Before the Subcomm. of the H.R. Comm. on Appropriations*, \*242 93d Cong. 208 (1973) (“The FORSCOM commander will be responsible for combat readiness of all ... Army ... forces ...”). An indispensable element of unit cohesion, readiness, and good order and discipline is the morale of the troops. See, e.g., *Goldman v. Weinberger*, 475 U.S. 503, 507, 106 S.Ct. 1310, 89 L.Ed.2d 478 (1986) (“[T]o accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps.”). Here, an objective, disinterested observer “fully informed of all the facts and circumstances,” *Boyce*, 76 M.J. at 249–50 (internal quotation marks omitted) (quoting *Salyer*, 72 M.J. at 423), would recognize that if GEN Abrams had chosen to refer Appellant's case to a special court-martial that was not even empowered to adjudge a bad-conduct discharge, his decision would have been devastating to military morale. After all, members of the armed forces would have realized that GEN Abrams made that referral decision despite the fact that he knew there was overwhelming evidence that Appellant had deserted his post in a combat zone with intent to shirk hazardous duty and had engaged in misbehavior before the enemy, and despite the fact that he knew that other servicemembers were injured or were likely injured in the course of the military's efforts to rescue Appellant from the consequences of his own misconduct. Therefore, a hypothetical observer would “[not] harbor a significant doubt about the fairness of [Appellant's] proceeding[s],” *id.* (first alteration in original) (internal quotation marks omitted) (quoting *Salyer*, 72 M.J. at 423), because he or she would understand that GEN Abrams's referral decision was squarely rooted in the proper execution of his duties as FORSCOM commander and was not the product of public comments by Senator McCain.

In terms of the next stage of Appellant's court-martial proceedings, it cannot be emphasized strongly enough that Appellant *chose to plead guilty* to the offenses of desertion with intent to shirk hazardous duty and misbehavior before the enemy.<sup>16</sup> In doing so, he explicitly agreed in open court that he was voluntarily pleading guilty *because he was in*

*fact guilty* and not for any other reason. In a lengthy plea colloquy, Appellant explained in detail his intent to walk off his post in hostile territory, his reasoning for doing so, and the exact steps he took to attain his objective. Additionally, Appellant testified that the charged offenses “accurately and correctly describe what [he] did.” Based on Appellant’s own words, no impartial observer would conclude that it was the comments made by the President of the United States and/or by the chairman of the Senate Armed Services Committee that caused Appellant to plead guilty; rather, it was the strength of the Government’s evidence that caused him to take that step. Moreover, after Appellant raised to the military judge the issue of apparent unlawful command influence, the military judge offered Appellant the opportunity to *withdraw his plea of guilty*, and Appellant declined to do so. Thus, no claim of unfairness regarding the guilty plea phase of the court-martial proceedings can prevail.

[13] In terms of the sentencing stage of these proceedings, Appellant presented significant mitigation evidence. For example, he produced evidence that prior to his Army service, he served in the United States Coast Guard but soon was separated, at least in part because of his mental health. Indeed, Appellant’s Coast Guard physician noted that Appellant should not be allowed to reenlist in the military unless Appellant was first medically cleared by a psychiatrist. Although the Army complied with all applicable regulations regarding the enlistment of Appellant, the Army was not aware of this Coast Guard proviso when it allowed Appellant to join its ranks. Consequently, as a medical expert in this case testified, at the time of the offenses in 2009 Appellant likely suffered from several \*243 severe preexisting psychiatric conditions, to include *schizotypal personality disorder*.

To be clear, the sanity board in this case concluded that although Appellant was suffering from a severe mental disease or defect, he nevertheless was able to “appreciate the nature and quality and wrongfulness of his conduct.” Therefore, an insanity defense did not apply here. However, the record reflects that Appellant’s mental health conditions contributed to his misconduct in Afghanistan and explained in part his exceptionally poor judgment in deserting his post in a combat zone. Notably, the preliminary hearing officer who handled this case pursuant to [Article 32, UCMJ](#), stated in his report that there “is almost unanimous agreement that SGT Bergdahl left [his post] with good, albeit misguided, motives.”

Additionally, although it was a tragic consequence of his own decision to abandon his post, Appellant presented compelling evidence which detailed the five years he suffered from brutal and persistent physical and psychological torture at the hands of the Taliban. During the first year of his captivity, the Taliban regularly whipped Appellant with *copper* cables, heavy rubber hoses, and the buttstocks of their AK-47 assault rifles; burned the bottom of Appellant’s feet with matches; and forced Appellant to watch execution videos while threatening to decapitate him. For several months, Appellant’s hands and feet were shackled to a metal bedframe, causing the development of *bedsores* and resulting in such severe atrophy of Appellant’s muscles that he could not walk. Eventually, Appellant’s captors detained him inside an iron cage where he was shackled for the remaining four years he spent as their prisoner. The cage was approximately six feet wide and seven feet long, was made of quarter-inch iron bars spaced approximately four inches apart on all sides—including on the bottom—and was elevated about eight inches above the ground. The size and construction of the cage made it “excruciatingly painful” to stand, and “impossible” to move around. Appellant was left to “rot inside that cage.” This torture exacerbated Appellant’s preexisting mental conditions. As a result, he requires “more complicated” and “more extended” medical treatment for his mental health problems. However, Appellant is precluded from accessing such health-care benefits provided by the United States Department of Veterans Affairs. *See* [38 U.S.C. § 5303\(a\) \(2012\)](#).

And finally, at sentencing Appellant introduced evidence that, upon his return to military custody, he provided significant intelligence to the Army. One witness at trial described the information supplied by Appellant as a “goldmine” that “reshaped” the Army’s understanding of hostage-taking in the region, potentially helping other prisoners of war in Afghanistan. This information was later incorporated into Army training programs.

Ultimately, however, this mitigation evidence does not overcome our firm conviction that the sentence adjudged in this case had nothing to do with the comments made by Senator McCain or President Trump and was instead based solely on the serious offenses to which Appellant pleaded guilty and on the facts established during the Government’s case in aggravation. Indeed, it is telling that at his sentencing hearing after his guilty plea, and *fully aware of his own case in mitigation*, Appellant specifically recognized that he was deserving of punishment and asked to have a

*dishonorable discharge imposed upon him.* His counsel stated the following:

Sergeant Bergdahl has been punished enough. Even the most glorious of confinement facilities would serve no rehabilitative purpose or any principle under our *Manual for Courts-Martial* ... based on what Sergeant Bergdahl has suffered at the hands of his Taliban captors for five years and the long-standing physical effects that he would have from that.

*But punishment is warranted for his actions, and the defense would request that you give Sergeant Bergdahl a dishonorable discharge ....*

(Emphasis added.)

Then, during a lengthy exchange between Appellant and the military judge, Appellant acknowledged both that he was fully aware of the implications of receiving a dishonorable discharge and that he wanted the military \*244 judge to impose that specific punishment upon him. Accordingly, it is difficult indeed to discern how an impartial observer would conclude that this aspect of Appellant's sentence was unfair.

Moreover, we underscore the fact that despite the sensational nature of this case, despite the public calls for the lengthy imprisonment of Appellant, despite Senator McCain's threat that he would hold a hearing if Appellant did not receive a sentence to his liking, and despite the Commander in Chief's ratification of his statements that Appellant was a traitor who should be severely punished, the military judge imposed on Appellant *no prison time whatsoever*. Thus, an objective, disinterested observer would conclude that rather than being swayed by outside forces, the military judge was notably impervious to them. Indeed, it can be said that this result—whether one agrees with it or not—stands as a testament to the strength and independence of the military justice system. Therefore, assertions of an appearance of unlawful command influence are once again unavailing.

