IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

In re Master Sergeant (E-8)	)	PETITION FOR A WRIT OF
Timothy B. Hennis,	)	MANDAMUS OR OTHER
United States Army,	)	APPROPRIATE WRIT
Petitioner	)	
	)	Crim. App. Dkt. No. 20100304
	)	USCA Misc. Dkt. No._____/AR

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

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I.

WHETHER THE EN BANC PANEL OF THE ARMY COURT OF CRIMINAL APPEALS (ARMY COURT) IS IMPROPERLY CONSTITUTED WHERE THE CONFLICTED ARMY JUDGE ADVOCATE GENERAL (ARMY JAG) APPOINTED JUDGES DIRECTLY TO PETITIONER'S CASE IN VIOLATION OF THE FIFTH AMENDMENT AND ARTICLE 66, UCMJ.

II.

THE ARMY JAG APPOINTED JUDGES ON PETITIONER'S CASE BECAUSE THEY WERE "TEAM PLAYERS." THE CONFLICTED DEPUTY JUDGE ADVOCATE GENERAL (DJAG) RATES AND SENIOR RATES THE ARMY COURT JUDGES. EVERY CHIEF JUDGE SINCE DOCKETING AND SIX OF THE TEN CURRENT ARMY COURT JUDGES ARE DISQUALIFIED FROM PETITIONER'S CASE. THE ARMY COURT'S INTERNAL PROCEDURES WERE ISSUED BY A CONFLICTED CHIEF JUDGE AND DO NOT PRESERVE DISQUALIFICATIONS. WOULD A REASONABLE PERSON QUESTION THE IMPARTIALITY AND INDEPENDENCE OF THE ARMY COURT JUDGES REVIEWING THE APPELLANT'S CASE?

III.

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Preamble

This petition raises novel questions regarding whether the protections of the Fifth Amendment, 28 U.S.C. § 455, and Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [hereinafter UCMJ], have buckled under the weight of pervasive judicial conflicts and the public's willingness to indulge suspicions and doubts concerning the independence and impartiality of the appellate judges in this capital case. At a minimum, the actions of the Judge Advocate General of the Army (Army JAG), Deputy Judge Advocate General (DJAG), and Chief Judges of the Army Court of Criminal Appeals (Army Court) create an appearance the deck is stacked against the petitioner during the ongoing review of his death sentence.

Thus, pursuant to Rules 4(b)(1), 18(b) and 27(a), the All Writs Act, 28 U.S.C. § 1651, and Article 67(a), UCMJ, the petitioner hereby prays for an order vacating the lower court's opinion and for an order directing that petitioner receives a properly constituted panel of appellate judges appointed and assigned without conflict to review his capital appeal under Article 66, UCMJ. In the alternative, petitioner requests this Court appoint a special master to collect evidence for this Court to determine whether the appellate judges abused their discretion in failing to recuse themselves from petitioner's case.

I

History of the Case

On February 4, April 8, June 2, 2008; January 6, March 31, May 8, June 9, July 22, August 18, September 9, October 1, December 16, 2009; January 20, March 1-5, March 8-12, March 22-26, March 29-April 2, April 6-9, April 12-15 2010; and January 21, 2011, MSG Hennis was tried by a panel of officer and enlisted members sitting as a general court-martial at Fort Bragg, North Carolina. The panel convicted MSG Hennis, contrary to his pleas, of three specifications of premeditated murder in violation of Article 118, UCMJ; 10 U.S.C. § 918. The panel sentenced MSG Hennis to be reduced to the grade of E-1, to forfeit all pay and allowances, to be discharged from the service with a dishonorable discharge, and to be put to death. The convening authority approved the adjudged sentence.

Between 2007-2008, petitioner filed writs of extraordinary relief on the subject of jurisdiction with the Army Court and this Court. *Hennis v. Parrish*, ARMY Misc. 20080448 (Army Ct. Crim. App. 25 Jun. 2008)(order); *Hennis v. Parrish*, 67 M.J. 50 (C.A.A.F. 26 Sep. 2008)(order) denying without prejudice). In addition, between 2010-2012, the petitioner filed writs of extraordinary relief for lack of jurisdiction with the federal district court in North Carolina and the Fourth Circuit. *Hennis v. Helmick*, 2010 U.S. Dist. LEXIS 146565 (E.D.N.C. 2010); *Hennis v. Helmick*, 666 F.3d 270 (4th Cir. 2012). After court-martial, petitioner

again filed writs disputing jurisdiction between 2013-2014 with the Army Court and this Court. *Hennis v. Ledwith*, ARMY Misc. 20130828 (Army Ct. Crim. App. 3 Oct. 2013)(order); *Hennis v. Ledwith*, 73 M.J. 240 (C.A.A.F. 2014)(order denying without prejudice); *Hennis v. Nelson*, ARMY Misc. 20140634 (Army Ct. Crim. App. 2014); *Hennis v. Nelson*, 74 M.J. 77 (C.A.A.F. 2014)(order denying without prejudice); *Hennis v. Nelson*, 2015 U.S. Dist. LEXIS 127734 (D. Kan. 2015)(order dismissing without prejudice). On November 7, 2013, the Army Court denied a motion to reconsider with a suggestion for en banc review. *Hennis v. Ledwith*, ARMY Misc. 20130828 (Army Ct. Crim. App. 7 Nov. 2013).

After granting a motion for lack of quorum, the Army Court *sua sponte* determined to hear this case en banc on April 4, 2014. *United States v. Hennis*, ARMY 20100304 (Army Ct. Crim. App. 8 Apr. 2014)(order). On June 31, 2014, the Army Court denied petitioner's petition for new trial. On February 11, 2015, petitioner filed his brief asserting forty-three assignments of error, including personal and subject matter jurisdiction. (Appendix A). On July 28, 2015 the Army Court specified and later denied the issue of whether the Army Court could accept ex parte requests for expert assistance. *Hennis*, ARMY 20100304 (Army Ct. Crim. App)(order). On September 23, 2015, the government filed its response

brief.[1] (Appendix B). On February 16, 2016, petitioner filed his reply brief. (Appendix C). On February 25, March 8, and May 6, 2016, the Army Court specified three issues related to personal jurisdiction for additional briefing. On July 15, 2016, petitioner filed a motion requesting additional time to file eight additional assignments of error and supplemental matters personally raised by petitioner. (Appendix D at 154-55, 195). On October 6, 2016 the Army Court denied petitioner's motion without prejudice to raise the issues on reconsideration. *Hennis*, ARMY 20100304 (Army Ct. Crim. App. 6 Oct. 2016)(order).

On October 6, 2016, the Army Court issued its opinion finding there was jurisdiction and no prejudicial errors among the forty-three assignments of error. *United States v. Hennis*, ___M.J.___, slip op at 1 (Army Ct. Crim. App. 6 Oct. 2016). The petitioner filed a motion to vacate on October 27, 2016, based on the final panel composition of the decision. (Appendix D at 214-429). Additionally, on November 1, petitioner filed a motion to stay the proceedings or delay until July 6, 2017, assuming *arguendo* the Army Court had the authority to grant the request. (Appendix D at 214).

[1] The government originally filed a brief on July 23, 2015, but it was rejected for noncompliance with Army Court rules.

On November 17, the Army Court denied the motions to vacate and stay, and issued a "final" extension to file a motion for reconsideration by December 21, 2016. *Hennis*, ARMY 20100304 (Army Ct. Crim. App. 17 Nov. 2016).

II

Relief Was Repeatedly Sought and Denied Below

Relief was sought from the Army Court multiple times. On March 20, 2014, Petitioner filed a motion for lack of quorum requesting a properly composed and non-disqualified panel assigned by a non-disqualified Chief Judge and reconsideration of interlocutory decisions by the original panel. (Appendix D at 1-49). The Army Court denied the motion for a qualified Chief Judge and properly constituted panel. *Hennis*, ARMY 20100304 (Army Ct. Crim. App. 8 Apr. 2014)(Appendix D at 321-22). Instead, on April 4, 2014, the Army Court *sua sponte* decided to hear this case en banc and reconsidered months' worth of motions, including requests for resources and reconsideration of a petition for new trial, in three duty days.[2] *Hennis*, ARMY 20100304 (Army Ct. Crim. App. 4 Apr. 2014) (Appendix D at 321-22, 326). There was no deviation from previous panel decisions. *Id*. (Appendix D at 321).

[2] April 4-8, 2014 consisted of a Friday through Tuesday. Thus the Army Court was only open three duty days between 4-8 April.

On January 11, 2016, prior to oral argument and the opinion, petitioner also filed a motion for the appellate judges to answer interrogatories to determine disqualifications. (Appendix D at 70). The government requested that appellant's request for interrogatories be considered a motion to disqualify the panel. (Appendix D at 129). In conjunction with the denial of the motion, at least one judge disqualified himself and "*no longer* [took] part in the proceedings." *Hennis*, ARMY 20100304 (Army Ct. Crim. App. 5 Feb. 2016)(order)(Appendix D at 296).

Most recently, on October 27, 2016, petitioner filed a motion to vacate the opinion of the court under Article 66, UCMJ and requested a properly constituted panel to address new errors. (Appendix D at 247-429). The Army Court denied petitioner's motion to vacate and an additional request for any information outside the record relevant to their denial of the motion to vacate. *Hennis*, ARMY 20100304 (Army Ct. Crim. App. 17 Nov. 2016)(order)(Appendix D at 463).

Finally, petitioner has also previously filed motions requesting the Army Court's internal operating procedures (October 15, 2015) and requesting information regarding appointment and oath of office for the Court of Military Commissions Review (CMCR)(November 3, 2016). (Appendix D at 57, 430). However, only excerpts of the Army Court's internal operating procedures were provided and the motion for information related to the appointment of CMCR

judges was denied. *Hennis*, ARMY 20100304 (Army Ct. Crim. App. 21 Oct. 2015, 17 Nov. 2016)(orders) (Appendix D at 302-09).

