IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

UNITED STATES, Petitioner v. Marcus N. FULTON, Commander U.S. Navy (in his official capacity as Military Judge) Respondent Ernest J. JOHNSON, Ship's Serviceman Second Class (E-5) U.S. Navy Real Party in Interest	)	GOVERNMENT PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF MANDAMUS Case No. _____

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Preamble

COMES NOW THE UNITED STATES and respectfully requests that this Court issue a stay of the trial proceedings in the general court-martial of *United States v. Johnson* and grant Petitioner's Writ of Mandamus Petition, directing the Military Judge to do the following: (1) reverse his ruling that the President of the United States committed unlawful command influence; and (2) direct the Military Judge not to instruct the Members that Ship's Serviceman Second Class (SH2) Johnson may not receive any type of punitive discharge if he is convicted of sexual assault at this court-martial.

I

History of the case

The Government preferred charges against the accused, SH2 Johnson, on December 12, 2012. The charges are all related to an incident that occurred on September 9, 2012, when the accused is alleged to have sexually assaulted another sailor who was asleep or intoxicated. The charges include four specifications of sexual assault and two specifications of abusive sexual contact in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2012). The Convening Authority referred the charges to general court-martial on March 8, 2013.

On May 10, 2013, Trial Defense Counsel moved to dismiss all charges due to unlawful command influence. On June 12, 2013, the Military Judge partially granted SH2 Johnson's motion, finding that comments by the President of the United States constituted apparent unlawful command influence. As a remedy, the Military Judge ruled that he will instruct the Members that they may not award any type of punitive discharge.

Trial was scheduled to begin on Monday, June 17, 2013, and involves transportation of witnesses to Hawaii, where the trial will take place. On June 13, 2013, the Military Judge granted Petitioner's request to continue the trial for one week to allow this Court time to rule on Petitioner's request for a stay.

Jurisdictional Statement

This Court has jurisdiction to issue all writs necessary or appropriate in aid of its existing statutory jurisdiction. 28 U.S.C. § 1651(a); *Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999); *Loving v. United States*, 62 M.J. 235, 239 (C.A.A.F. 2005). The All Writs Act provides that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (2006). As a Court created by Act of Congress, this Court has the authority to issue the writ requested. *United States v. Dowty*, 48 M.J. 102, 106 (C.A.A.F. 1998). The Act requires two separate determinations: first, whether the requested writ is "in aid of" a court's jurisdiction; and second, whether the requested writ is "necessary or appropriate." *Denedo v. United States*, 66 M.J. 114, 119 (C.A.A.F. 2008), *aff'd*, 129 S. Ct. 2213 (2009).

II

Specific Relief Sought

Petitioner seeks a stay of the trial proceedings while this Court considers this Writ. Petitioner further seeks a Writ of Mandamus directing the Military Judge to reverse his ruling that the comments by the President constituted unlawful command influence, and that if the accused is convicted the Members may not award a punitive discharge. This Court should issue the

Writ of Mandamus without prejudice to the right of the Accused to raise the issue of unlawful command influence in the course of normal appellate review, if and when such review becomes appropriate.

III

Issue Presented

WHETHER THE MILITARY JUDGE ERRED AS A MATTER OF LAW BY FINDING THAT (1) COMMENTS MADE BY THE PRESIDENT OF THE UNITED STATES CONSTITUTED APPARENT UNLAWFUL COMMAND INFLUENCE; (2) THAT THE GOVERNMENT HAD NOT PROVEN BEYOND A REASONABLE DOUBT THAT THE COMMENTS WILL HAVE NO IMPACT ON THIS TRIAL; AND (3) THAT THE REMEDY IS THAT THE ACCUSED MAY NOT RECEIVE A PUNITIVE DISCHARGE.