[14] And finally, in terms of the clemency and appellate stages of this case, we reiterate the following critical points: Appellant pleaded guilty to deserting his unit with intent to shirk hazardous duty and of engaging in misbehavior before the enemy; American servicemembers were injured searching for Appellant after he chose to desert his post in a combat zone; the United States government was required to exchange five members of the Taliban who had been held at the U.S. detention facility in Guantanamo Bay, Cuba, in order to secure Appellant's release; and yet the military judge imposed as a sentence only a dishonorable discharge, a

reduction in rank, and partial forfeitures of pay after Appellant specifically asked to receive a dishonorable discharge. Under these circumstances, we are confident that an objective, disinterested observer would decide that the convening authority's decision not to exercise his discretionary clemency authority on behalf of Appellant was a foregone conclusion unaffected by any public comments made about the case. We further observe that Appellant's post-trial matters submitted to the convening authority were “absent of any formal request for clemency in the form of a sentence reduction.” *Bergdahl*, 79 M.J. at 526. Similarly, we conclude that in light of these facts, there would be no basis for an impartial observer to believe that the decision by the Army Court of Criminal Appeals to affirm the findings and sentence in this case was in any way unfair.

### III. Conclusion

The totality of these circumstances makes it clear beyond a reasonable doubt that the comments made by President Trump and Senator McCain—regardless of how “troubling,”<sup>17</sup> “disturbing,”<sup>18</sup> “disappointing,”<sup>19</sup> “inaccurate,”<sup>20</sup> “inappropriate,”<sup>21</sup> and “ill-advised”<sup>22</sup> they were—did not place an intolerable strain upon the public's perception of the military justice system in this particular case. Rather, the record reflects that the decision-making at each stage of Appellant's court-martial proceedings was unaffected by any outside influences. Therefore, we are confident that “an objective, disinterested observer, fully informed of all the facts and circumstances, would [not] harbor a significant doubt about the fairness of these proceedings.” *Boyce*, 76 M.J. at 249 (internal quotation marks omitted) (quoting *Lewis*, 63 M.J. at 415). Accordingly, we affirm the decision of the United States Army Court of Criminal Appeals.

Chief Judge STUCKY, concurring in part and dissenting in part.

This case has caused me as much concern as any in the more than thirteen years I have sat on this Court. It was superbly argued \*245 and has brought forth the finest efforts of my colleagues, both in the majority opinion and in the concurrences. I join Judge Sparks's opinion but find it necessary to write separately to express my dismay that senior members of our government thought it appropriate to try to influence the outcome of Appellant's court-martial.



In the past, I have questioned the doctrine of apparent unlawful command influence, but the Court has adhered to it. *See United States v. Boyce*, 76 M.J. 242, 254 (C.A.A.F. 2017) (Stucky, J., dissenting). Moreover, if there ever were a case in which it should be applicable it is this one.

Senator McCain certainly had a right to announce that he intended to hold hearings on Appellant, as Judge Maggs correctly points out. But conditioning the hearings on Appellant's receiving a sentence to no punishment was undoubtedly meant to cause the sentencing authority and the convening authority to carefully consider the adverse personal and institutional consequences of adjudging or approving such a sentence.

President Trump's vicious and demeaning remarks about the treatment he believed Appellant should receive were relayed to members of the public, some of whom would be called upon to decide Appellant's fate. Given the reckless nature of the comments made and ratified by the President and the glare of publicity that surrounds the utterances of any president, and particularly this one, the government has a unique burden to bear in rebutting the appearance of unlawful influence. It has not done so. That being the case, I agree with Judge Sparks: the comments of Senator McCain and the President have placed an intolerable strain on the military justice system, and the only appropriate remedy is dismissal of the charges and specifications with prejudice.

One final thing needs to be said. This case is unique in modern American military jurisprudence. Let us hope that we shall not see its like again.

Judge SPARKS, concurring in part and dissenting in part, with whom Chief Judge STUCKY joins.

This case is a cautionary example of the vulnerabilities of the military justice system and lends fodder to those who continue to question whether the military has a credible criminal justice system. I am concurring in part and dissenting in part from the majority opinion.<sup>1</sup> I agree with the majority that (1) both the late Senator McCain and the President could commit unlawful influence under the Uniform Code of Military Justice (UCMJ) and the *Manual for Courts-Martial, United States (MCM)*, and (2) that there is some evidence that each committed such influence. However, I part with the majority's ultimate conclusion that the Government carried its burden to establish beyond a reasonable doubt that an objective, disinterested observer, fully informed of all the facts and circumstances,

would *not* harbor a significant doubt about the fairness of the proceedings. Additionally, in my view, the egregious circumstances of this particular case deprived Appellant of due process under the Fifth Amendment of the United States Constitution. *U.S. Const. amend. V.*

### I. *The Commander in Chief*

As Commander in Chief, the President has significant authority and control over the military and the military justice system. With regard to the latter, under Article 36, UCMJ, 10 U.S.C. § 836, Congress has delegated authority to the President to create procedural rules for the administration of justice via the *MCM*. Under that authority, as the majority has held, the President is a convening authority. Furthermore, although not commanders in the strict military sense, the President, the Secretary of Defense, and the service secretaries are vested with the mantle of command authority. *See* Article 22, UCMJ, 10 U.S.C. § 822; Amicus Brief in Support of Appellant's Petition for Grant of Review at 6, *United States v. Bergdahl*, No. 19-0406 (C.A.A.F. Aug. 12, 2019). Thus, when the President or any of these authorities inject themselves into the military justice \*246 system in a manner intending or appearing to compromise a military accused's right to a fair trial, a significant potential unlawful influence problem arises. Further, as admirably and thoroughly detailed by Professors Joshua E. Kastenbergh and Rachel E. VanLandingham in their amicus brief to this Court cited above, the President pursuant to his Article II powers retains significant control over the military establishment. *Id.* In essence, the Chief Executive of the country enjoys a position atop the military justice system that allows his voice to be heard far and wide.

### II. *The Appearance of Unlawful Influence*

As noted earlier, the majority and I disagree on application of the standard used to determine an appearance of unlawful influence in this case. Specifically, I disagree that the Government carried its burden to establish that the cumulative effect of Senator McCain's comment; his staff's persistent focus on this particular case; the constant invective directed at this accused by the Commander in Chief as a candidate and later ratified once elected to office; and the Commander in Chief's comments while in office, did not put an intolerable strain on public perception of the military justice system. Unlike the majority, I cannot conclude that "an objective, disinterested observer, fully informed of all the facts and

circumstances” would not “harbor a significant doubt about the fairness of the proceeding.” *United States v. Boyce*, 76 M.J. 242, 249 (C.A.A.F. 2017) (internal quotation marks omitted) (citation omitted).

I believe this fictional member of the public must have some basic understanding of the importance of the concept of unlawful influence and its potentially corrosive effect on the military criminal justice system. Because of the unique nature of the military justice system and the even more unique nature of the concept of unlawful command control, a typical member of the public may be unable to comprehend the full breadth and complexity of the issue. In fact, arguably, the only comparable issue in state and federal criminal justice systems is adverse pretrial publicity. Although, the facts of this case giving rise to the appearance of unlawful influence could also fairly be characterized as adverse pretrial publicity, every military justice practitioner understands the difference between the two concepts. Unlawful influence exerted on the military trial process corrupts and erodes the very legitimacy of the system. It is not simply a question of a damaging adjacent outside influence. The process itself is tainted.

By imputing this understanding to the fictional observer, we are arming him or her with the necessary information to properly assess whether a given set of facts places an intolerable strain on the system. An observer with an appreciation for the unique role of undue influence in the military justice process is, in my mind, more suitably positioned to assess the degree of strain such influence might impart. Under the circumstances of the present case, such an informed observer would believe that—whether or not the results of Appellant's trial were foreordained—the comments of Senator McCain and of the Commander in Chief corrupted the trial process beyond repair.

### III. Due Process

The facts of this case also raise a serious due process concern. The concept of constitutional due process is rooted in the notion of fundamental fairness, and this Court has long recognized this concern as it pertains to unlawful command influence. “The exercise of command influence tends to deprive servicemembers of their constitutional rights.” *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986). “[I]n the military justice system both the right to a trial that is fair, and the right to a trial that is objectively seen to be fair, have constitutional dimensions sounding in due process.” *Boyce*, 76 M.J. at 249 n.8. Congress's “prime motivation for

establishing a civilian Court of Military Appeals was to erect a further bulwark against impermissible command influence.” *Thomas*, 22 M.J. at 393. So the question arises: What process was due the accused in this case?