III

Relief Requested

Master Sergeant Hennis seeks a writ of mandamus or other appropriate writ to vacate the lower court's opinion and direct a properly constituted panel be appointed and assigned to conduct review under Article 66, UCMJ. In the alternative, petitioner requests this Court appoint a special master to collect evidence for this Court to determine whether the appellate judges abused their discretion in failing to recuse themselves from petitioner's case.

IV

Issues Presented

I.

WHETHER THE EN BANC PANEL OF THE ARMY COURT OF CRIMINAL APPEALS (ARMY COURT) IS IMPROPERLY CONSTITUTED WHERE THE CONFLICTED ARMY JUDGE ADVOCATE GENERAL (ARMY JAG) APPOINTED JUDGES DIRECTLY TO PETITIONER'S CASE IN VIOLATION OF THE FIFTH AMENDMENT AND ARTICLE 66, UCMJ.

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Statement of Facts

1. The Army Judge Advocate General (Army JAG) is conflicted.

The Army JAG, Lieutenant General (LTG) Flora Darpino, assisted in the recall of MSG Hennis to active duty and rendered legal advice that jurisdiction existed over MSG Hennis. (App Ex. LV at 20-21, 31)(Appendix E). Throughout 2006, the Chief, Office of The Judge Advocate General – Criminal Law Division[3] (OTJAG-CLD), then-COL Darpino, now the current Army JAG, emailed the XVIII Airborne Corps and Fort Bragg Staff Judge Advocate (SJA) regarding MSG Hennis' jurisdictional status and recall for court-martial purposes. (Appendix E at

[3] The duties of the Chief, OTJAG-CLD include "producing legal opinions for the Army Staff related to military justice matters," which would include opinions to the Secretary of the Army and Assistant Secretary of the Army for Manpower and Reserve Affairs. Annual Report of the Code Committee on Military Justice Including Separate Reports of the U.S. Court of Appeals for the Armed Forces, the Judge Advocates General of the U.S. Armed Forces for the Period October 1, 2005 to September 30, 2006 at page 28 available at http://www.armfor.uscourts.gov/newcaaf/annual/FY06AnnualReport.pdf.

20-31). In one email then-COL Darpino opined MSG Hennis' status was a reservist and retiree. (Appendix E at 31); s*ee Hennis*, ___ M.J. at ___, slip op at 6-7. At that time, she also opined there was both subject matter and personal jurisdiction over MSG Hennis' offenses. *Id*.

In another email exchange, then-COL Darpino stated that the recall was pending with the Acting Assistant Secretary for Manpower and Reserve Affairs (ASA (M&RA)), but the SJA then asked, "is this for his decision or will it go to SecArm afterward?" (App. Ex. LV at 20-21). Then-COL Darpino responded, "His decision." (App. Ex. LV at 20.) However, earlier, then-COL Darpino suggested it would be prudent for the Secretary of the Army to take action. (App. Ex. LV at 31)(Appendix E). The Army Court ultimately reviewed and tacitly adopted the Army JAG's legal opinion that actual Secretarial approval was unnecessary in denying the jurisdiction claims. *See Hennis*, ___ M.J. at ___, slip op. at 6-7.

Under Article 66, UCMJ, the Army JAG executes a quasi-judicial function of selecting judges to sit on the Army Court of Criminal Appeals (Army Court). Lieutenant General Darpino appointed ten judges to the court in 2014 and 2015 after the court determined to hear petitioner's case en banc on April 4, 2014. Ultimately, only four of those judges did *not* recuse themselves and took part in this case. At the times of appointment, the Chief Judges had both recused themselves and it was clear those appointed would hear petitioner's case.

On 28 October 2015, an investiture ceremony was conducted for the newly appointed Army Court Judges including two judges who participated in the decision on this case.[4] (Def. App. Ex. JJ)(Appendix F). At that time, the Army JAG made public comments regarding the new judges. (Appendix F). The Army JAG stated that a reason for selecting the judges were that they were "team players." (Appendix F). Three of the five active duty judges referenced by the Army JAG at that time have disqualified themselves from this case without comment. *Hennis*, ___ M.J. at ___, slip op at 1.

The appellant has argued that the decision, the process, and the ability to recall MSG Hennis were unlawful. (Appellant's Br. at 27)(Appendix A). However, the Army Court concurred with then-COL Darpino's legal opinion regarding jurisdiction over MSG Hennis and that the ASA(M&RA) had the authority to order MSG Hennis to active duty. *Hennis*, ___ M.J. at ___, slip op at 6-7.

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[4] The "new" Army Court Judges included BG Paul Wilson (as Chief Judge), COL Michael Mulligan, COL James Herring, LTC Paulette Burton, LTC Stefan R. Wolfe, and LTC Richard A. Weis. Judge Herring and Judge Burton were the only judges who ultimately took part in the case. Brigadier General Wilson, COL Mulligan, and LTC Wolfe all recused themselves from this case. BG Wilson rendered the post-trial legal advice on this case. COL Mulligan was the lead prosecutor in *United States v. Hassan* and Chief of GAD when the case was first docketed. LTC Wolfe was a former Deputy Chief of the Trial Counsel Assistance Program at the time of the post-trial Article 39A, UCMJ, session in this case. It is unknown whether LTC Weis ever took action on this case in spite of being on active duty several times during the case.

2. The Army JAG re-appointed Judge Burton after she previously rendered appellate decisions on the same or similar issues pending in petitioner's case.

The Army JAG re-appointed Judge Paulette Burton to the Army Court in 2015 describing her as a "team player." (Appendix F). During her first tour on the Army Court, while then-BG Darpino was the Chief Judge of the Army Court, Judge Burton authored the opinion in *United States v. Akbar*. 2012 CCA LEXIS 247 (Army Ct. Crim. App. 13 Jul 2012). Many of the same issues, such as whether aggravating factors must be enacted by Congress, whether panel members were impliedly biased, and many systemic assignments of error were affirmed by Judge Burton in *Akbar*. *Compare Akbar*, 2012 CCA LEXIS 247 *with Hennis*, ___ M.J. at ___, slip op at 1-106. Critically, Judge Burton was re-appointed after petitioner's opening brief was filed but before this Court's review of *Akbar*. *See United States v. Akbar*, 74 M.J. 364 (C.A.A.F. 2015)(decided 19 Aug. 2015)(Appendix A). Thus it was clear Judge Burton would be hearing the same or similar issues in petitioner's case.

Immediately previous to re-appointment, Judge Burton served as the SJA for U.S. Army Criminal Investigation Command (CID) from what appears to be 2013-2015.[5] The Commanding General of CID is also "dual hatted" as the Commanding General of the U.S. Army Corrections Command (USACC). The Commandant of

[5] As discussed later, the Army Court denied access to these exact dates of assignment. (Appendix D at 296-97).

the United States Army Disciplinary Barracks reports directly to the Commander, USACC. During that time, MSG Hennis filed a number of administrative complaints for a number of issues which required redress by USACC. It is unknown whether Judge Burton rendered legal advice to the Commander of USACC related to any issues arising from petitioner's issues while in confinement. The Army court denied requests which would determine such information. (Appendix D at 296-97).

3. The Deputy Judge Advocate General is conflicted.

The DJAG, Major General (MG) Thomas Ayres both rates and senior rates each judge on the Army Court.[6] In 2007, Then-COL Ayres, SJA, XVIII Airborne Corps and Fort Bragg, recommended to the convening authority that MSG Hennis be tried at a capital general court-martial. (App. Ex. XX)(Appendix G). Then-COL Ayres advised the convening authority that there was jurisdiction to try MSG Hennis. (Appendix G at 1-3). Then-COL Ayres also recommended denial of funding for a mitigation expert and other resources at trial contrary to death penalty professional responsibility guidelines. (Appendix G at 4-10). One of petitioner's primary arguments on appeal has been that the Army did not have jurisdiction to

[6] There is no publicly available rating scheme for the appellate judges as required in Army Reg. 27-10, Legal Services: Military Justice [hereinafter AR 27-10], para. 15-10 paragraph 5-9b (11 May 2016). Normally, Army performance evaluations require a different rater and senior rater, but there are exceptions when the rater is a Major General. *See* AR 623-3, paras. 2-3f, 2-20, Appendix D-2a.

try MSG Hennis and if there was jurisdiction, MSG Hennis could not be reduced or discharged. (Appellant's Br. at 12-85)(Appendix A). Further, petitioner has requested investigatory resources to include a mitigation specialist on appeal. (Appendix D at 157-58, 296-97, 310-11, 321-22). Thus, the Army Court judges were required to review their rater and senior rater's legal advice and whether funding for resources were necessary in a capital case.

4. Chief Judges of the Army Court of Criminal Appeals are conflicted.

Since MSG Hennis' case arrived at ACCA, every Chief Judge has been conflicted from taking action in this case.[7] The current Chief Judge, Brigadier General (BG) Stuart Risch recused himself due to undisclosed disqualifications after the en banc panel decision was made.[8] *Hennis*, ___ M.J. at ___, slip op at 1. Currently, six of the ten judges on the Army Court have not taken part on this case "as a result of their disqualification." *Hennis*, ___ M.J. at ___, slip op at 1. In spite of a request, no reasons for disqualification have been provided.

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[7] Since docketing in 2012, the Chief Judges presiding over ACCA have included Chief Judge Flora Darpino, Chief Judge Thomas Ayres, Chief Judge Charles N. Pede (Oct. 2013-Mar. 2015), Chief Judge Paul Wilson (Mar. 2015-Jun.2016), and Chief Judge Stuart Risch (Jun. 2016-Present). Notably, the reasons why Chief Judges Pede and Wilson did not remain at the court for the minimum three years as required by the tenure provisions of AR 27-10 para. 12-13, is unknown.