IV

Statement of Facts

The Government preferred charges against SH2 Johnson on December 12, 2012 for an alleged sexual assault that occurred on September 9, 2012. (Charge Sheet, Dec. 12, 2012.) The Convening Authority referred the charges to general court-martial on March 8, 2013. (*Id.*)

On May 7, 2013, the Department of Defense reported the results of an anonymous survey, which showed that the "estimated number of military personnel victimized by sexual assault and related crimes has surged by about 35 percent over the past two years." (Appellate Ex. X at 61.) Several days earlier, news media outlets widely reported that the Air Force's chief for

sexual assault prevention was arrested on charges that he groped and attacked a woman. (*Id.* at 63.) All these events prompted both Congress and the President to express anger with the military's handling of the problem. (*Id.*) The same day the survey was released, the President of the United States gave an impromptu answer to a question from a reporter about sexual assault in the military by saying:

> The bottom line is: I have no tolerance for this, I expect consequences. So I don't just want more speeches or awareness programs or training, but ultimately folks look the other way. If we find out somebody's engaging in this stuff, they've got to be held accountable, prosecuted, stripped of their positions, court-martialed, fired, dishonorably discharged. Period.

(Military Judge's ruling at 8, Jun. 12, 2013.)

Three days later, Trial Defense Counsel moved to dismiss all charges due to unlawful command influence from these statements, and other statements by senior military and DoD leaders. (Appellate Ex. X.) The Convening Authority provided a sworn statement as evidence on the motion which included the following paragraphs:

> 4. The resolve of the Navy, DOD and senior officials to address the issue of sexual assault holds no bearing on my decision to refer charges in any court-martial, including the charges referred in this case. As a General Court-Martial Convening Authority, I exercise independent judgment free from any real or perceived policy objectives, and statements made by senior officials, including those on sexual assault. An independent convening authority is essential in

> providing those accused of a crime with a fair and impartial system of justice.
>
> 5. For those reasons, while I am aware of Navy and DOD policy regarding sexual assault, and of related statements by senior officials, they in no way had any bearing, or influence, on the referral of charges in this case.

(Appellate Ex. XI at 16-17.)

On June 12, 2013, the Military Judge partially granted SH2 Johnson's motion, finding that comments by the President of the United States constituted apparent unlawful command influence. (Military Judge ruling, Jun. 12, 2013.) The Military Judge found that the President's statements "may indicate that a particular result is required of the military justice system—— namely that members found to have committed sexual assault must be "prosecuted, stripped of their positions, court-martialed, fired, dishonorably discharged." (*Id.* at 9.)

The Military Judge evaluated these statements as they relate to the clemency process, deciding whether the President's statement would tend to "impinge on the discretion of the convening authority to come to an independent decision about the appropriateness of a punitive discharge in this case if the members were to adjudge one." (*Id.* at 12.) He considered these statements in the context of recent inquiries from the Secretary of Defense and some Senators criticizing convening authorities

for taking action favorable to service members convicted of sexual assault. (*Id.* at 12.)

The Military Judge found that under these circumstances, a disinterested and informed member of the public would have "doubts about whether the accused would receive a post-trial review of any punitive discharge that was untainted by improper external influences." (*Id.*) To remedy any potential taint during post-trial review and to restore the public's confidence in the military justice system, the Military Judge ruled that if SH2 Johnson is convicted of sexual assault, he will instruct the Members that they may not award any type of punitive discharge. (*Id.* at 13-14.)

Trial was scheduled to begin on Monday, June 17, 2013. (Appellate Ex. I.) On Thursday, June 14, 2013, the Military Judge granted the United States' Motion for Continuance, and rescheduled trial to begin on June 24, 2013.

V

Reasons Why the Writ Should Issue

AN EXTRAORDINARY WRIT IS NECESSARY AND APPROPRIATE BECAUSE THE UNITED STATES HAS NO OTHER MEANS OF OBTAINING RELIEF FROM THE JUDGE'S RULING AND BECAUSE THE RIGHT TO RELIEF IS CLEAR AND INDISPUTABLE. A SINGLE COMMENT BY THE PRESIDENT DOES NOT GRANT EVERY SEXUAL ASSAULT PERPETRATOR THE WINDFALL OF NOT RECEIVING A PUNITIVE DISCHARGE, BECAUSE THE PRESIDENT'S COMMENTS WERE NOT UNLAWFUL COMMAND INFLUENCE.