During the period in which the UCMJ was being drafted, Congress struggled with striking the appropriate balance between discipline and justice. One of the most controversial issues was the extent to which officers in the chain of command should be authorized \*247 to influence courts-martial. See *United States v. Littrice*, 3 C.M.A. 487, 13 C.M.R. 43 (1953).<sup>2</sup> In *Littrice*, the first judges appointed to this Court made it apparent that they understood the critical responsibility of resolving the delicate balance between command control and true justice:

Thus, confronted with the necessity of maintaining a delicate balance between justice and discipline, Congress liberalized the military judicial system but also permitted commanding officers to retain many of the powers held by them under prior laws. While it struck a compromise, Congress expressed an intent to free courts-martial members from any improper and undue influence by commanders which might affect an honest and conscientious consideration of the guilt or innocence of an accused.

*Id.* at 491, 13 C.M.R. at 47. In *Littrice*, this Court ultimately determined that undue influence had occurred, concluding that “[t]he accused was convicted and sentenced by a court-martial which was not free from *external influences* tending to disturb the exercise of a deliberate and unbiased judgment.” *Id.* at 496, 13 C.M.R. at 52 (emphasis added).

Preserving the inherent fairness of the military justice process by shielding it from outside influence continues as one of this Court's highest responsibilities. Such preservation of an accused's due process protects the impartial and truth-seeking nature of the military, and indeed any, justice system.

### IV. Remedy

Many of our past cases dealt with allegations of the appearance of unlawful influence in which the influence was directed towards various participants in the court-martial system other than the accused. *E.g.*, *United States v. Lewis*, 63 M.J. 405, 406 (C.A.A.F. 2006) (appearance of unlawful influence by the government directed towards the military judge); *United States v. Salyer*, 72 M.J. 415, 417 (C.A.A.F. 2013) (appearance of unlawful influence by the government directed towards the military judge); *Boyce*,

76 M.J. at 244 (appearance of unlawful influence by the Air Force chief of staff directed towards the convening authority). However, in a military trial, the accused is the most important participant since he or she has the most at stake. Moreover, remedies ordered in these past cases have been designed to vindicate a variety of constitutional and regulatory rights afforded a military accused. *E.g.*, *Lewis*, 63 M.J. at 416 (charges and specifications dismissed without prejudice because the error of unlawful command influence cannot be rendered harmless); *Salyer*, 72 M.J. at 428 (findings and sentence dismissed with prejudice because “any remedy short of dismissal at this stage would effectively validate the Government’s actions”); *Boyce*, 76 M.J. at 253 (reverse findings and sentence without prejudice, recognizing that “in individual cases that are properly presented to this Court ... we will meet our responsibility to serve as a ‘bulwark’ against [unlawful command influence] by taking all appropriate steps within our power to counteract its malignant effects”). It stands to reason that since this Court has previously been willing to afford the accused a remedy when the unlawful influence was directed towards other participants, we certainly should afford a remedy when the unlawful influence is directed at the accused himself. An accused servicemember has a due process right to be tried in an environment that is free from personal and public vilification by high, even the highest, authorities in the system. The entire trial process must be one that promotes the legitimacy of the military justice system.

## V. Conclusion

“Command influence is the mortal enemy of military justice.” *Thomas*, 22 M.J. at 393. “[T]he apparent existence of ‘command control’ ... is as much to be condemned as its actual existence.” *United States v. Johnson*, 14 C.M.A. 548, 551, 34 C.M.R. 328, 331 (1964). “There is no doubt that the appearance \*248 of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial.” *United States v. Allen*, 33 M.J. 209, 212 (C.M.A. 1991) *overruled on other grounds by United States v. Dinger*, 77 M.J. 447 (C.A.A.F. 2018). For years, we have quoted these principles. We have a responsibility to act and rule in accordance with them. Never in the history of the modern military justice system has there been a case in which the highest level figures, including the Commander in Chief, have sought to publicly demean and defame a specific military accused. The vilification of Sergeant Bergdahl before, during, and after his court-martial was unprecedented, hostile, and pernicious in the extreme.

It both placed an intolerable strain on the military justice system and denied the accused his due process right to a fair trial. I am compelled to conclude that the only appropriate remedy in this case is dismissal of the findings and sentence with prejudice. Therefore, I must respectfully dissent from so much of the analysis and judgment that concludes otherwise.

Judge MAGGS, concurring in part and concurring in the judgment.

The lead opinion correctly reasons that Appellant is not entitled to relief under a theory of apparent unlawful command influence unless three conditions are met. The first condition is that the prohibitions in Article 37(a), UCMJ, 10 U.S.C. § 837(a) (2012), or Rule for Courts-Martial (R.C.M.) 104(a)(1), were applicable to the late Senator John McCain and to President Donald Trump when they made certain statements about Appellant and his court-martial. The second condition is that Appellant has produced “some evidence” that one or more of the statements violated the prohibitions of these provisions. *United States v. Boyce*, 76 M.J. 242, 249 (C.A.A.F. 2017) (internal quotation marks omitted) (citation omitted). The third condition is that the Government has failed to prove beyond a reasonable doubt that the statements “did not place an intolerable strain on the public’s perception of the military justice system.” *Id.* at 252. The lead opinion determines that the first two conditions are satisfied but that the third condition is not. The lead opinion therefore concludes that Appellant is not entitled to relief.

My views are different, but I reach the same ultimate conclusion. Contrary to the lead opinion, I do not believe that the second condition was met with respect to Senator McCain’s statements based on the military judge’s findings of fact. In addition, I do not believe that the first condition is met with respect to President Trump because he was not the convening authority in this case and thus did not violate either Article 37(a), UCMJ, or R.C.M. 104(a)(1). I therefore do not join Parts II.A. or II.B. of the lead opinion. As I explain below, I otherwise concur in the lead opinion and I concur in the judgment affirming the decision of the United States Army Court of Criminal Appeals.

## I. Senator McCain and Article 37(a), UCMJ

Article 37(a), UCMJ, protects courts-martial from outside interference in several ways. At the time of the events in question, the second sentence of this article read as follows:

No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a

court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

Article 37(a), UCMJ. I agree with the determination in Part II.A.1 of the lead opinion that this provision applied to Senator McCain because, as a military retiree, he was a “person[ ] ... subject to this chapter.” Article 2(a)(4), UCMJ, 10 U.S.C. § 802(a)(4). But I disagree with the determination in Part II.B.1 of the lead opinion that Appellant provided “some evidence” that Senator McCain violated this provision when he declared: “If it comes out that [Appellant] has no punishment, we’re going to have to have a hearing in the Senate Armed Services Committee.”

A close examination of the second sentence of Article 37(a), UCMJ, reveals that it contains two prohibitions. One is a proscription against “attempt[ing] to coerce ... the action” of a convening authority or other listed \*249 persons who are not at issue here. Because the UCMJ does not define the term “coerce,” we must assume that Article 37(a), UCMJ, and other provisions in the UCMJ employ the term in accordance with its ordinary meaning.<sup>1</sup> See *United States v. Schloff*, 74 M.J. 312, 313 (C.A.A.F. 2015) (“In the absence of any specific statutory definition, we look to the ordinary meaning of the word.”). *Black’s Law Dictionary* defines “coerce” to mean “compel by force or threat” and defines “threat” to mean “a communicated intent to inflict harm or loss on another or another’s property.” *Black’s Law Dictionary* (11th ed. 2019) (entries for “coerce” and “threat”). Definitions from other dictionaries are similar.<sup>2</sup> In this case, the military judge found that “[n]either Senator McCain, nor anyone else, has threatened or otherwise tried to forcefully influence [the convening authority’s] decisions in this case.” Appellant does not contend that this finding of fact is clearly erroneous. Senator McCain therefore did not violate the second sentence of Article 37(a), UCMJ, by attempting to “coerce” the convening authority when he stated the need for a hearing if Appellant received no punishment.