[8] Thus Chief Judge Risch, like the other disqualified judges, is prevented from taking any action on this case. *See Walker v. United States*, 60 M.J. 354 (C.A.A.F. 2004); *United States v. Witt*, 75 M.J. 380, 383 (C.A.A.F. 2016).

Brigadier General Paul Wilson, the former Chief Judge presiding at the time of oral argument, was disqualified from taking action on the case because he had rendered post-trial legal advice. Brigadier General Wilson served as the SJA, XVIII Airborne Corps and Fort Bragg, for post-trial matters. (Addendum)(Appendix H). Trial defense counsel raised the jurisdiction issues and significant trial errors in the R.C.M. 1106 matters to the convening authority. (Appendix H). Then-COL Wilson disagreed with the allegations of error and recommended that the findings and sentence be approved. (Appendix H). The Army Court reviewed and agreed with the legal advice of the former Chief Judge while he presided over the court.

Brigadier General Charles N. Pede, the former Chief Judge presiding at the time of the en banc determination, is disqualified from this case. *See Hennis*, 20103004 (Army Ct. Crim. App. 8 Apr 14)(order). However, on 9 March 2015, BG Pede promulgated the Army Court of Criminal Appeal Standard Operating Procedures (ACCA SOP) which includes procedures for voting on interlocutory matters such as motions.[9] (Appendix D at 308 (ACCA SOP at 8-4(c),(d)). An

[9] The appellant has only received an excerpted copy of the ACCA SOP from the Army Court. Thus any discussion of what is or is not contained in the SOP is dependent upon what the Army Court has provided. The excerpts provided do not reference the voting procedures for the opinion. Thus, neither Appellant nor an outside observer has any idea whether the Chief Judge is also aware of the votes or opinion.

explanatory memorandum is drafted by the Senior Judge for every vote. *Id*. The SOP requires the memorandum be circulated to the Chief Judge and Judges, even if they are disqualified. (Appendix D at 305-309). Nothing in the rules provided to Appellant prevents a Judge's vote from being seen by the Chief Judge or other disqualified judges. (Appendix D at 305-309).

5. Danger of Judicial Disqualification

The danger of judicial disqualification in this case is significant. The U.S. Army Judge Advocate General's Corps (JAG Corps) is comprised of approximately 1834 judge advocates. (Appendix J). As viewed through the Army JAG Corps career model, the thousands of judge advocates are narrowed to approximately 400 Colonels and Lieutenant Colonels who meet the minimum qualifications to be assigned as a military appellate judge. (*See* Appendix I, J). However, given the limited number of military justice billets, the number of judge advocates with the requisite skill identifier to sit on the Army Court is likely very small.[10]

[10] The number of judge advocates who have achieved the Additional Skill Identifier (ASI) Level of "Master," necessary for assignment as an appellate judge, is not publicly available. *See* Army JAG Policy Memorandum 11-7 (9 Jun 2011)(requiring for Master ASI attendance at the Graduate Course, multiple criminal law courses, ninety-six (96) months of military justice experience, and serving as a Regional Defense Counsel, Chief of Military Justice at a Corps, Professor or Chair of TJAGLCS Criminal Law Department, Chief of TCAP or DCAP, Deputy Chief of GAD, DAD, OTJAG-CLD, or TDS-HQ, Staff Judge Advocate, or Military Judge).

This high-profile case has spanned decades, requiring the involvement of countless judge advocates to include the current Army JAG, DJAG, and former Chief Judges of the Army Court. In 2006, during pre-trial phase of this case, the offices at XVIII Airborne Corps, 82nd Airborne Division, and OTJAG-CLD, and Trial Counsel Assistance Program (TCAP) in Government Appellate Division (GAD) were comprised of approximately 118 judge advocates. *See* Archived JAGC Directories Page, Personnel, Plans & Training Office Website (last viewed Dec. 13, 2015)(avail. at https://www.jagcnet2.army.mil/Sites/ppto.nsf/homeContent.xsp?open&documentId=F52C35079663DCBC85257D380062A7AF)(login required)). Further, over the course of pretrial, trial, post-trial, federal writs, military writs, federal writ appeals, and now military appeals, hundreds of other judge advocates rotated through those offices, possibly taking actions or expressing opinions regarding this case. *See id*.

Finally, conflicts in capital cases are common due to the heavy involvement of individuals well versed in military justice. *See United States v. Murphy*, 30 M.J. 1040 (A.C.M.R. 1990)(sitting en banc with Judges Foreman, Werner, and Neurauter not taking part); *United States v. Witt*, 72 M.J. 727 (A.F. Ct. Crim. App. 9 Aug. 2013)(sitting en banc with Judges Gregory, Roan, Hecker, and Weber not taking part due to conflicting interests); *see also Walker v. United States*, 60 M.J. 354 (C.A.A.F. 2004)(discussing the conflicts within the court).

6. The total number of judges taking part in this case is unknown.

At present, at least eleven judges appear to have taken action in this case.[11] (*Compare* Appendix D at 288-339 *with* Appendix D at 341-91). On 4 April 2014 date, after a motion for lack of quorum, the court *sua sponte* decided to hear the case en banc and reconsidered every motion previously submitted. (Appendix D at 321). Since April 4, 2014, the composition of the court has changed no less than 29 times and many judges previously taking part in the case appear to have left the court. (Appendix D at 341-91). During those times, several motions were filed by appellant, but the orders are silent as to which judges took part in the decisions, only stating who did not take part. (*Compare* Appendix D at 311 (order stating only which judges did not participate) *with* Appendix D at 316 (order denying petition for new trial stating both participants and nonparticipants)).

[11] It appears that Chief Judge Glanville, (Appendix D at 302 (Motion for Internal Rules)), Judge Cook, Judge Kern, Judge Borgerding, (Appendix D at 321 (En Banc Recon of Motions)) Judge Moran, Judge Tellitocci (Appendix D at 316 (Petition for New Trial)), Judge Celtnieks (Appendix D at 311 (Second Motion for Learned Counsel, Mitigation Specialist, and Investigator)) Judge Tozzi, Judge Penland, Judge Burton, and Judge Herring (Oral Argument and Opinion) have all taken action based on the orders or opinion in this case. In addition, Judges Holden, Sullivan, and Hoffman heard the initial jurisdiction writ in 2008. *Hennis v. Parrish*, ARMY Misc. 20080448 (Army Ct. Crim. App. 25 Jun. 2008)(order). However, there has been no reason given why any of the previous judges did not take part in the ultimate opinion.

Only four judges attended oral argument:[12] Senior Judge Tozzi, Judge Herring, Judge Penland, and Judge Burton. After oral argument Chief Judge Risch and Judge Febbo were appointed to the court, but it was unknown whether they would participate. Petitioner filed numerous motions after argument, but they were not ruled upon until the day of the Court's decision. (Appendix D at 288-89). Thus, the final composition of the court was not clear until the opinion was issued stating that Chief Judge Risch and Judge Febbo were not taking part in the decision. *Hennis*, ___ M.J. at ___, slip op at 1.

During the timeframes when motions, briefs, and specified issues were pending before the court it is unknown whether COL Maggs, LTC Weis, LTC Saladino, or LTC Almanza took any part in the proceedings. (Appendix D at 288-339, 341-91). Finally, based on the current panel composition effective 1 August 2016 (without an end date), LTC Borgerding[13] is currently assigned to the Court,

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[12] Oral argument is not recorded at the Army Court nor publicly available. Both the Air Force Court of Criminal Appeals (AFCCA) and Navy and Marine Corps Court of Criminal Appeals (NMCCA) record and post audio of their oral arguments. *See* U.S. Air Force Court of Criminal Appeals Website, Audio File Archive, http://afcca.law.af.mil/content/audio.php%3Ftabid=4.html (last visited 25 Oct. 2016); U.S. Navy Judge Advocate General's Corps Website, NMCCA Oral Arguments, http://www.jag.navy.mil/courts/oral_arguments.htm (last visited 25 Oct. 2016).

[13] LTC Borgerding is a reserve judge advocate. Judge Borgerding first participated in the initial reconsideration of motions as an en banc panel. However, it is unclear whether the conflicted Chief Judge participated in mobilizing her on active duty to take action on petitioner's case.

but the opinion is silent as to whether she participated on this case. *Hennis*, ___ M.J. at ___, slip op at 1; (Appendix D at 341).

7. Judge Celtnieks took action on this case but later disqualified himself for unknown reasons.

Judge Larss Celtnieks was appointed by the Army JAG to the court in June of 2014 after the case was heard en banc. Subsequently Judge Celtnieks appears to have taken part in numerous interlocutory matters raised by the appellant. (Appendix D at 296-314). Judge Celtnieks was present during multiple status conferences with the parties. On 10 January 2016, appellant filed a request for the Army Court to answer interrogatories regarding potential conflicts due to the potential for appearances of impropriety, lack of transparency, and inadequate procedures to address potential conflicts.[14] (Appendix D at 70). An attachment to that motion included a list of material witnesses, government counsel, and defense team members. (Appendix D at 85-87). In a response, the government stated "a request for voir dire from appellate judges is treated as a motion to disqualify." (Appendix D at 129). In the order denying the motion, Judge Celtnieks "recused himself and is *no longer* taking part in this case." (Appendix D at 296). The

[14] The government opposed this motion and argued the motion should be considered a motion to disqualify the judges. (Gov. Resp. to Motion for Interrogatories at 9).

grounds for recusal were not revealed. The Army Court did not reconsider any motions in which Judge Celtnieks participated.