A. Standard of review for Extraordinary Writs.

A petitioner has the burden of showing that he has a clear and indisputable right to the requested extraordinary relief. *Ponder v. Stone*, 54 M.J. 613, 616 (N-M. Ct. Crim. App. 2000). The Supreme Court has held that three conditions must be met before a court may provide extraordinary relief in the form of a writ of mandamus: (1) the party seeking the writ must have "no other adequate means to attain the relief"; (2) the party seeking the relief must show that the "right to issuance of the relief is clear and indisputable"; and (3) "even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Cheney v. United States Dist. Court*, 542 U.S. 367, 380-81 (2004) (citations and internal quotation marks omitted).

B. The United States has no other adequate means of attaining relief.

As a party to litigation, the United States may petition for extraordinary relief. *United States v. Caprio*, 12 M.J. 30, 32 (C.M.A. 1981). Here, the Military Judge has ruled "the Court will instruct members that they may not award any type of discharge." (Military Judge's Ruling at 13-14.) It goes without saying that normal appellate review is not an adequate remedy. If the Military Judge will not allow the Members to award a punitive discharge, it will be impossible for the United States to seek correction of the Military Judge's ruling through the course of normal appellate review.

Likewise, an Article 62 appeal is impossible because the Military Judge's ruling meets none of the statutory criteria for appeal. 10 U.S.C. § 862 (2012). Therefore, a Writ appeal is the only means of obtaining relief.

C. Petitioner's right to relief is clear and indisputable. The Military Judge's ruling is incorrect because the President did not commit unlawful command influence, and even if he did, his statements have had no impact on the fairness of this trial.

In the context of writs of mandamus, military courts have read the requirement that the right to relief be clear and indisputable to require a petitioner to establish a ruling or action that is contrary to statute, settled case law, or valid regulation. *See, e.g., Dettinger v. United States*, 7 M.J. 216,

224 (C.M.A. 1979). Here the Military Judge's ruling is contrary to statute and settled case law for four reasons. First, the President of the United States cannot commit unlawful command influence. Second, the President's comments in this case did not constitute unlawful command influence. Third, even if they did, his comments had no impact on the fairness of this trial. Fourth, the Military Judge's remedy was not appropriate as it was premature, and it does not restore the public's faith in the military justice system——it undermines it.

1. The President of the United States is not covered by Article 37, UCMJ.

Article 37(a), UCMJ, establishes the prohibition against unlawful command influence:

> 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 exercises of its or his functions in the conduct of the proceedings. 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. The President of the United States is not covered by the plain text of this prohibition for two reasons.

First, the President is not "subject to" the UCMJ. Article 2(a), UCMJ, explicitly lists those "persons [that] are subject

to this chapter": service secretaries appear nowhere in the long list of persons Congress identifies as "subject to" the Code. Therefore, the prohibition against attempting to coerce or influence a convening, approving, or reviewing authority with respect to his judicial acts does not apply to him, as this clause only applies to persons "subject to" the UCMJ.

Second, this first sentence prohibiting the censure, reprimand, or admonishment of the court members does not apply because the President is not the authority convening this court-martial, nor is he "any other commanding officer." Article 37(a), UCMJ. The President is not "any other commanding officer" because "[t]he term 'commanding officer' includes only commissioned officers." Article 1(3), UCMJ, 10 U.S.C. § 801 (2012). The President is not a commissioned officer.

The United States recognizes that this Court analyzed this issue and determined that while a civilian could not commit actual unlawful command influence, testing for apparent unlawful command influence was still appropriate. *United States v. Hutchins*, No. 200800393, 2012 CCA LEXIS 93 (N-M. Ct. Crim. App. Mar. 20, 2012). But where the plain text of Congress' statute is inapplicable to the President, it is unclear why a court would nevertheless apply the test for apparent unlawful command influence.

Likewise, the United States acknowledges that the Court of Appeals for the Armed Forces appears to have tested for UCI involving civilian leaders in the military. *See United States v. Simpson*, 58 M.J. 368, 374-77 (C.A.A.F. 2003); *United States v. Hagen*, 25 M.J. 78, 88 (C.M.A. 1987) (Sullivan, J., concurring); *United States v. Fowle*, 7 C.M.A. 349, 351-52 (C.M.A. 1956).