The other prohibition in the second sentence of Article 37(a), UCMJ, is a proscription against attempting “by any unauthorized means [to] influence the action” of a convening authority or other listed persons not relevant here. In applying this provision, the question is whether Senator McCain’s statement that a Senate committee will hold a hearing if Appellant receives no punishment was “some evidence” of both (a) an attempt “to influence the action” of the convening authority, and (b) an “unauthorized means” of doing so. Based

on the Supreme Court’s holdings with respect to Congress’s power to investigate and the military judge’s findings of fact, the answer to this question is no.

The Supreme Court has recognized that Article I of the Constitution implicitly grants Congress authority to gather information necessary for intelligently exercising its enumerated powers. The Supreme Court has explained:

The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.

*Watkins v. United States*, 354 U.S. 178, 187, 77 S.Ct. 1173, 1 L.Ed.2d 1273 (1957); see also *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 504, 95 S.Ct. 1813, 44 L.Ed.2d 324 (1975) (“[T]he power to investigate is inherent in the power to make laws because ‘[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change.’ ” (second alteration in original) (quoting *McGrain v. Daugherty*, 273 U.S. 135, 175, 47 S.Ct. 319, 71 L.Ed. 580 (1927))); *Barenblatt v. United States*, 360 U.S. 109, 111, 79 S.Ct. 1081, 3 L.Ed.2d 1115 (1959) (“The scope of [Congress’s] power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.”). The Supreme Court further has recognized that Congress may delegate its constitutional investigative powers to committees and subcommittees, such that they “are endowed with the *full power* of the Congress to compel testimony.” *Watkins*, 354 U.S. at 201, 77 S.Ct. 1173 (emphasis added); see also *Eastland* 421 U.S. at 505, 95 S.Ct. 1813. And holding or proposing to hold “embarrassing oversight hearings” is one common way that Congress ensures that Executive Branch officers do not abuse their discretion in implementing federal law. Elena \*250 Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2258 (2001).

To be sure, Congress’s power to investigate, including its power to hold hearings, is not unlimited. The Supreme Court has indicated that congressional investigations “must be related to, and in furtherance of, a legitimate task of the Congress.” *Watkins*, 354 U.S. at 187, 77 S.Ct. 1173. Similarly, the Supreme Court has said that Congress cannot



hold hearings solely “to expose the private affairs of individuals without justification in terms of the functions of the Congress.” *Id.* The Supreme Court has also asserted that investigations “conducted solely for the personal aggrandizement of the investigators or to ‘punish’ those investigated are indefensible.” *Id.* And the Supreme Court has declared that Congress’s investigative powers are limited to legislative concerns, explaining: “Congress [is not] a law enforcement or trial agency.” *Id.* But the Supreme Court has never held that Congress is disabled from investigating executive and judicial responses to criminal conduct.<sup>3</sup>

In this case, Appellant argues that Senator McCain’s statement that the Senate Armed Services Committee would have to hold a hearing if Appellant received no punishment crossed the line between the authorized and the unauthorized because it was a “blatant threat to the fair administration of military justice” and it served to “ensure that punishment ensued.” If the military judge’s findings of fact supported these arguments, they might warrant further inquiry even though they do not fit neatly within the categories of exceptions to Congress’s investigative powers that the Supreme Court previously has identified. But the military judge did not find that Senator McCain had threatened the fair administration of justice or that his comments ensured that Appellant would receive punishment. On the contrary, the military judge found that even though Senator McCain had considerable power as the chair of the Senate Armed Service Committee “there is absolutely no evidence that he has attempted or threatened to use any such power to control the discretion of those in SGT Bergdahl’s military justice chain of command.” The military judge further found that “[n]either Senator McCain nor members of his staff have ever even attempted to contact” the convening authority or members of his staff. The military judge also found that Senator McCain’s intention was not to influence the trial but was instead “political posturing designed to embarrass a political opponent (President Obama) and gain some political advantage.” And consistent with these findings, the military judge found that the convening authority “was not affected by [Senator McCain’s] comments and did not consider them in making his decision as to the disposition of the charges against SGT Bergdahl.” These findings are all findings of fact, and we must accept them unless they are clearly erroneous.<sup>4</sup> Here, Appellant has not argued that any of military judge’s findings are clearly erroneous.

Based on these findings of fact, I agree with the military judge’s legal conclusion that Senator McCain did not attempt to influence the court-martial by unauthorized means in

violation of Article 37(a), UCMJ. The military judge correctly reasoned:

Certainly it is true that, as [Senator McCain] said, he could hold hearings at the [Senate Armed Services Committee]; as the Chairman, that is certainly his prerogative. But, such hearings are designed to uncover malfeasance or malfeasance by public officials in the exercise of the public trust and are not a review or check on a particular court-martial. The [Senate Armed Services Committee] simply has [no] ability to oversee the trial of this case in particular or trials by court-martial in general. They can certainly hold hearings, \*251 gather information and draft and submit changes to the UCMJ to the [C]ongress for vote. However, such changes would be: 1) Prospective and 2) Not tied to or effecting [sic] a particular case that has already been disposed of. *The defense has simply failed to provide some evidence which, if true, would constitute [unlawful command influence] which would have a logical connection to this court-martial in terms of potential to cause unfairness in the proceedings.*

Emphasis added.

Perhaps Appellant could have developed additional facts at trial that might support his arguments. But we have no authority to find additional facts at this stage of the proceedings. Accordingly, based on the absence of findings of fact necessary to support Appellant’s theory that Senator McCain’s statements constituted an attempt by unauthorized means to influence the convening authority, Appellant has failed to “show ‘some evidence’ that unlawful command influence occurred.” *Boyce*, 76 M.J. at 249 (citation omitted).

## II. President Trump and R.C.M. 104(a)(1)

I agree with the lead opinion that Article 37(a), UCMJ, did not apply to President Trump, either before or after he assumed office.<sup>5</sup> But I disagree with the lead opinion’s determination in Part II.A.2 that R.C.M. 104(a)(1) applied to President Trump. At the relevant times, R.C.M. 104(a)(1) read as follows:

No *convening authority* or commander may censure, reprimand, or admonish a court-martial or other military tribunal or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court-martial or tribunal, or with respect to any other exercise of the functions of the court-martial or tribunal or such persons in the conduct of the proceedings.

Emphasis added.

The parties disagree about whether the term “convening authority” in R.C.M. 104(a)(1) covers President Trump. Appellant contends that the term includes President Trump because he has the power to convene a general court-martial. The Government argues that the term includes only the person who actually convened the specific court-martial at issue, which in this case was General Abrams, not President Trump. Neither party has identified any precedent that directly answers this question about the meaning of “convening authority” in R.C.M. 104(a)(1).

The lead opinion sides with Appellant, relying on Article 22(a)(1), UCMJ, 10 U.S.C. § 822(a)(1), which provides that “[g]eneral courts-martial may be convened by ... the President of the United States.” But Article 22(a)(1), UCMJ, does not answer the issue disputed by the parties. The interpretive question is whether the term “convening authority” in R.C.M. 104(a)(1) refers to the authority who actually convened the court-martial at issue or instead refers more broadly to anyone who has the power to convene a court-martial. Article 22(a)(1), UCMJ, does not resolve this issue because it merely says that the President is a person who *may* convene a court-martial. If the term “convening authority” in R.C.M. 104(a)(1) means only the authority who actually convened the specific court-martial at issue, then Article 22(a)(1), UCMJ, is irrelevant because President Trump did not convene this court-martial, even though he had the power to do so.

In my view, the answer to the disputed issue lies in recognizing the important “principle that a text does include not only what is express but also what is implicit.” Antonin Scalia & Bryan A. Garner, *Reading Law: \*252 The Interpretation of Legal Texts* 96 (2012). As Justice Antonin Scalia and Professor Bryan Garner have explained, “[a]dhering to the *fair meaning* of the text (the textualist’s touchstone) does not limit one to the hyperliteral meaning of each word in the text. ... The full body of a text contains implications that can alter the literal meaning of individual words.” *Id.* at 356. In this case, each party is essentially arguing that R.C.M. 104(a)(1) contains implicit qualifiers. Appellant believes that the term “convening authority” implicitly means *a person empowered to act as a convening authority*, whereas the Government believes the term implicitly means the convening authority *in the specific case at issue*. The lead opinion effectively reads the qualifier advocated by Appellant into the text of the rule. But in my view, while either proposed implicit qualifier is linguistically possible, the Government has the stronger argument about which qualifier is implied in R.C.M. 104(a)(1).