8. Lack of transparency.

Requests for information to determine possible disqualifications have been denied by the Army Court. (Appendix D at 57, 70, 247, 430). Appellant has filed multiple motions requesting information relevant to determine conflicts or qualification. (Appendix D at 57, 70, 247, 430) (Motion for Interrogatories, Motion for ACCA SOP, Motion for CMCR Info, Motion for Information Relevant to Denial of Motion to Vacate). However, all but one motion have been denied outright, and the petitioner's motion for the Army Court's SOP was granted but the documents provided were excerpted. (Appendix D at 302). Namely, the Army Court provided only excerpts of the SOP rather than a complete copy. (Appendix D at 304-309).

Sources of information necessary to conduct conflicts checks as well as many other sources of information about the Army Court are not publicly available. The biographies or basic identifying information of the appellate judges are not publicly available, unlike every other service court, CAAF, the U.S. Court of

Military Commissions Review (CMCR), federal district court, federal circuit court, and the Supreme Court. (Appendix D at 89-103)[15]

The ACCA SOP governing the management of disqualifications is also not publicly available, unlike every federal court of appeals.[16] On 10 January 2016, appellant filed a motion for applicable portions of ACCA SOP related to *en banc* determinations and procedures for determining and eliminating conflicts of interest. (Appendix D at 302). The Army Court provided only five pages with numerous missing provisions and lacking cross references from the ACCA SOP dated 9 March 2015.[17] (Appendix D at 304-09). The SOP places the sole responsibility for a judge's recusal solely on each judge and there are no provisions

[15] The biographies provided in the Appendix C are also available to the public online. About the Court - Website for the Court of Appeals (available at for the Armed Forces http://www.armfor.uscourts.gov/newcaaf/library/brochure.pdf); USCMCR Judges – Office of Military Commissions Website (available at http://www.mc.mil/Portals/0/pdfs/CMCRJudges/Judge%20Cook%20Bio.pdf); Judges' Biographies – U.S. District Court District of Maryland Website (available at https://www.mdd.uscourts.gov/publications/JudgesBio/bennettbio.pdf); U.S. Court of Appeals – D.C. Circuit – Judges Website (available at http://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+Judges+-+BMK); Biographies of Current Justices of the Supreme Court (available at http://www.supremecourt.gov/about/biographies.aspx)

[16] All federal courts of appeal are required to publish their internal rules or operating procedures under 28 U.S.C. § 2077(a). While this Court does not publicly publish its internal operating procedures, they invite counsel to attend a yearly new counsel training where questions are welcomed in an open forum. No such forum exists at the Army Court.

[17] In its order, the Court references the ACCA SOP dated 2009, but did not provide a copy of any portion of those rules.

which provide for a standing list of previous cases, previous billets, or previous rating chains.[18] (Appendix D at 304-09). The SOP does not cite the Code of Judicial Conduct for Army Trial and Appellate Judges [hereinafter Army Judicial Code], which extends Rule for Courts-Martial [hereinafter R.C.M.] 902 to appellate judges. *See* Army Judicial Code Rules 2.7, 2.11. Finally, the SOP does not require anyone to check for conflicts prior to assigning judges to a case. (Appendix D at 304-09).

The judicial complaint procedures for failure to recuse provided by R.C.M. 109 and Army Regulations lack transparency and could not be implemented without conflict in this case. *See* R.C.M. 109(c); Army Reg. 27-10, Legal Services: Military Justice [hereinafter AR 27-10], para. 15-10 (11 May 2016). First, unlike complaints against federal judges, the findings of any complaint are not published or made public.[19] *See* R.C.M. 109c(4) Discussion (stating

[18] Many federal courts provide for a standing list of potential conflicts that can be reviewed prior to assignment of a case to a panel or judge to a case. *See e.g*., Internal Operating Procedures of the United States Court of Appeals for the Third Circuit, Chapter 11: Recusal or Disqualification of Judges, para. 11.1. (requiring judges to notify clerk of disqualification prior to a case being sent to a panel and optional submission of standing list of circumstances normally requiring recusal).
[19] Congress recognized public perception concerns with federal judges in passing and updating the Judicial Councils Reform and Judicial Conduct and Disability Act of 1908 as amended by the Judicial Improvements Act of 2002. These laws were intended "to protect the judicial system and the public from further acts by a judicial officer that are detrimental to the fair administration of justice." *In re Complaint of Judicial Misconduct,* 425 F.3d 1179 (9th Cir. 2005).

"complaints will be treated with confidentiality." Second, the complaint procedure requires the Chief Judge of the Army Court, who has disqualified himself from this case, to forward any complaints to the Standards of Conduct Office (SOCO). *See* AR 27-10, para. 15-12. Finally, the Army JAG, who is conflicted in this case, must make the initial determination of whether suspension for failure to recuse is appropriate and must approve any action with respect to the findings. This action cannot be appealed. *See* AR 27-10, para. 15-11b.; AR 27-1, para. 7-8.

The rating schemes for the Army Court judges are not publicly available as required by AR 27-10, paragraph 5-9. The regulation requires "[a]ll active and reserve appellate judges will be rated in accordance with rating schemes published by the Chief Judge, U.S. Army Court of Criminal Appeals." AR 27-10, para. 5-9b. However, recent requests to the Army Court for the rating schemes have resulted in being directed to the DJAG's office where it was stated the DJAG rates and senior rates the judges. No publicly available rating scheme appears to exist.

No judge has stated his or her reasons for not taking part in the case or why he or she is disqualified. No judge taking part in this case has identified the issues he or she weighed in his or her decision to remain on the case.

VII

Reasons for Granting the Writ

The conflicted Army JAG assigned judges directly to this case in violation of the Fifth Amendment and Article 66, UCMJ. Further, under a totality of the circumstances, a reasonable person would question the independence and impartiality of the Army Court because: 1) the Army JAG appointed judges directly to this case and made public comments that would appear to detract from an appearance of independence; 2) the Army JAG selected a "team player" judge when it was clear she had ruled in favor of the government on similar issues in other capital cases 3) the DJAG rates and senior rates every member of this en banc panel in spite of his having a personal interest in the outcome of the case; 4) every Chief Judge has recused himself from this case, and the current internal operating procedures enacted after this case was docketed do not preserve those recusals; 5) one judge appears to have taken action while conflicted on this case, and 6) the lack of transparency of the Army Court causes a reasonable person to question the independence and impartiality of this en banc panel.

Further, Judge Herring and Judge Burton were disqualified as military appellate judges because of their appointment to the Court of Military Commissions Review. First, the acceptance of appointment to the CMCR terminated their military commissions. Second, as appointed judges of the CMCR,

Judges Herring and Burton no longer meet the UCMJ definition of military judge. Third, the assignment of inferior officers and principal officers to a single court itself violations the Appointments Clause of the U.S. Constitution.

Finally, this Court must grant this extraordinary writ because the Army Court has not yet reviewed multiple assignments of error that require legal and factual review under Article 66, UCMJ. However, the panel is not properly composed and lacks properly designated officials to remedy the composition. Thus this "is an extraordinary circumstance which directly and adversely affects the normal course of appellate review." *Walker v. United States*, 60 M.J. 354, 359 (C.A.A.F. 2004).

I.

WHETHER THE EN BANC PANEL OF THE ARMY COURT OF CRIMINAL APPEALS (ARMY COURT) WAS IMPROPERLY CONSTITUTED WHERE THE CONFLICTED ARMY JAG APPOINTED JUDGES DIRECTLY TO PETITIONER'S CASE IN VIOLATION OF THE FIFTH AMENDMENT AND ARTICLE 66, UCMJ.

Law and Argument

The conflicted Army JAG violated the Due Process Clause of the Fifth Amendment by performing the quasi-judicial function of appointing judges to sit on petitioner's case, creating an impermissible risk of actual bias.

The Army JAG is statutorily vested with judicial and quasi-judicial responsibilities under Article 66, UCMJ, to include appointing appellate judges to

the Army Court. *United States v. Mitchell,* 39 MJ 131, 139 (C.M.A. 1994)(quoting *United States v. Monett*, 36 CMR 335, 336 n.1 (C.M.A. 1966)). The Supreme Court has emphasized that Due Process attaches to quasi-judicial functions. *Schweiker v. McClure*, 456 U.S. 188 (1982)(citations omitted)(stating "due process demands impartiality on the part of those who function in judicial or quasi-judicial roles"). Moreover, officers acting in a judicial or quasi-judicial capacity are disqualified if they have an interest in the controversy. *Tumey v. Ohio*, 273 U.S. 510, 521 (1927).[20]

The Supreme Court recently held "[w]hen a judge has served as an advocate for the State in the very case the court is now asked to adjudicate, a serious question arises as to whether the judge, even with the most diligent effort, could set aside any personal interest in the outcome." *Williams v. Pennsylvania*, 136 S.Ct. 1899, 1905 (2016). Thus, "there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case." *Id*.

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[20] The Code of Judicial Conduct for Army Trial and Appellate Judges adopted by the Army JAG reflects these Due Process concerns and specifically incorporates the broader protections of Rule for Courts-Martial [hereinafter R.C.M.] 902 when effectively defining "interests in a case." *See* Rule 2.11 of the Code of Judicial Conduct for Army Trial and Appellate Judges and R.C.M. 902 (requiring disqualification of judges who have personal knowledge of disputed facts, acted as counsel, or whose impartiality may reasonably be questioned). Thus, these protections should also apply to judicial and quasi-judicial acts of the Army JAG when appointing appellate judges.