Here, Petitioner does not argue that it is settled case law that the President is not covered by Article 37. That issue is decidedly not settled. That is why the Military Judge's ruling on this issue was premature, and better handled on direct review. The Court of Appeals for the Armed Forces is presently considering this very issue in *Hutchins.* 2012 CAAF LEXIS 732 (C.A.A.F. Jul. 2, 2012.) It would be ironic, and against judicial economy and the interests of justice, if the Military Judge were permitted to disallow members to adjudge a punitive discharge because of apparent command influence by the President, and then weeks later this result was rendered incorrect by a decision in *Hutchins* ruling that a civilian by clear statutory language definition cannot commit unlawful command influence. Because it is unclear that the President is covered by Article 37, the Military Judge should not have launched a preemptive strike to remedy perceived unfairness that may later occur in the post-trial processing of this case.

2. The Defense must show unlawful command influence that has potential to cause unfairness in the proceedings.

At trial, the burden of raising unlawful command influence rests with the defense. *United States v. Biagase,* 50 M.J. 143, 150 (C.A.A.F. 1999). The defense must: (1) "show facts which, if true, constitute unlawful command influence" and (2) show "that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings." *Id.*

If the defense meets its burden, the Government must establish one of the following by proof beyond a reasonable doubt: (1) disprove the predicate facts on which the allegation of unlawful command influence is based; (2) persuade the military judge that the facts do not constitute unlawful command influence; or (3) prove at trial that the unlawful command influence will not affect the proceedings. *United States v. Reed,* 65 M.J. 487, 488 (C.A.A.F. 2008)(quoting *United States v. Simpson,* 58 M.J. 368, 373 (C.A.A.F. 2003)).

"In the course of addressing these issues, military judges and appellate courts must consider apparent as well as actual unlawful command influence." *Id.* "[T]he appearance of unlawful command influence will exist where 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. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006).

3. The Military Judge was incorrect because the President's comments do not constitute unlawful command influence. The President properly addressed and assured Americans that the military justice system would take sexual assaults seriously.

Leaders of the military have a justifiable concern in maintaining discipline and responding to and preventing illegal practices. A failure to respond is both irresponsible and unconscionable. *United States v. Smith*, 1 M.J. 1204, 1207 (N.C.M.R. 1977). Around the time that the *Smith* case was being tried, "there was considerable adverse publicity in the news media alleging abuses in the Marine Corps recruit training system." *Id.* "The Marine Corps, with many voices starting with the Commandant's, condemned all maltreatment of recruits and indicated its firm and unalterable refusal to either forgive or forget such conduct." *Id.* The Court found "that the response of the Marine Corps was entirely just and proper." *Id.*

Similarly, in 1996 and 1997, the sexual abuse of trainees by drill instructors at the Army's Aberdeen Proving Grounds was the subject of intense media attention. *United States v. Ayers*, 54 M.J. 85, 92-94 (C.A.A.F. 2000); *United States v. Simpson*, 58 M.J. 368, 371-72 (C.A.A.F. 2003). Senior officials in the Army made numerous statements on the Army's "zero tolerance" of

sexual harassment, and demanded "no leniency" and "severe punishment" for the offenders. 58 M.J. at 376. But even there, the Court found beyond a reasonable doubt that the statements did not taint the proceedings. *Id.*

Likewise, in 1988, failure to follow accountability procedures led to the death of a Marine after he was left in the desert during a training exercise in Twentynine Palms, California. *United States v. Lawson,* 33 M.J. 946 (N.M.C.M.R. 1991). The incident became the subject of heated press and congressional coverage. *Id.* at 949. The Court found that the Commandant's strongly worded comments on accountability, using the facts of this incident as a clear example of a serious problem, "was a proper and expected discharge of the Commandant's immense responsibility." *Id.* at 951.

Needless to say, the Commandant's "immense responsibility" pales in comparison to the President's. The President is designated by the Constitution both as the Executive head of Government, and as the Commander in Chief. The question posed him, and much recent press, indicates that some in the American public perceive that the military does not treat sexual assaults as serious crimes. The President's comments assured these people that he takes sexual assaults very seriously.

But this is not unlawful command influence. Rather, it is the President exercising a constitutional responsibility granted

him by a nation that prizes civilian control of the Military. A Military Judge may not hinder him: "If the Courts interpreting and applying Article 37 are too strident and idealistic in seeking to control improper influence their decisions can be unduly debilitating to commanders who, for fear of creating questionable legal appearances, may be frozen to inaction in situations where their leadership responsibilities demand action." *Lawson*, 33 M.J. at 950.