Most of the Rules for Courts-Martial are implicitly limited in their application to the specific court-martial at issue. For example, when R.C.M. 802(c) states that “[n]o party may be prevented ... from presenting evidence or from making any argument, objection, or motion at trial,” the fair meaning is that no party *in the specific case at issue* shall be prevented from presenting evidence or making argument at trial *in the specific case at issue* even though the words “in the specific case at issue” are not expressly stated. Without these implicit qualifiers, R.C.M. 802(c) would afford a party to *any* court-martial the right to present evidence and make argument in *any* other court-martial. Likewise, when R.C.M. 705(e) provides that “no member of a court-martial shall be informed of the existence of a pretrial agreement,” the fair meaning is that no member *in the specific case at issue* shall be informed of a pretrial agreement *in the specific case at issue* even though the words “in the specific case at issue” are not expressly stated. Without these implicit qualifiers, R.C.M. 705(e) would prevent a commander who had once served as a member of *any* court-martial from ever afterward seeing or negotiating a pretrial agreement in *any* other court-martial. Similarly, when R.C.M. 502(a)(2) provides that “[n]o member may use rank or position to influence another member,” the fair meaning is that no member *in the specific case at issue* may use rank to influence another member *in the specific case at issue* even though the words “in the specific case at issue” are not expressly stated. Otherwise, R.C.M. 502(a)(2) would prevent a senior officer who has once served as a member in *any* court-martial from ever again giving orders to a junior officer who has ever served as a member in *any* court-martial. In each of these rules, the implied qualifiers likely were not stated expressly because they would be apparent to anyone without mentioning and because adding “in the specific case at issue” to every clause of every rule would make the Rules for Courts-Martial intolerably cumbersome to read.

In the same way, when R.C.M. 104(a)(1) provides that “[n]o convening authority ... may censure, reprimand, or admonish ... any ... military judge,” I believe that the fair meaning is that no convening authority *in the specific case at issue* may censure, reprimand, or admonish any military judge *in the specific case at issue* even though R.C.M. 104(a)(1) does not expressly state the words “in the specific case at issue.”<sup>6</sup> These implicit qualifiers harmonize R.C.M. 104(a)(1) with the other rules discussed above (which are worded very similarly) and with the general principle that the Rules for Courts-Martial are implicitly limited in their

application to the specific court-martial at issue. The implicit qualifiers also harmonize R.C.M. 104(a)(1) with Article 37(a), UCMJ, which all agree applies only to the convening authority who actually convened the specific court-martial at issue. *See* Scalia & Garner, *supra*, at 252 (“[L]aws dealing with the same subject—being \*253 *in pari materia* (translated as ‘in a like matter’)—should if possible be interpreted harmoniously.”).<sup>7</sup>

This reading also strikes me as being much more plausible than the one asserted by Appellant. If “no convening authority” implicitly means no *person empowered to act as a* convening authority, and is not implicitly limited to the convening authority in the specific case at issue, then R.C.M. 104(a)(1) would have an astonishingly broad scope. For instance, it would cover not just the President of the United States, but also every junior officer in any service stationed anywhere in the world who is designated as a summary court-martial convening authority. *See* Article 24(a), UCMJ, 10 U.S.C. § 824(a). While the President might have authority to promulgate a rule so much broader in scope than Article 37(a),

UCMJ, it is difficult to believe that he would do so implicitly. For these reasons, between the two proposed interpretations of the term “convening authority,” the one proposed by the Government is objectively more reasonable.

### III. Conclusion

Because of my disagreements with the lead opinion's determinations with respect to both Senator McCain and President Trump, I do not join Parts II.A. or II.B. of the lead opinion. While my conclusions above would suffice to decide this case if they had the support of the majority of the Court, they do not. I therefore join Part II.C. of the lead opinion based on the assumptions that, *even if* Appellant had shown some evidence that Senator McCain *had* violated Article 37(a), UCMJ, and *even if* R.C.M. 104(c) *did* apply to the President, the statements at issue would not, within the meaning of *Boyce*, have “place[d] an intolerable strain upon the public's perception of the military justice system.” *Boyce*, 76 M.J. at 252.

#### Footnotes

- 1 The granted issue is: “Whether the charges and specifications should be dismissed with prejudice or other meaningful relief granted because of apparent unlawful command influence.” *United States v. Bergdahl*, 79 M.J. 307 (C.A.A.F. 2019) (order granting review).
- 2 Importantly, when employing *de novo* review, “the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court's rulings.” *Black's Law Dictionary* 121 (11th ed. 2019) (defining “appeal *de novo*”); *see also, e.g., Salve Regina Coll. v. Russell*, 499 U.S. 225, 238, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991) (“When *de novo* review is compelled, no form of appellate deference is acceptable.”); *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 168 (2d Cir. 2001) (“When we review a district court's decision *de novo*, we take note of it, and study the reasoning on which it is based. However, our review is independent and plenary; as the Latin term suggests, we look at the matter anew, as though the matter had come to the courts for the first time.”).
- 3 Article 2(a), UCMJ, reads: “The following persons are subject to this chapter: ... (4) Retired members of a regular component of the armed forces who are entitled to pay.”
- 4 Article 22, UCMJ, states: “(a) General courts-martial may be convened by— (1) The President of the United States ....”
- 5 R.C.M. 104(a), a regulation, *see* Article 36, UCMJ, 10 U.S.C. § 836 (2012), is thus more protective than the statute—Article 37, UCMJ—as it proscribes a broader swath of conduct. This is entirely permissible. *See, e.g., United States v. Adcock*, 65 M.J. 18, 24 (C.A.A.F. 2007) (explaining that the President has the “authority to prescribe rules and regulations implementing the UCMJ, including provision of ‘additional or greater rights’ than those provided for by Congress” (citations omitted)).
- 6 *Cf. United States v. Bergdahl*, 80 M.J. 230, 235–36 (C.A.A.F. 2020) (Maggs, J., concurring in part and concurring in the judgment).
- 7 As noted by our colleague, the military judge concluded that “ ‘[t]he defense has simply failed to provide some evidence which, if true, would constitute [unlawful command influence] which would have a logical connection to this court-martial in terms of potential to cause unfairness in the proceedings.’ ” *Bergdahl*, 80 M.J. at 251 (Maggs, J., concurring in part and concurring in the judgment) (second alteration in original) (italics removed). However, this is a conclusion of law, not a finding of fact, and is reviewed *de novo* by this Court. *United States v. Wallace*, 39 M.J. 284, 286 (C.M.A. 1994) (“Where the issue of unlawful command influence is litigated on the record, the military judge's findings of fact are reviewed under a clearly-erroneous standard, but the question of command influence flowing from those facts is a question of law that

this Court reviews *de novo*.”). Moreover, we underscore the point that Appellant has solely raised before this Court the issue of *apparent* unlawful command influence, and a *de novo* review of the facts as applied to the *apparent* unlawful command influence demonstrates that Appellant has met his initial low burden of presenting “some evidence.”