The Army JAG has a personal interest in this case due to her substantial personal involvement with both the recall and prosecution of MSG Hennis. Then-COL Darpino was deeply involved with the recall process of MSG Hennis as evidenced by the email traffic with the SJA and Deputy SJA. (Appendix E). Critically, she personally opined there was subject matter jurisdiction over MSG Hennis' offenses under Article 3, UCMJ, and that the proper recall authority was the ASA(M&RA), which were both issues raised before the court-martial and Army Court. (Appendix E at 20, 31). Further, under her personal direction, OTJAG-CLD coordinated with various Army staff sections to facilitate the recall and prosecution of MSG Hennis. (Appendix E). The Army Court ultimately reviewed and tacitly adopted her legal opinion when denying the lack of jurisdiction claims. *See Hennis*, ___ M.J. at ___, slip op. at 6-7.

Due to the depth of the Army JAG's personal involvement, this case poses an even greater risk of actual bias than in *Williams*, which involved the bias of a single judge on a panel. *See Williams*, 136 S.Ct. at 1905. Here, similar to the judge in *Williams*, the Army JAG was significantly involved in this case by providing her legal opinion on jurisdiction and helping effectuate the recall of MSG Hennis to active duty, a critical stage in the prosecution. *Id*. However, the impermissible risk here was even greater than *Williams* because the Army JAG's

potentially tainted decisions stretched to every single judge who ruled on petitioner's case, rather than just one.

Most strikingly, the Army JAG personally a judges to sit on petitioner's case who previously rendered opinions favorable to the government on pending issues in this case.[21] Namely, Judge Burton was personally selected by the Army JAG after she opined in favor of the government on numerous capital issues. *See Akbar*, 2012 CCA LEXIS 247. Specifically, Judge Burton previously sided with the government on the then-unsettled issue regarding whether the President could enact aggravating factors. In spite of that opinion, she was appointed to petitioner's case after petitioner the then-unsettled was raised in his opening brief. (Appendix A).

Furthermore, the selections themselves must also be viewed in the context of their timing: when the Army JAG personally selected and appointed these judges to the court, the Army Court had already decided to hear petitioner's case en banc. Accordingly, at the time of selection and appointment, it was clear that any judges

[21] While not as clear other judges may have been appointed due to their previous opinions. Senior Judge Tozzi was personally selected by the Army JAG to be re-appointed to the court in spite of previously affirming the government's broad reading of Article 2, UCMJ, which remains central to petitioner's case. *See United States v. Ali*, 70 M.J. 514 (Army Ct. Crim. App. 18 July 2011). Further, Judge Tozzi was also on the Army Court when petitioner's original writ before the Army Court challenging jurisdiction was decided. *Hennis v. Parrish*, ARMY Misc. 20080448 (Army Ct. Crim. App. 25 Jun. 2008)(order). However, it is unknown whether he discussed issues with the panel judges or participated on the writ.

appointed to the Army Court would be automatically assigned to MSG Hennis' case. *See United States v. Witt*, 75 M.J. 380, 383 (C.A.A.F. 2016). Moreover, because every Chief Judge was conflicted and unable to reassign the case or panel members, there was no possible buffer between the Army JAG's actions and MSG Hennis' appeal. Ultimately, the Army JAG appointed Senior Judge Tozzi, Judge Penland, and Judge Celtnieks, Judge Herring, and Judge Burton.[22]

Furthermore, the Army JAG's actions deprived petitioner of the Due Process safeguard of an independent review by an appellate court, and instead potentially "placed a finger on the scales" against the petitioner. In *Weiss*, the Supreme Court found that Congress achieved "an acceptable balance between independence and accountability" by placing service court judges under the control of Judge Advocates General "who have no interest in the outcome of a particular court-martial." *Weiss v. United States*, 510 U.S. 163, 180 (1994). Thus, by taking action on a particular case in which there was an impermissible risk of an interest in the

[22] Five other judges were also appointed since the en banc determination, but they disqualified themselves. Those judges included a former career prosecutor and lead prosecutor in *United States v. Hassan* (COL Mulligan) and the post-trial SJA in MSG Hennis' case (BG Wilson). Also, Judge Celtnieks later recused himself "due to his disqualifications." Senior Judge Tozzi and Judge Penland first appear on the 31 July 2014 panel composition memorandum. Judge Herring and Judge Burton first appear on the 20 July 2015 panel composition memorandum. The Army Court denied production of the actual dates of assignment as requested. *Hennis* ARMY 20100304 (Army Ct. Crim. App. 5 Feb. 2015)(order).

outcome, the Army JAG effectively upset the balance struck by Congress to ensure petitioner's Due Process right to an independent appellate court.

Finally, the Army JAG's assignment of judges directly to this case also violates the clear separation of duties between the JAG and Chief Judge in Article 66, UCMJ. The Army JAG is empowered by statute to select and appoint appellate judges and designate the Chief Judge. UCMJ, art. 66(a). However, "[o]nce the court is established, and the chief judge is designated, responsibility for assignment of judges within the court is vested by statute in the chief judge." *Walker*, 60 M.J. at 357. This separation of duties reflects Congress' intent to "create a degree of separation between the Judge Advocate General and internal assignments within the court." *Id*. Thus, the Army JAG's assignment of judges automatically placed them on the MSG Hennis' case and eviscerated the separation required in Article 66, UCMJ, and substantially prejudicing his statutory right to an independent appellate review.

Ultimately, the actions of the Army JAG violate Due Process and Article 66, UCMJ, and present an unacceptable risk that "the deck was stacked" against appellant by appointing judges directly to MSG Hennis' case. Thus this extraordinary writ should issue.

II.

THE ARMY JAG APPOINTED JUDGES ON PETITIONER'S CASE BECAUSE THEY WERE "TEAM PLAYERS." THE CONFLICTED DEPUTY JUDGE ADVOCATE GENERAL (DJAG) RATES AND SENIOR RATES THE ARMY COURT JUDGES. EVERY CHIEF JUDGE SINCE DOCKETING AND SIX OF THE TEN CURRENT ARMY COURT JUDGES ARE DISQUALIFIED FROM PETITIONER'S CASE. THE ARMY COURT'S INTERNAL PROCEDURES WERE ISSUED BY A CONFLICTED CHIEF JUDGE AND DO NOT PRESERVE DISQUALIFICATIONS. WOULD A REASONABLE PERSON QUESTION THE IMPARTIALITY AND INDEPENDENCE OF THE ARMY COURT JUDGES REVIEWING THE APPELLANT'S CASE?

Summary of Argument

The Army Court judges were required to disqualify themselves because under the totality of circumstances, a reasonable person would not believe the Army Court was unfettered in its ability to overturn the legal determinations of its supervising chain of command. The Army JAG appointed judges directly to this case and made public comments that would appear to detract from an appearance of independence. The DJAG rates and senior rates every member of the en banc panel in spite of being conflicted from taking action on the case. Every Chief Judge has recused himself or herself from this case and the current internal operating procedures enacted after this case was docketed do not preserve those recusals. Finally, the lack of transparency of the Army Court causes a reasonable person to question the independence and impartiality of this en banc panel.

Law

The Army Code of Judicial Conduct requires that "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." Army Code of Judicial Conduct Rules 2.11 (emphasis added).

A military appellate judge is required to "disqualify himself or herself in any proceeding in which that military judge's impartiality *might reasonably be questioned*." R.C.M. 902(a)(emphasis added); *see United States v. Kincheloe*, 14 M.J. 40, 49 (C.M.A. 1982); *United States v. Mitchell,* 39 MJ 131, 143 (C.M.A. 1994)(stating disqualification necessary when reasonable person who knew all the facts may question impartiality or independence).

In addition, this Court has held provisions of 28 U.S.C. § 455 applicable to all appellate judges in the military justice system. *See United States v. Lynn*, 54 M.J. 202, 205 (C.A.A.F. 2000)("Title 28 USC § 455 applies to judges of the Courts of Criminal Appeals."); *United States v. Gorski*, 48 M.J. 315, 317 (1997) (Memorandum of Judge Effron).[23]

Thus, the aim of R.C.M. 902 in conjunction with 28 U.S.C. § 455 is clear: "to foster the appearance of impartiality . . . [to focus] on the appearance of

[23] *See also American Bar Association Model Code of Judicial Conduct* Rule 1.2.

impartiality, as opposed to the existence in fact of any bias or prejudice, a judge faced with a potential ground for disqualification ought to consider how his participation in a given case looks to the average person on the street." *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980); *Planned Parenthood of Southeastern. Pennsylvania v. Casey*, 812 F. Supp. 541, 543 (E.D. Pa. 1993) (noting that "Congress enacted section 455(a) to ensure that the public's perception of the judiciary remained positive by avoiding the harm to public confidence that would result from the appearance of bias, *especially in high profile cases*.") (internal citation omitted)(emphasis added).

The military justice system demands at all levels that a court's "actions and deliberations must not only be untainted, but must also avoid the very appearance of impurity." *Kincheloe*, 14 M.J. at 50 (citations omitted). The Supreme Court has been long been cautious of the danger of appearance issues, stating:

> But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered . . . Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. *Justice must satisfy the appearance of justice*.

In re Murchison, 349 U.S. 133, 136 (1955).

Therefore, where military judges "believe that a reasonable person might perceive them as not being independent, they [are] required as a matter of regulatory law to disqualify themselves from participating in the review of this case." *United States v. Mitchell*, 39 M.J. 131, 142 (C.M.A. 1994)(citations omitted).

Argument

a. The actions and statements of the Army JAG create an appearance of impropriety because a reasonable person would question the independence or impartiality of this en banc panel.

In addition to assigning judges directly to MSG Hennis' case as discussed in section 1 above, the Army JAG's public comments would cause a reasonable person to question the independence or impartiality of this panel.

The Army JAG stated that two judges sitting on this case were selected because they were "team players" creating an appearance that members of the Army Court lacked independence. The Army JAG acts in a judicial or quasi-judicial capacity when fulfilling a Congressional mandate to establish a fair, impartial, and independent court. See UCMJ, art. 66(a); *Monett*, 36 CMR at 336 n.1. Accordingly members executing judicial functions cannot act in a manner contrary to promoting "public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." Army Judicial Code Rule 1.2. Further, a judge "shall not make any

public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending in any court." Army Judicial Code Rule 2.10.