Here, the President's comments were made in impromptu response to a reporter's question. No disinterested member of the public would believe that his comments should grant a windfall to every sexual assault perpetrator in the foreseeable future. His comments were intended to assure concerned members of the public, and to dispel any notion that Military victims are or should be cowed or hesitant to report crimes of sexual assault: "For those who are in uniform who've experienced sexual assault, I want them to hear directly from their commander in chief that I've got their backs." (Appellate Ex. X at 62.)

These comments, taken as a whole, do not undermine the public's perception of fairness in the military justice system. They strengthen it.

4. Even if the Military Judge correctly found that the President's comments constitute apparent UCI, he was incorrect, and premature, in ruling that the Government failed to prove the lack of any prejudicial effect on this proceeding.

Even where the issue of unlawful command influence is raised, "prejudice is not presumed." *United States v. Reynolds*, 40 M.J. 198, 202 (C.M.A. 1994). The error must be the proximate cause of unfairness in the court-martial. *Id.* Here, as in most cases, there are three potential populations that could be affected by unlawful command influence: (1) potential witnesses; (2) the Members; and (3) the Convening Authority. The Military Judge incorrectly, and prematurely, ruled that the Government did not prove that the comment's had no effect on this proceeding. (Military Judge's Ruling at 12.)

First, the Military Judge's finding of prejudice itself was premature. Here, the Military Judge simply presumed prejudice, in violation of *Reynolds.* This abandonment of settled law, and application of clearly erroneous law, is alone justification for reversal of the Military Judge's ruling. The Judge based his finding of apparent unlawful command influence entirely on the potential impact it might have on the clemency process. (Military Judge's ruling at 12-14.) But assessing apparent unlawful command influence not only cannot stem from a presumption of prejudice——but more is needed, akin to analysis of implied bias:

> In the implied bias area, this Court has recognized that "observation of the member's demeanor may inform judgments" about the public perception of the fairness of a trial. *United States v. Downing*, 56 M.J. 419, 422 (2002). While demeanor is "[a] measure of actual bias," it is "also relevant to an objective observer's consideration." *Id.* at 423. On an issue as sensitive as unlawful command influence, evaluation of demeanor of the court members as well as other witnesses, viewed through the prism of *Biagase* and the presumption of prejudice, is critical to evaluate whether there is an objective appearance of unfairness. Even if there was no actual unlawful command influence, there may be a question whether the influence of command placed an "intolerable strain on public perception of the military justice system." *See United States v. Wiesen*, 56 M.J. 172, 175 (2001).

United States v. Stoneman, 57 M.J. 35, 42-43 (C.A.A.F. 2002).

Second, the Military Judge did not to base his decision on any actions by the Convening Authority. Instead, he presumed unlawful command influence based on a speculation that the Convening Authority may not fairly consider a hypothetical clemency request to disapprove a punitive discharge after trial. The impact on the Convening Authority's decision to award clemency is purely speculative at this point, and it is inappropriate to simply bar a punitive discharge out of concern that the clemency process might not be fair.

Here, the Convening Authority's sworn statement shows that he has been independent, and will continue to strive to provide a "fair and impartial system of justice." (Appellate Ex. XI at 16.) There is no reason to doubt this claim. The President's comments have not caused SH2 Johnson any unfairness at this

point. Simply barring a punitive discharge as a potential punishment at this point is premature.

Third, there was no unfairness related to any potential witnesses. Compare this case with *United States v. Piatt*, 15 M.J. 636, 639 (N.M.C.M.R. 1982), where the accused had a character witness who heard the Commandant's presentation on hazing, and then had reservations about testifying because he was concerned that "his testimony would not correspond to the views of the Commandant and might affect his personal career."[1] Here, the trial has not even occurred yet, so SH2 Johnson is free to argue on direct appeal, should it occur, that such a prejudicial impact occurred. But such prejudice has not occurred yet.

Fourth, at this time, there has been no actual unfairness related to any impact on the Members. In this area, the Military Judge correctly found that there was no evidence of unlawful influence on the Members, and that any potential influence could be remedied through *voir dire* and in applying the liberal grant mandate. (Military Judge's Ruling at 13).