- 8 “If I am captured ... I will make every effort to escape.” Exec. Order No. 10,631, 3 C.F.R. 266 (1954–1958).
- 9 For example: “But we fought to get a traitor, who, when our country was strong, would've been executed for desertion” Def. Appellate Ex., at 28; “[H]e was a deserter 100% it's not like the old days, in the old days you deserted you were in big trouble. Today they want to find all sorts of excuses—I don't know what, it's crazy, it's just crazy[,]what's going on with our country is absolutely insane” Def. Appellate Ex., at 368; “I always say, we get Bergdahl, a horrible traitor who deserted! In the old days you get shot! (Mimics a handgun firing with his hand).” Def. Appellate Ex., at 375.
- 10 In his brief, Appellant refers to a “longstanding practice of not prosecuting returning [prisoners of war] except for offenses committed in captivity.” Brief for Appellant at 21, *United States v. Bergdahl*, No. 19-0406 (C.A.A.F. Dec. 4, 2019). However, the publication cited by Appellant in support of this proposition is less than clear about the parameters of this so-called “practice.” See Vernon E. Davis, *The Long Road Home: U.S. Prisoner of War Policy and Planning in Southeast Asia* 154–56 (Office of the Secretary of Defense, 2000). Further, this “practice” pertained to individuals who served in the Vietnam War, not to military personnel who served in more recent armed conflicts. *Id.* And importantly, Appellant cites no specific instance of this “practice” having been invoked when a soldier's intentional and criminal act of desertion resulted in his fellow servicemembers being wounded while trying to rescue the deserter from the enemy. Therefore, we conclude that an objective, disinterested observer would give little weight to Appellant's argument.
- 11 See generally Dep't of the Army, Reg. 15-6, Boards, Commissions, and Committees, Procedures for Administrative Investigations and Boards of Officers (Apr. 1, 2016). Major General (MG) Dahl, who served as the Army Regulation 15-6 investigating officer, found that the elements for a criminal offense were met and recommended forwarding the investigation “for whatever action, if any, the GCMCA deems appropriate.” MG Dahl's recommendation was followed. At trial, MG Dahl recommended that no term of imprisonment be imposed on Appellant. Once again, MG Dahl's recommendation was followed.
- 12 DUSTWUN is used “when the responsible commander suspects the member [of the armed forces] may be a casualty whose absence is involuntary, but does not feel sufficient evidence currently exists to make a definite determination of missing or deceased.” United States Army Human Resources Command, *Army Casualty and Mortuary Affairs Frequently Asked Questions* (Mar. 23, 2020), <https://www.hrc.army.mil/content/Army%20Casualty%20and%20Mortuary%20Affairs%20Frequently%20Asked%20Questions> (last visited Aug. 19, 2020).
- 13 MSG Allen died in October 2019. Jamiel Lynch & Ralph Ellis, *Mark Allen, Soldier Injured in 2009 Search for Bowe Bergdahl, Dies*, CNN (Oct. 14, 2019), <https://www.cnn.com/2019/10/14/us/mark-allen-dies-soldier-who-searched-for-bowe-bergdahl/index.html>.
- 14 The preliminary hearing officer also said that any such evidence of casualties needed to be served on the defense. And yet, there is no evidence that the Government did so. However, Appellant has not raised this issue before this Court.
- 15 Even if GEN Abrams had no specific knowledge of any casualties at the time he referred the charges to a general court-martial, he was aware of the following: (1) United States Armed Forces conducted a massive, long-term manhunt for Appellant in hostile territory in Afghanistan; (2) during a search of that scale and in that location, it was likely that at least some casualties occurred; (3) the Article 32, UCMJ, preliminary hearing officer specifically noted in his report that evidence about casualties should be developed prior to making “a final decision on the disposition of[f] SGT Bergdahl's case”; (4) a referral of charges to a general court-martial instead of a special court-martial merely increases the potential *maximum* punishment that can be imposed on an accused and is not a mandate of a *minimum* punishment; and (5) evidence about casualties could be presented at trial or sentencing, so by referring Appellant's case to a general court-martial, GEN Abrams merely would be empowering the court-martial panel or the military judge to make an appropriate final disposition at that later juncture of the case. Thus, GEN Abrams's referral decision is consistent with the Article 32, UCMJ, preliminary hearing officer's recommendation.
- 16 Specifically, pursuant to his guilty pleas, a military judge sitting as a general court-martial convicted Appellant of one specification of desertion with intent to shirk hazardous duty and one specification of misbehavior before the enemy in violation of Articles 85 and 99, UCMJ. Appellant pleaded guilty to misbehavior before the enemy as the charge was written. However, instead of pleading guilty to the entire charged period of desertion from June 30, 2009, until May 31, 2014, Appellant pleaded guilty to just one day of desertion—June 30, 2009—because he was captured the same day he left his observation post. The military judge accepted Appellant's guilty plea by exceptions and substitutions.
- 17 *Bergdahl*, 79 M.J. at 519 (internal quotation marks omitted).
- 18 *Id.* (internal quotation marks omitted).



19 *Id.* (internal quotation marks omitted).  
20 *Id.* at 527 (internal quotation marks omitted).  
21 R. of Trial, *United States v. Bergdahl*, vol. XXXVI, 579 (testimony of GEN Robert Abrams).  
22 *Bergdahl*, 79 M.J. at 522 (internal quotation marks omitted).

1 I join Parts I, II.A., and II.B. of the opinion of the Court, but respectfully dissent from Parts II.C. and III.  
2 Over the years that military justice has been under criticism, and particularly during the period the new Uniform Code of Military Justice was being prepared by the Morgan Committee and studied by Congressional Committees, one of the most controversial issues with which all interested parties was concerned dealt with the extent officers in the chain of command should be authorized to influence court-martial activities.  
*Littrice*, 3 C.M.A. at 490, 13 C.M.R. at 46.

1 The terms “coercion” and “coerce” also appear in Articles 31(d) and 120(g)(4)(c), UCMJ, 10 U.S.C. §§ 831(d), 920(g)(4)(c), respectively.  
2 See, e.g., 1 *Shorter Oxford English Dictionary* 442 (5th ed. 2002) (defining “coerce” to mean “[f]orcibly constrain or impel”); *Webster’s Third New International Dictionary, Unabridged* 439 (1986) (defining “coerce” to mean “compel to an act or choice by force, threat, or other pressure”).  
3 Congress, indeed, often investigates the federal response to alleged criminal conduct. A prominent example in the military con-text involved is discussed in *United States v. Calley*, 46 C.M.R. 1131, 1138 (A.C.M.R. 1973).  
4 For comparison, see, e.g., *McDonnell v. United States*, — U.S. —, 136 S. Ct. 2355, 2371, 195 L.Ed.2d 639 (2016) (noting whether public official makes a quid pro quo agreement is a question for the trier of fact); *McCormick v. United States*, 500 U.S. 257, 270, 111 S.Ct. 1807, 114 L.Ed.2d 307 (1991) (noting intent of state legislator in asking for money from constituents is a question for the trier of fact).  
5 The various limitations in Article 37(a), UCMJ, apply to an “authority convening a general, special, or summary court-martial,” a “commanding officer,” and a “person subject to this chapter [i.e., subject to the UCMJ].” President Trump was not an authority convening a court-martial because he did not convene a court-martial. President Trump was not a commanding officer because Article 1(3), UCMJ, 10 U.S.C. § 801(3), defines that term to “include[ ] only commissioned officers,” which President Trump was not. And unlike Senator McCain, President Trump was not a person subject to the UCMJ because he was not an active or retired member of the military and did not fit within any of the other classes of persons listed Article 2(a)(1), UCMJ.  
6 A court-martial could have more than one convening authority if, for example, the original court-martial convening authority is re-assigned and successor takes over. See R.C.M. 103(6) (“ ‘Convening authority’ includes a commissioned officer in command for the time being and successors in command.”).  
7 In *Russello v. United States*, the Supreme Court cited the familiar and uncontroversial principle that a difference in the wording of two sections of “the same Act” presumably gives the two sections different meanings. 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) (internal quotation marks omitted) (citation omitted). This principle, however, is not apt when comparing the wording of a congressionally enacted statute like Article 37(a), UCMJ, to the wording of a presidentially promulgated procedural rule like R.C.M. 104(a)(1), because the article and rule are in different texts. Instead, the wording of R.C.M. 104(a)(1) should be compared to other similarly worded Rules for Courts-Martial, which as shown above generally contain an implied limitation restricting their application to the specific case at issue. Because R.C.M. 104(a)(1) differs little from those other rules, it presumably also carries the same implied limitation.