However, during the 28 October 2015 investiture ceremony, the Army JAG stated that a reason for selecting the judges was they were "team players." (Appendix F). When viewed along with the personal involvement of the Army JAG, DJAG, and Chief Judge, these comments could be interpreted to mean the military judges were assigned directly to this case to support the past decisions and leadership of the Army and JAG Corps "team" rather than to independently review each case.

More importantly a reasonable person could view the appointment of Judge Burton in particular as "stacking the deck" against the petitioner because it appears they would resolve issues in favor of the government.[24] First, then-BG Darpino was the Chief Judge while Judge Burton were previously on the court. Namely, at the time she was appointed, Judge Burton had already authored the Army Court's opinion in *Akbar* which had already affirmed many of the same systemic issues in a military justice raised in MSG Hennis' case. *Akbar*, 2012 CCA LEXIS 247.

[24] Further, it is notable that many other judges appointed to the Court recused themselves due to disqualifications. However, this bolsters the appearance that the Army JAG was selecting judges contrary to appellant's interests. Only by virtue of the judges' personal decisions to disqualify did they not sit on the case.

Thus, a reasonable person could view appointing Judge Burton to the court as "stacking the deck" against the petitioner's pending claims.

b. The conflicted DJAG's rating of the Army Court makes a reasonable person question the impartiality and independence of the Army Court.

The conflicted DJAG's performance evaluation rating of the Army Court creates an appearance of lack of impartiality or independence. *See Mitchell*, 39 M.J. 131. In *Mitchell*, the Court of Military Appeals found that fitness reports by a non-conflicted Judge Advocate General or Assistant Judge Advocate did not detract from an independent judiciary. *Id*. However, unlike *Mitchell*'s systemic due process challenge, MSG Hennis raises a "special" and specific claim that certainly may cause a reasonable person who knows all the facts "to question the objectivity that the appellate military judges . . . [will bring] to their consideration of this appeal." *See id.* at 153 (Wiss, J., concurring in part, dissenting in part, and concurring in the result).

Critically, MSG Hennis's appeal is the exact claim that the *Mitchell* Court noted would change its legal calculus. *Mitchell*, 39 M.J. at 145 n.8 ("Our judgment might be different if the judges of the Court of Military Review were reviewing a case where the Judge Advocate General or the Assistant Judge Advocate General, prior to their appointment, acted as a military trial judge, trial counsel, defense counsel, or *staff judge advocate* in that case.")(emphasis added)(citing *United States v. Engle*, 1 M.J. 387, 390 (C.M.A. 1976)). Relying on *Engle*, the Court in

Mitchell noted that where the staff judge advocate, had to deal with his "previous legal opinions" and "sufficiency of his own earlier work . . . [h]uman nature being what it is' . . . 'the very fact of being called upon to condemn or countenance one's own workmanship cannot create a healthy outcome). *Id*. at 39 M.J. at 145 (quoting *Engle*, 1 M.J. at 390).

The current rating scheme is exactly the improper scenario envisioned by the court in *Mitchell* and creates an appearance of lack of independence or that the DJAG may have a personal interest in the case. *See id*. Here, the DJAG was conflicted by having rendered referral advice in this case, but he conducts the performance evaluations (both as rater and senior rater) of the members of the Army Court who are called upon to agree or disagree with his legal opinion. Unlike in *Mitchell*, there is no arm's length or separation between the judges and a conflicted rater or senior rater. *See id*. Therefore, a reasonable observer could not reach the same confident conclusion that the COMA made in *Mitchell* and the Supreme Court made in *Weiss*, that "Judge Advocates General 'have no interest in the outcome of a particular court-martial.'" *Mitchell*, 39 M.J. at 138; *Weiss*, 510 U.S. at 180.

Finally, the fact that this is a capital case contributes to an appearance that the Army JAG, DJAG, or the Chief Judges could have a personal interest in the outcome of the case. Justice Scalia once noted that an important factor in his

decision not to recuse himself in a particular case was because it was "a run-of-the-mill legal dispute about an administrative decision." *Cheney v. U.S. Dist. Court for D.C.*, 541 U.S. 913, 918-19 (2004) (Memorandum of Justice Scalia). However, this case is certainty not run-of-the-mill and MSG Hennis sits on death row pending the Army Court's decision. *See Loving v. United States*, 62 M.J. 235, 236 (C.A.A.F. 2005) (internal footnotes omitted)(stating "'Death is different' is a fundamental principle of Eighth Amendment law."). Thus, given the high profile nature of the case, it adds to the potential appearance that the Army JAG, DJAG or Former Chief Judge could have an interest in the outcome of this case. *See e.g., Planned Parenthood*, 812 F. Supp. at 543.

c. The actions of the disqualified former Chief Judges would make a reasonable person question the impartiality and independence of the Army Court.

The implementation of the ACCA SOP by former Chief Judge BG Pede after he recused himself from the case violates the Army Judicial Code Rule 2.11 because it does not preserve the recusal. *See Walker*, 60 M.J. at 358. In *Walker*, the court found that a policy implemented by a disqualified Chief Judge to substitute judges from a case in which he was conflicted was error. *Id*. However, the court held that the disqualified Chief Judge could implement generally applicable rules so long as the rule is drafted or applied in a manner that preserves the effect of the recusal. *Id*.

Under the current ACCA SOP enacted after the en banc decision,[25] the Chief Judge still receives information regarding interlocutory matters such as motions in spite of his recusal. Under paragraph 8-4(c) and (d), any interlocutory vote requires the Chief Judge be provided an "explanatory memorandum" and necessary pleadings regardless of whether there is a reason for "nonparticipation" to include disqualification.[26] (Appendix D at 308)(stating the Senior Judge "will cause to be distributed" a memorandum and voting sheet to the Chief Judge and Judges.) Since the en banc decision, Appellant has filed at least twenty-three motions before the Army Court including multiple denied requests for expert assistance, learned counsel, and time to file supplemental assignments of error. (Appendix D). The disqualified Chief Judges' visibility over the interlocutory matters and votes of the sitting judges may create the appearance of a chilling effect on the panel's decisions. Therefore, under the ACCA SOP implemented by BG Pede, the recusals for all the Chief Judges are not preserved.

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[25] The basis, justification, and participation in the en banc decision was also not disclosed by the court as part of the procedures utilized in the en banc determination.

[26] The word nonparticipation is also used in paragraph 11-6 in conjunction with disqualifications. ACCA SOP para. 11-6(f)(stating "the nonparticipation of a judge, whether by reason of disqualification or absence. . . .") Thus, it appears nonparticipation includes disqualification. When read together, the interlocutory voting process appears to be first a distribution of voting sheets, a memorandum, and documents to the entire court. Then disqualified judges return the sheets with the reason for not voting as "disqualified."

The ACCA SOP implemented by the disqualified Chief Judge also violates Army Judicial Code Rule 2.9 by requiring the initiation of ex-parte communications with disqualified judges. Rule 2.9 prohibits judges from initiating, permitting, or considering ex parte communications concerning a pending matter. Army Judicial Code Rule 2.9. Further, the commentary clarifies that "[a] judge may consult with other judges on pending matters, but must avoid ex-parte discussions of a case with judges who have been disqualified from hearing the matter." *Id*.

However, under the ACCA SOP, the Senior Judge must distribute information related to a pending matter to judges who are disqualified from hearing the case. ACCA SOP para. 8-4. Part of that information disseminated is an "explanatory memorandum" written by the Senior Judge which may explicitly or implicitly communicate the judge's opinion of the issues and arguments of counsel. Thus, the ACCA SOP implemented by the Chief Judges does not preserve the recusals or disqualifications of any Judge not participating in this case.

Because the actions of the disqualified Chief Judges' did not preserve recusal and required ex-parte communications, a reasonable person would question the impartiality or independence of the Army court. *See Walker*, 60 M.J. at 358.

d. In light of the above, the lack of transparency and danger of disqualifications make it more likely a reasonable person would question the impartiality or independence of the Army Court.

The conflicts and actions of the Army JAG, DJAG, and Chief Judges on this case would alone cause a reasonable person to question the impartiality or independence of the Army Court. However, the danger of disqualification and lack of transparency exacerbate the issues instead of dispelling them.

First, the danger of judicial disqualification in this case is significant, contributing to the likelihood a reasonable person would question the Army Court. In other words, hundreds of judge advocates in a relatively small JAG Corps have likely worked on this case, worked in the same office as someone who worked on this case, advised a commander involved at some stage of the proceeding, or expressed an opinion concerning the guilt or innocence of the accused. *See* 28 U.S.C. § 455; R.C.M. 902. Further, based on the timing and length of the trial, those participants are now in positions of authority such as the Army JAG, DJAG, every Brigadier General, and at least five other members of the Army Court. Therefore, the significant risk of disqualification makes it more likely a reasonable person would "indulge suspicions and doubts concerning the integrity of judges." *See Liljeberg v. Health Srvs. Acquisition Corp*., 486 U.S. 847, 864-65 (1988).

Second, the overall lack of transparency contributes to the fatal perception because it prevents the detection of conflicts. Unlike the federal system, basic

biographic information of the appellate judges, the appellate judge rating schemes, the SOP's governing administration and disqualification, and the judicial complaint procedures are all currently withheld from public scrutiny. An open review of these sources of information not only allow detection of conflicts, but also bolster credibility of the system by easily putting otherwise innocuous concerns to rest. Further, it is completely unclear which judges have taken action on interlocutory matters related to this case as the composition of the court has changed nearly thirty (30) times since the case went en banc and the orders do not indicate which judges actually took part.