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[1] Even under those facts, the Navy-Marine Corps Court of Military Review found no unlawful command influence. *Id.* at 640. The Court of Military Appeals reversed the case on other grounds, so it did not review this determination, but it did criticize it. *United States v. Piatt*, 17 M.J. 442, 447 (C.M.A. 1984). But this is exactly the type of prejudicial nexus that is lacking in this case. There is no evidence that a witness, member, or the Convening Authority, heard the President's comments and is now acting differently out of fear of displeasing the President.

Another potential remedy would be to grant the Defense extra peremptory challenges, to remove any possible lingering doubt that the accused did not have his case fairly considered by a fair and impartial panel. *Simpson*, 58 M.J. at 373.

Fifth, the comments did not cause any unfairness in the Convening Authority's handling of the case so far. The Convening Authority referred this case to court-martial months before the President's comments, so the comments could not possibly have impacted that decision.

D. A Writ of Mandamus is appropriate in this case.

Finally, even if the United States has shown that it has a clear and indisputable right to relief and no other relief is available, this Court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Cheney*, 542 U.S. at 380-81.

Issuance of a Writ is especially appropriate in this case, not only based on the facts here, but because of the broader impact this ruling might have if it is allowed to stand. The Military Judge readily admitted that there was "no evidence that Rear Admiral Ponds [the Convening Authority] would be more susceptible to the unlawful command influence in this case than any other convening authority." (Military Judge's ruling at 13.) And the accused did not show any particular prejudice to his case that would not be present in every sexual assault case.

Therefore, at least in front of this Military Judge, no person convicted of sexual assault could ever receive a punitive discharge for the immediate future.[2] This ruling is contrary to at least one other Air Force trial court that has considered this issue and found no unlawful command influence. (Appendix 6.)

The proper course of action is to allow trial to proceed, and if SH2 Johnson is convicted, permit him to raise this issue during normal appellate review with a developed Record.

Here, SH2 Johnson is charged with serious crimes of sexual assault of a fellow service member. To protect the public's perception of fairness in the military justice system, this Military Judge has decided that a punitive discharge is not available as punishment for this crime. His ruling does the opposite of its intended purpose. If allowed to stand, it may be the final straw that undermines the public's faith in the fairness of the military justice system.

E. A stay is required now, so that irreparable harm does not result to the United States' prosecution of this case, and other cases are not adversely affected.

This Court should immediately stay trial proceedings, given the potential injury to the Government case, and the public interest in permitting the Members to be free to adjudge, should

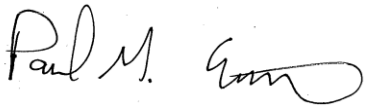
[2] The Military Judge has already granted identical relief in another case, *United States v. Fuentes.*

they desire, a discharge in this case as just punishment. Without an immediate stay, plans to arrange for witness travel to Hawaii will be in limbo, potentially at great cost to the taxpayers.

In order to save cost, operational impact, and needless travel and strain on units and military and civilian witnesses, the United States requests this Court impose an immediate stay, so that this Court may consider the underlying issues.

Conclusion

The Military Judge's finding of unlawful command influence and decision that no punitive discharge is available as a remedy is contrary to settled law. Thus, the circumstances in this case justify a writ of mandamus. Therefore, the United States respectfully requests that this Court grant its petition and immediately issue a stay of the trial proceedings while this Court considers the issue.



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Appendix

1. Military Judge's ruling, Jun. 12, 2013

2. Appellate Ex. X: Defense Motion to dismiss for unlawful command influence

3. Appellate Ex. XI: Government response to defense motion

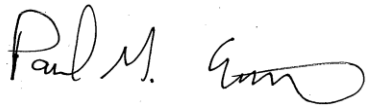
4. Charge Sheet and convening orders

5. Appellate Ex. I, Trial Milestones

6. Ruling on Defense Motion to Dismiss, United States v. Rodriguez

Certificate of Filing and Service

I certify that the original and required number of copies of the foregoing were delivered to the Court, the Appellate Defense Division, and that I caused a copy to be electronically delivered to the Respondent and the Trial Defense Counsel for the Real Party in Interest on June 14, 2013.



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