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Not Reported in M.J. Rptr., 2020  
WL 7316058 (Army Ct.Crim.App.)

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Only the Westlaw citation is currently available.  
*This opinion is issued as an unpublished opinion  
and, as such, does not serve as precedent.*  
U.S. Army Court of Criminal Appeals.

Sergeant Robert B. BERGDAHL,  
United States Army, Petitioner  
v.  
UNITED STATES, Respondent

ARMY MISC 20200588

11 December 2020

For Petitioner: Colonel Michael C. Friess, JA; Lieutenant Colonel Angela D. Swilley, JA; Major [Matthew D. Bernstein](#), JA; [Franklin D. Rosenblatt](#), Esquire; Jonathan F. Potter, Esquire; Stephen A. Saltzburg, Esquire; Stephen I. Vladeck, Esquire; [Philip D. Cave](#), Esquire; [Sean T. Bligh](#), Esquire; [Christopher L. Melendez](#), Esquire; Sabin Willet, Esquire; [Eugene R. Fidell](#), Esquire (on brief and reply brief).

For Respondent: Lieutenant Colonel Wayne H. Williams, JA; Major Jonathan S. Reiner, JA; Captain Allison L. Rowley, JA (on brief).

Before KRIMBILL,<sup>1</sup> RODRIGUEZ, and WALKER  
Appellate Military Judges

**MEMORANDUM OPINION AND ACTION ON  
PETITION FOR EXTRAORDINARY RELIEF IN  
THE NATURE OF A WRIT OF *CORAM NOBIS***

RODRIGUEZ, Judge:

\*1 Petitioner requests this court issue a writ of error of *coram nobis* dismissing the charges and specifications with prejudice. Specifically, petitioner asserts the military judge who presided over his court-martial and made rulings adverse to petitioner concerning unlawful command influence (UCI), failed to disclose his application for employment as an immigration judge with the United States Department of Justice (DOJ) to the parties while petitioner's case was ongoing and, as a result, petitioner did not receive a fair trial. We hold petitioner is not entitled to *coram nobis* relief because we find no valid reason for petitioner's failure to raise this issue and seek relief earlier. Accordingly, we find petitioner's

writ does not meet the threshold criteria for *coram nobis* review and, therefore, deny the petition.

**BACKGROUND**

On 16 October 2017, a military judge sitting as a general court-martial convicted petitioner, pursuant to his pleas, of desertion with intent to shirk hazardous duty and misbehavior before the enemy in violation of Articles 85 and 99, Uniform Code of Military Justice, 10 U.S.C. §§ 885, 899 [UCMJ]. On that same day, the military judge applied for a position as an immigration judge with the DOJ's Executive Office for Immigration Review (EOIR).<sup>2</sup> As part of his application, the military judge submitted an earlier ruling he made in petitioner's case as a writing sample.<sup>3</sup> The military judge never disclosed on the record that he had applied to become an immigration judge at the DOJ upon his retirement from the Army.

The military judge sentenced petitioner on 3 November 2017 to a dishonorable discharge, reduction to the grade of E-1, and forfeiture of \$1,000 per month for ten months. The convening authority approved the sentence as adjudged.

Petitioner's case was then docketed with this court for review pursuant to Article 66, UCMJ, on 8 June 2018. On 28 September 2018, the EOIR released a public notice announcing the military judge was sworn in as an immigration judge. The military judge's retirement from the Army became effective on 1 November 2018.

On 21 December 2018, petitioner submitted his brief to this court pursuant to Article 66, UCMJ, asserting four assigned errors. Petitioner submitted a supplemental assigned error on 30 April 2019. None of the assigned errors discussed any concerns with the military judge's new employment as an immigration judge.

On 16 July 2019, this court affirmed the findings of guilty and the sentence in petitioner's case. [United States v. Bergdahl](#), 79 M.J. 512 (Army Ct. Crim App. 2019). On 27 August 2020, the Court of Appeals for the Armed Forces (CAAF) affirmed this court's decision. [United States v. Bergdahl](#), 80 M.J. 230 (C.A.A.F. 2020).

\*2 On the same day the CAAF affirmed petitioner's conviction and sentence, 27 August 2020, petitioner requested the military judge's application for employment as an immigration judge from the EOIR through the Freedom

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of Information Act (FOIA). On 7 September 2020 petitioner filed a motion for reconsideration with the CAAF, which the government answered on 11 September 2020. In response to his FOIA request, petitioner received the military judge's application for employment as an immigration judge on 15 September 2020.

After petitioner filed a reply brief to the government's answer, and motions to supplement the record with the newly-obtained materials obtained through the FOIA request from the EOIR, the CAAF denied petitioner's motion for reconsideration and the motion to supplement the record. The CAAF indicated that its denial was without prejudice to petitioner's right to file a writ of *coram nobis* with the appropriate court. *United States v. Bergdahl*, No. 19-0406/AR, 2020 CAAF LEXIS 569 (C.A.A.F. 14 Oct. 2020).

On 23 October 2020, petitioner submitted to this court a request for extraordinary relief in the nature of a writ of *coram nobis*.

#### LAW AND ANALYSIS

The All Writs Act, 28 U.S.C. § 1651 (2012), authorizes this court to consider petitioner's claims and issue writs in aid of its subject-matter jurisdiction under Article 66, UCMJ. Specifically, we may issue a writ of *coram nobis* only if necessary as “an extraordinary remedy” to correct errors of a fundamental character in a case. See *United States v. Denedo*, 66 M.J. 114, 123 (C.A.A.F. 2008) (*Denedo I*); *United States v. Denedo*, 556 U.S. 904, 917, 129 S.Ct. 2213, 173 L.Ed.2d 1235 (2009) (*Denedo II*); *United States v. Morgan*, 346 U.S. 502, 522-12, 74 S. Ct. 247, 252-43, 98 L.Ed. 248 (1954) (quoting *United States v. Mayer*, 235 U.S. 55, 69, 35 S. Ct. 16, 19, 59 L.Ed. 129 (1914)); 28 U.S.C. § 1651(a) (All Writs Act).

The All Writs Act does not expand our underlying jurisdiction to consider “the findings and sentence as approved by the convening authority.” Article 66(c), UCMJ; *Denedo I*, 66 M.J. at 120; *Denedo II*, 556 U.S. at 914, 129 S.Ct. 2213. The Supreme Court established the landscape of our inquiry for this case in *Denedo II*, holding that “[b]ecause *coram nobis* is but an extraordinary tool to correct a legal or factual error, an application for the writ is properly viewed as a belated extension of the original proceeding during which the error allegedly transpired.” *Denedo II*, 556 U.S. at 912-13, 129 S.Ct. 2213.

In *United States v. Morgan*, 346 U.S. 502, 511-12, 74 S.Ct. 247, 98 L.Ed. 248 (1954), the Supreme Court observed that

*coram nobis* permits the “[c]ontinuation of litigation after final judgment and exhaustion or waiver of any statutory right of review,” but only under very limited circumstances. Although a petition may be filed at any time without limitation, the Supreme Court and our Superior Court have established six prerequisites as threshold criteria for a petitioner to obtain *coram nobis* review of his claims: (1) the alleged error is of the most fundamental character; (2) no remedy other than *coram nobis* is available to rectify the consequences of the error; (3) valid reasons exist for not seeking relief earlier; (4) the new information presented in the petition could not have been discovered through the exercise of reasonable diligence prior to the original judgment; (5) the writ does not seek to reevaluate previously considered evidence or legal issues; and (6) the sentence has been served, but the consequences of the erroneous conviction persist. *Denedo I*, 66 M.J. at 126 (citing *Morgan*, 346 U.S. at 512-13, 74 S.Ct. 247); *Loving v. United States*, 62 M.J. 235, 252-53 (C.A.A.F. 2005)).

\*3 We find petitioner has not met the third threshold requirement in *Denedo I*.<sup>4</sup> This court finds no valid reason why petitioner did not seek relief earlier. The only explanations provided by petitioner are that “[petitioner's] case was still before the [CAAF] on petition for reconsideration when [petitioner] received [the military judge's] job application from the [DOJ],” and the “FOIA request was filed out of an abundance of caution.” These explanations do not clarify why petitioner did not request the military judge's employment application earlier, and why he did not raise this issue at this court on direct appeal.