Thus, under a totality of the circumstances without transparency to dispel quell their speculation, a member of the public is "all too willing to indulge suspicions and doubts concerning the integrity" of the Army Court judges on petitioner's case. *See Liljeberg*, 486 U.S. at 864-65. Thus, the appellate judges improperly failed to recuse themselves from MSG Hennis' case.

III.

THE PANEL IS IMPROPERLY CONSTITUTED BECAUSE: 1) JUDGE BURTON AND JUDGE HERRING'S ACCEPTANCE OF APPOINTMENT AS A CMCR JUDGE TERMINATED THEIR MILITARY COMMISSIONS; 2) AS APPOINTED JUDGES OF THE CMCR, JUDGES HERRING AND BURTON DO NOT MEET THE UCMJ REQUIREMENTS OF APPELLATE MILITARY JUDGES; AND 3) THE ASSIGNMENT OF INFERIOR OFFICERS AND PRINCIPAL OFFICERS TO A SINGLE JUDICIAL TRIBUNAL ITSELF VIOLATES THE APPOINTMENTS CLAUSE OF THE U.S. CONSTITUTION.

Facts

Congress passed and the President signed the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) in response to the Supreme Court's decision in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). In 2009, President Obama halted all military commission proceedings, stating that the 2006 Act had "failed to establish a legitimate legal framework." Remarks by the President on National Security (May 21, 2009). President Obama urged Congress to make the "military commissions a more credible and effective means of administering justice." *Id*. Accordingly, Congress enacted the Military Commissions Act of 2009. Title XVIII, National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111–84, 123 Stat. 2190, 2574 (2009). One goal of the legislation was to "strengthen the military commissions system during appellate review." 155 CONG. REC. S7381 (Jul. 13, 2009) (Statement of Sen. McCain).

The 2009 Act replaced the original Court of Military Commission Review (CMCR), merely an agency review board under the Secretary's supervision, with a

new CMCR as the fifth independent Article I court of record in the federal system.[27] *See* 10 U.S.C. § 950f(a) (establishing the CMCR as a "court of record"). "Court of record" is a term of art used by Congress to establish a tribunal that is functionally independent of the political branches, and the 2009 Act utilized this term.

Consistent with the CMCR's elevated status as a "court of record," the 2009 Act required the President to appoint civilian judges through the Appointments Clause. 10 U.S.C. § 950f(b)(3).[28] In addition, the 2009 Act retained the Secretary's ability to assign "commissioned officers of armed forces" to also serve as appellate judges. 10 U.S.C. § 950f(b)(2). A CMCR judge, therefore, "shall be *assigned or appointed*." 10 U.S.C. § 950f(b)(1). Accordingly, a CMCR judge may be either

[27] There are four other Article I courts of record: (1) the United States Court of Appeals for the Armed Forces (10 U.S.C. § 941); (2) the United States Tax Court (26 U.S.C. § 7441); (3) the United States Court of Federal Claims (28 U.S.C. § 171); and (4) the United States Court of Appeals for Veterans Claims (38 U.S.C. § 7251). This designation has also been used with respect to territorial courts established under Article IV. *See* 48 U.S.C. § 1424(a)(3) (District Court of Guam); 48 U.S.C. § 1611(a) (District Court for the Virgin Islands); 48 U.S.C. § 1821(a) (District Court for the Northern Mariana Islands). The judges on these courts have statutory tenure to ensure their judicial independence.

[28] The statute is silent with respect to the removal of appointed civilian judges. Given the adjudicative nature of the tribunal, Congress is presumed to have intended them to be removable by the President only for good cause. *Wiener v. United States*, 357 U.S. 349, 356 (1958) (President has no inherent power to remove constitutionally appointed quasi-judicial officers "and none is impliedly conferred upon him by statute simply because Congress said nothing about it.").

assigned by the Secretary of Defense or appointed by the President (by and with the consent of the Senate). *Compare* 10 U.S.C. § 950f(b)(2) *with* 10 U.S.C. § 950f(b)(3).

The Secretary of Defense assigned Colonel Herring and Lieutenant Colonel Burton to the CMCR on September 10, 2015.[29] Interestingly, they were both later appointed to that court by the President with the consent of the Senate.

After Judges Herring and Burton were assigned by the Secretary, a challenge was made against a CMCR Judge in the D.C. Circuit. In *In re Al-Nashiri*, 791 F.3d 71 (D.C. Cir. 2015), the petitioner sought a writ of mandamus and prohibition to disqualify appellate military judges (like Judge Herring and Judge Burton) who were assigned by the Secretary of Defense to the CMCR on the basis that their assignment violated the Appointments Clause of the Constitution. The court declined to issue the writ, finding that the petitioner did not provide the clear and indisputable right required to grant extraordinary relief, and noting:

> There may be another reason to pump our judicial brakes. Once this opinion issues, the President and the Senate could decide to put to rest any Appointments Clause questions regarding the CMCR's military judges. They could do so by re-nominating and re-confirming the military judges to be CMCR judges. Taking these steps—whether or not they are constitutionally required—would answer any Appointments Clause challenge to the CMCR.

[29] *See* Office of Military Commissions Webpage, USCMCR Judges, available at http://www.mc.mil/Portals/0/pdfs/CMCRJudges/Judge%20Herring%20Bio.pdf; http://www.mc.mil/Portals/0/pdfs/CMCRJudges/Judge%20Burton%20Bio.pdf (last visited 14 Oct. 2016).

Nashiri, 791 F. 3d at 86 (emphasis in original).

Subsequently, on March 14, 2016, the President nominated Colonel James W. Herring and Lieutenant Colonel Paulette V. Burton, to be judges on the CMCR. 162 CONG. REC. S1474 (daily ed. Mar. 14, 2016). The nominations were made pursuant to 10 U.S.C. § 950f(b)(3), which permits the President, with advice and consent of the Senate, to appoint additional judges to the CMCR. Specifically, the appointment stated:

> The following named officers [are nominated] for appointment in the grades indicated in the United States Army as appellate military judges on the United States Court of Military Commission Review under Title 10 U.S.C. Section 950f(b)(3). In accordance with their continued status as appellate military judges pursuant to their assignment by the Secretary of Defense and under 10 U.S.C. Section 950f(b)(2), while serving on the United States Court of Military Commission Review, all unlawful influence prohibitions remain under 10 U.S.C. Section 949b(b).

162 CONG. REC. S1474. The nomination was confirmed on 28 April 2016. 162 CONG. REC. S2600.

Law and Argument

A. Judge Burton and Judge Herring's acceptance of appointment as a CMCR Judge terminated their military commissions.

Judges Herring and Burton's commissions were terminated upon appointment to a civil office, thus rendering them unqualified to sit on the Army Court. Federal law generally prohibits active duty officers from holding civil office in the

Government of the United States. 10 U.S.C. § 973 (2012). Such offices include positions that require "an appointment by the President by and with the advice and consent of the Senate." 10 U.S.C. § 973(b)(2) (2012). Thus the plain reading of the statute requires termination, revocation, or, at a minimum, resignation of an active duty officer's commission.

Congressional intent also supports the conclusion that an active duty officer should be precluded from holding a civil office such as an appointment to the CMCR. This statute was created to "prevent the military establishment from insinuating itself into the civil branch of government and thereby growing 'paramount' to it." *Riddle v. Warner*, 522 F. 2d 882, 884 (9th Cir. 1975). "Congress was also interested in assuring the efficiency of the military by preventing military personnel from assuming other official duties that would substantially interfere with their performance as military officers." *Id*.

Significantly, just four years after *Riddle* was decided the Department of Justice Office of Legal Counsel was asked to opine on whether "a commissioned military officer can retain his commission if he accepts a Presidential designation as Acting Administrator of General Services." Memorandum 79-23; 2 U.S. Op. Off. Legal Counsel 148 (1979). Citing *Riddle*, the Office of Legal Counsel concluded that the officer could not retain his commission under such circumstances:

> [A] military officer who does not occupy a statutory office in a military department is not eligible for designation as Acting Administrator of General Service and that, in any event, acceptance or the exercise of its functions would result in the termination of his military commission.

Id. While 10 U.S.C. § 973 was later amended, the Standards of Conduct Office opined in 2002 that the statute "as a general rule, requires retirement or discharge for members elected or appointed to a prohibited civil office." DoD SOCO, Advisory Number 02-21, What Constitutes Holding a "Civil Office" by Military Personnel (2002). *See also* DoDD 1344.10, ¶ 4.4.

Thus, by being appointed to the CMCR, and by further performing the duties of that office, the military commissions of Judge Herring and Judge Burton were ended as a matter of law. Accordingly, their continued service on the Army Court is void. *See United States v. Janssen*, 73 M.J. 221 (C.A.A.F. 2014). And any decision rendered by them after their appointments to the CMCR is also void.

B. As appointed judges of the CMCR, Judges Herring and Burton do not meet the UCMJ requirements for appellate military judges.

Judges Herring and Burton's appointment as civilians to the CMCR under 10 U.S.C. § 950f(b)(3) causes them to no longer meet the statutory definition of either a military judge or appellate military judge because they are no longer assigned or directly responsible to the Judge Advocate General (Army JAG).

Article 26(c), UCMJ, provides:

> A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial may perform such duties *only when he is assigned and directly responsible to the Judge Advocate General, or his designee*, of the armed for of which the military judge is a member and may perform duties of a judicial or nonjudicial nature other than those relating to his primary duty as a military judge of a general court-martial when such duties are assigned to him by or with the approval of that Judge Advocate General or his designee.

10 U.S.C. § 826(c)(emphasis added). However, when appointed to a position on a civilian court of record, where independence is a requirement, they are no longer assigned and directly responsible to the Army JAG. Therefore, in accordance with 10 U.S.C. § 949b(4), Judge Herring and Judge Burton are—at most—assigned to the Secretary of Defense as appellate military judges on the CMCR.

With respect to "appellate military judges," Article 66(a), UCMJ, requires the Judge Advocate General to establish a Court of Criminal Appeals, "which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges." 10 U.S.C. § 866(a) (2012). Judge Herring and Judge Burton, however, are judges of an Article I court of record, and nothing in the plain language of Article 66 permits the Judge Advocate General to assign them to a Court of Criminal Appeals. Once appointed to the higher court, the assignment of Judge Herring and Judge Burton to the Army Court is no more valid than an assignment of a judge from the United States Court of Appeals for Veterans Claims to the Army Court.

C. The assignment of inferior officers and principal officers to a single judicial tribunal itself violates the Appointments Clause of the U.S. Constitution.

The assignment of Judges Herring and Burton to the Army Court violates the appointments clause because, as superior, principal officers, they cannot serve on a court supervised and constituted by "inferior officers." To hold otherwise would vitiate the constitutional distinction between principal and inferior officers under Appointments Clause jurisprudence.

In *Weiss v. United States*, 510 U.S. 163 (1994), the Supreme Court concluded that military officers assigned to sit as appellate judges on the service Courts of Criminal Appeals act as "inferior officers." Accordingly, a military officer's assignment to an intermediate service court does not offend the Appointments Clause because they are performing duties within the scope of an office to which they were properly appointed, and supervised at all times by superior officers within the Executive Branch. Three years later in *Edmond v. United States*, 520 U.S. 651 (1997), the Court reiterated that none of the judges on the services' Courts of Criminal Appeals, including civilians appointed by a Department Head, qualify as principal officers.

By contrast, CMCR judges are principal officers for Appointments Clause purposes. *See Intercollegiate Broadcasting Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1338-1340 (D.C. Cir. 2012) (Copyright Royalty Board judges were

principal officers); *Soundexchange, Inc. v. Librarian of Congress*, 571 F.3d 1227, 1226-27 (D.C. Cir. 2009) (Kavanaugh, J., concurring) (same); *United States v. Libby*, 498 F.Supp.2d 1, 13 (D.D.C. 2007) ("[I]f the scope of authority given to the Special Counsel by the [Attorney General] encompassed duties that no inferior officer could possess, this [would be] strong evidence that the Special Counsel is a principal officer for Appointments Clause purposes.").

Thus, the assignment of inferior officers and appointment of principal officers to a single judicial tribunal itself violates the Appointments Clause by vitiating the constitutional distinction. An inferior officer is necessarily subordinate to some other superior officer in the Executive Branch. *See Edmond*, 520 U.S. at 662 ("Whether one is an 'inferior' officer depends on whether he has a superior."). For the active duty judges of the Army Court, that superior is the Judge Advocate General of the Army. A principal officer, however, is a presidential appointee who may not be made a subordinate of an inferior officer. Accordingly, assignment of principal and inferior officers to a single tribunal, as occurred in appellant's case, undermines this Constitutional distinction.

Justice Alito highlighted precisely this problem in *DoT v. Association of American Railroads*, 135 S. Ct. 1225 (2015). The assignment of Amtrak's President raised constitutional problems similar to those in this case, insofar as Amtrak's board operates, like this Court, as an independent multimember body. Justice Alito

concluded that any member could "cast the deciding vote with respect to a particular decision. One would think that anyone who has the unilateral authority to tip a final decision one way or the other cannot be an inferior officer." 135 S. Ct. at 1239 (Alito, J., concurring).

Finally, even if it was possible to serve on the Army Court as a principal officer, an additional appointment by the president would be necessary because Army Court duties are not germane to CMCR duties. *See United States v. Weiss*, 36 M.J. 224, 228 (C.M.A. 1992) (holding a second appointment required if duties of appointed officer are not germane to the duties of the appointed office).

Ultimately, "[t]he Appointments Clause of Article II is more than a matter of 'etiquette or protocol;' it is among the significant structural safeguards of the constitutional scheme." *Janssen*, 73 M.J. at 221 (citation omitted). In the wake of his appointment to the CMCR, an Article I Court, the participation of Judge Herring and Judge Burton in SFC Hennis' case renders the Army Court's decision void.

VI.

BECAUSE THE EN BANC PANEL IS IMPROPERLY COMPOSED, THE ARMY LACKS PROPERLY DESIGNATED OFFICIALS TO REMEDY THE COMPOSITION, AND NEW ASSIGNMENTS OF ERROR MUST BE REVIEWED, THIS "IS AN EXTRAORDINARY CIRCUMSTANCE WHICH DIRECTLY AND ADVERSELY AFFECTS THE NORMAL COURSE OF APPELLATE REVIEW." *WALKER V. UNITED STATES*, 60 M.J. 354, 359 (C.A.A.F. 2004).

Law and Argument

This is an extraordinary circumstance with directly affects the normal course of appellate review because the panel is improperly constituted, the Army lacks properly designated officials to remedy the composition, and numerous assignments of error must be reviewed under Article 66, UCMJ. In *Walker*, this Court found that a writ should issue where a conflicted Chief Judge took direct action on a case by assigning a replacement Senior Judge to the panel reviewing a capital case. 60 M.J. at 359. In granting the writ, this Court found a writ was necessary because the "[p]etitioner's case is pending Article 66 review before a court lacking a properly designated official" who can remedy the improper panel composition. *Id*.

Petitioner lacks a properly constituted panel without a properly designated official to remedy the panel because the Army JAG, DJAG, and Chief Judge are all conflicted from petitioner's case. If this Court determines any of the above assignments of error in petitioner's favor, the Army Court en banc panel is improperly composed. Under the first basis for writ, the Army JAG's actions render the entire court improper and there are no Army officials which could remedy the court. If the second basis for writ alone supports relief, then the failure to ensure disqualifications by the Army SOP renders the court without remedy to replace judges. Finally, if the third basis for writ alone supports relief, then the

panel of two remaining judges would, at a minimum, violate Article 66, UCMJ, mandate for a panel consisting of at least three members and there is currently no remedy. Thus, relief on any of the above grounds would constitute an extraordinary circumstance warranting review. *See Walker*, 60 M.J. at 359.

Similar to Walker, petitioner's Article 66 review is ongoing and has eight new assignments of error to be reviewed before the Army Court. In *Walker*, this Court emphasized that review under Article 66 was a critical element for achieving finality in a capital conviction. *Walker*, 60 M.J. at 359. In a motion after oral argument, petitioner requested additional time to file additional *Grostefon* matters and eight assignments of error to include ineffective assistance of counsel. (Appendix D at 154). These assignments of error were not raised due to previous denials of resources needed to conduct timely investigation in order to file motions to attach and create a factual record. (Appendix D at 134, 185, 214). In denying the motion, the Army Court recognized that it would likely review those assignments of error in a motion for reconsideration. (Appendix D at 288-89)(stating "Nothing in this order shall prejudice appellant from raising the same or similar issues in any motion for reconsideration of this Court's Article 66, UCMJ, review"). Thus, a reconsideration of the Army Court's Article 66 review based on previously unraised issues constitutes the normal course of appeals. Thus, similar to *Walker*, these extraordinary circumstances require this Court's

action to ensure the normal course of appellate review under Article 66, UCMJ.

See Walker, 60 M.J. at 359

VIII

Respondent's Contact Information

The United States is the respondent.

CARLING M. DUNHAM
Captain, Judge Advocate
Appellate Attorney
Government Appellate Division
9275 Gunston Road, Suite 3200
Fort Belvoir, VA 22060
(703) 693-0767
carling.m.dunham.mil@mail.mil

SAMUEL E. LANDES
Captain, Judge Advocate
Branch Chief
Government Appellate Division
9275 Gunston Road, Suite 3200
Fort Belvoir, VA 22060
(703) 693-0779
samuel.e.landes.mil@mail.mil

A.G. COURIE III
Lieutenant Colonel, Judge Advocate
Deputy,
Government Appellate Division

MARK H. SYDENHAM
Colonel, Judge Advocate
Chief,
Government Appellate Division

Conclusion

Because the petitioner's panel is improperly composed, petitioner hereby prays for an order vacating the lower court's opinion and for an order directing that petitioner receives a properly constituted panel of appellate judges appointed and assigned without conflict to review his capital appeal under Article 66, UCMJ. In the alternative, petitioner requests this Court appoint a special master to collect evidence for this Court to determine whether the appellate judges abused their discretion in failing to recuse themselves from petitioner's case.

Respectfully submitted,

/s/ RYAN T. YODER
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
CAAF Bar No. 36337
9275 Gunston Road, Suite 3200
Fort Belvoir, VA 22060
(703) 693-0666
ryan.t.yoder.mil@mail.mil

Certificate of Compliance with Rule 24(d)

This brief complies with the type-volume limitation of Rule 24(d) because it contains 13319 words. It also complies with the typeface and type style requirements of Rule 37.

/s/ RYAN T. YODER
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
CAAF Bar No. 36337
9275 Gunston Road, Suite 3200
Fort Belvoir, VA 22060
(703) 693-0666
ryan.t.yoder.mil@mail.mil

Certificate of Filing and Service

I certify that I have, this November 23, 2016 filed and served the foregoing Petition for a Writ of Mandamus by emailing copies to the Clerk of the Court and the Government Appellate Division at the following email addresses:

efiling@armfor.uscourts.gov
usarmy.pentagon.hqda-otjag.mbx.usalsa-gad@mail.mil

A copy of the petition has also been delivered to the Clerk of Court, U.S. Army Court of Criminal Appeals.

/s/ RYAN T. YODER
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
CAAF Bar No. 36337
9275 Gunston Road, Suite 3200
Fort Belvoir, VA 22060
(703) 693-0666
ryan.t.yoder.mil@mail.mil