The timeline of events in this case is revealing. Petitioner's case was pending direct review at this court from 8 June 2018 through 16 July 2019. The military judge's new employment as an immigration judge became public knowledge on 28 September 2018. Thus, petitioner's case had only been pending at our court for less than three months prior to the DOJ's press release notice.

Approximately another ten months passed after the DOJ's notice until this court issued its decision in petitioner's case on 16 July 2019. During those ten months, petitioner submitted two briefs, claiming a total of five assigned errors, none of which alluded to any concerns with the military judge seeking employment as an immigration judge. At no point during those ten months did petitioner request the military judge's employment application. See, e.g., *Ragbir v. United States*, 950 F.3d 54, 65 (3d Cir. 2020) (holding that “[w]hat matters”

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in determining whether a delay in filing a *coram nobis* petition is valid “is whether a claim can be reasonably raised”). It was not until our Superior Court denied petitioner relief on his direct appeal that petitioner requested the military judge’s employment application from the DOJ, which he obtained within three weeks. *See, e.g., United States v. Castano*, 906 F.3d 458, 464 (6th Cir. 2018) (noting “*coram nobis* relief is generally not appropriate for claims that could have been raised on direct appeal”).

The timeline claiming newly-discovered evidence in petitioner’s case is similar to the timeline in *United States v. Kates*, ACM S32018, 2014 CCA LEXIS 360 (A.F. Ct. Crim. App. 17 June 2014) (order). In *Kates*, The Judge Advocate General of the Air Force, and subsequently the Secretary of Defense pursuant to the Secretary’s purported authority under 5 U.S.C. § 3101 *et seq.*, appointed Mr. LS (a military retiree and former military appellate judge who was then a civilian Air Force attorney), as an appellate military judge on the Air Force Court of Criminal Appeals (AFCCA). *Id.* at \*2. Mr. LS then took part in the AFCCA decision affirming *Kates*’ conviction. *Id.* The Court of Appeals for the Armed Forces (CAAF) also affirmed *Kates*’ conviction. *Id.* *Kates* did not raise the issue of Mr. LS’s participation in his case at the AFCCA or the CAAF.

Six months after denying *Kates*’ petition for review, the CAAF issued a decision in another case, ruling the Secretary of Defense did not have the legislative authority to appoint appellate military judges under the Constitution’s Appointments Clause, and therefore his appointment of Mr. LS to the AFCCA was “invalid and of no effect.” *Id.* at \*3 (citing *United States v. Janssen*, 73 M.J. 221, 225 (C. A. A. F. 2014)). Shortly after the CAAF’s decision in *Janssen*, *Kates* submitted a petition for extraordinary relief. *Id.* The AFCCA noted that by the time *Kates* petitioned the CAAF on direct appeal, the issue of Mr. LS’s appointment was “very much at issue in appellate litigation.” *Id.* at \*7. The AFCCA denied *Kates*’ petition stating:

\*4 The petitioner’s summary pleading provides no valid reasons why he did not seek relief on this matter earlier or any proffer as to why the issue of [Mr. LS’s] appointment could not have been discovered through the exercise of

reasonable diligence prior to the completion of appellate review in this matter.

*Id.* at \*8.

Similar to the AFCCA’s reasoning in *Kates*, we find petitioner made no effort to raise the issue of the military judge’s employment application to this court or the CAAF, “despite a meaningful opportunity to do so.” *Id.* at \*9. Petitioner claims that “[e]ven if knowledge of the [EOIR’s 28 September 2018] press release were imputed to Sergeant Bergdahl as of its date of issuance .... [t]he full import of the matter did not become clear until April 16, 2019, when [*In re Al-Nashiri*] was decided.”<sup>5</sup> We disagree. Just as the issue of Mr. LS’s appointment was very much at issue in appellate litigation at the time *Kates* petitioned the CAAF, the issue of the military judge’s employment as an immigration judge was a known appellate issue at either the date of the EOIR’s press release, or at least when *Al-Nashiri* submitted his pleadings challenging the judge in his case.<sup>6</sup> We find that, even if the *In re Al-Nashiri* decision of April 2019 is the date on which “the full import of the matter” became clear to petitioner, there is no adequate explanation for petitioner’s delay in raising the issue at least then, two months before this court issued its decision in petitioner’s case on direct review. Further, there is no adequate explanation for why petitioner did not seek to raise the issue during the following year his case was pending review at the CAAF.

\*5 In sum, petitioner has not presented a sound reason why he failed to pursue this claim while his case was pending Article 66 review at this court, when such a claim could have been reasonably raised. Accordingly, we find petitioner’s claim does not meet the threshold criteria for *coram nobis* review.<sup>7</sup>

NOW, THEREFORE, IT IS ORDERED:

This petition is DENIED.

Chief Judge (IMA) KRIMBILL and Judge WALKER concur.

Footnotes

- 1 Chief Judge (IMA) Krimbill participated in this case while on active duty.
- 2 The EOIR announced several open positions for immigration judges on 25 September 2017.
- 3 The military judge’s writing sample was his 24 February 2017 ruling denying petitioner’s motion to dismiss alleging apparent UCI relating to comments then-presidential candidate Donald Trump made concerning petitioner and his case



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during the 2016 presidential campaign. Petitioner made three separate motions to dismiss alleging apparent UCI during trial. The military judge ultimately ruled against petitioner on all his UCI motions to dismiss.

4 Having concluded petitioner fails to meet the stringent threshold requirements to establish eligibility for *coram nobis* review, we need not address the merits of his petition.

5 In *In re Al-Nashiri*, the petitioner sought a writ of mandamus vacating the military judge's orders in that case because the military judge in *In re Al-Nashiri* applied for a position as an immigration judge with the DOJ's EOIR and never disclosed his application. 921 F.3d at 227. After the EOIR issued its press release on 28 September 2018 (which announced both the *In re Al-Nashiri* judge and the military judge in Sergeant Bergdahl's case had just become immigration judges), Al-Nashiri learned of the military judge's job application through a FOIA request. *Id.* The court noted that Al-Nashiri was tried pursuant to the Military Commissions Act of 2009, 10 U.S.C. § 948b(a). *Id.* at 227. The core of the court's analysis focused on the DOJ's involvement in the military commission system and that the DOJ "detailed one of its lawyers to prosecute Al-Nashiri." *Id.* at 236. Thus, the court found the military judge's application for employment as an immigration judge created a disqualifying appearance of partiality because the military judge's future employer, the DOJ, was also a participant in Al-Nashiri's case. *Id.* at 235-37. The court granted Al-Nashiri's request for a writ of mandamus and vacated all orders issued by the military judge. *Id.* at 241.

6 We note at least one of petitioner's appellate defense counsel also submitted the brief for amicus curiae in *In re Al-Nashiri* in the United States Court of Appeals for the District of Columbia seeking a writ of mandamus, argued on 22 January 2019, approximately six months prior to this court issuing its decision in petitioner's case on direct appeal. 921 F.3d 224. In *In re Al-Nashiri*, the court considered the 28 September 2018 EOIR announcement of the military judge's investiture as an immigration judge. *Id.* at 232. The military judge in petitioner's case was listed in that same announcement. See footnote 5, *supra*. Petitioner included this announcement in Appendix C of his petition to this court.

7 We need not decide the five remaining *coram nobis* writ's criteria. See *Matus-Leva v. United States*, 287 F.3d 758, 760 (9th Cir. 2002) (holding threshold requirements for *coram nobis* relief are conjunctive; "failure to meet any one of them is fatal").

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February 2, 2021

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U.S. Court of Appeals for the Armed Forces.

CCA 20200588

**DAILY JOURNAL**

Robert B. BERGDAHL, Appellant

v.

UNITED STATES, Appellee

**Miscellaneous Docket - Summary Disposition**

On consideration of the writ-appeal petition, it is ordered that the petition is denied.

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