No. 12-5038

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EARLE A. PARTINGTON,

Petitioner,

v.

JAMES W. HOUCK, Vice Admiral, JAGC, USN(Ret.); ROBERT A. PORZEINSKI, Captain, JAGC, USN; ROBERT B. BLAZEWICK, Captain, JAG, USN; CHRISTOPHER N. MORIN, Captain, JAGC, USN; and UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES,

Respondents.

ON PETITION FOR REVIEW FROM THE UNITED STATES COURT OF APPEALS PANEL FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION OF EARLE A. PARTINGTON FOR RECONSIDERATION AND FOR REHEARING EN BANC

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Pursuant to Rules 35(b) and 40 of the Federal Rules of Appellate Procedure, Earle A. Partington, appellant-plaintiff in the instant case, petitions for a rehearing in this case, decided on July 23, 2013. Petitioner also respectfully suggests that, in view of the significance of the issues involved, the case be reheard by this court en banc.

In support of this petition, petitioner contends (1) that the panel opinion misapprehended the essential thrust of petitioner's principal arguments, and the nature of the United States Navy Judge Advocate General (NJAG)'s order; (2) that the opinion of the majority, deciding Partington's claims on the merits, denied his right to judicial review by the district court and appeal therefrom; and (3) that this case involves questions of sufficient importance, involving not only petitioner but all private defense counsel representing defendants within the military court system, that rehearing en banc would be appropriate.

STATEMENT REQUIRED BY RULE 35(b)

Partington represented the accused in *United States v. Toles* in court-martial at Pearl Harbor, Hawaii, and on appeal to the United States Navy-Marine Court of Criminal Appeals.[1] At the court-martial, *Toles* pled guilty to a number of charges and specifications, including a number of specifications charging video voyeurism

[1] The facts are taken from the record as cited in Partington's opening brief in the instant case.

under 18 U.S.C. § 1801. However, the Navy prosecutor apparently had drafted the video voyeurism specifications such that those specifications failed to allege the offenses. After Toles pled guilty, Partington raised the issue of whether video voyeurism was improperly charged and moved to dismiss the video voyeurism specifications. He told the military judge that:

> "I just want to correct one point. Our position is not that he knows he's not guilty because there's no offense. Our position is we are unsure whether this is an offense, alleges an offense, based on his plea, under [United States v.] Watkins, [21 M.J. 208 (C.M.A. 1986),] and this is why we did. We do not know what the Court would rule with regard to that." [JA 218; AR at 1003].

In response, the military judge at Toles' court-martial had stated as follows:

> "That's the posture of the case at this point. Is that -- and now having said that, I need to determine if I need to go further at this point to discuss this motion because at this point what we now have is a situation where the pleas are set aside and I have entered findings of not guilty on these [video voyeurism specifications] without taking the additional step of further questioning the accused at this point.
>
> And having made that determination, the question of where we go from there, there's certainly ways in which this could proceed even as today. The Government could choose to seek to try to amend, of course, it cannot do so without the consent of the accused, at which point by amending, if the accused consents, there is the likelihood that a pretrial agreement would stand and we would proceed on today. Or if the defense chooses not to do so, we will proceed on with it in the posture of me next determining what to do with

> this matter in the event the Government chooses to go forward with these charges.
>
> Okay. *Any of that unclear?*" [No response.] [Emphasis added.] [JA 216, AR 1001.]

At no time did the Navy prosecutor move to set aside these findings of not guilty to the video voyeurism specifications nor did the military judge ever set aside these findings or state that he had misspoke.

On appeal to the Navy-Marine Court of Criminal Appeals, Partington in the *argument* portion of Toles' opening brief (at 8A) stated in a timeline paragraph that:

> The military judge below, after Toles had entered his guilty pleas and had them accepted, ruled that the video voyeurism specifications (specifications 2 through 21 and 23 of charge IV) did not allege that offense because of the failure of the government to allege that the offenses had been committed in the special maritime and territorial jurisdictions [sic] of the United States, an element of 18 U.S.C. § 1801. In these specifications, the government had alleged violations of this federal statute via UCMJ Art. 134. *The military judge then ruled that he had "acquitted" Toles of these specifications. Toles had moved for neither an acquittal nor a dismissal of these specifications.*[2]
>
> The United States Supreme Court has defined an acquittal as a resolution, correct or not, of some or all of the factual elements of the offense charged. *Sanabria v. United States*, 437 U.S. 54, 71 (1978); *Lee v. United States*, 432 U.S. 23, 30 n.8 (1977). As the military judge

[2] The one error Partington made was an editing error. The two italicized sentences should have been in reverse order. The Navy defendants never caught this immaterial editing error.

> clearly had not resolved any of the factual elements of the video voyeurism specifications, the military judge's "acquittal" was not an acquittal for double jeopardy purposes.[5] Rather, the military judge dismissed those specifications for failure to allege an offense, a legal issue. The issue presented is what is the effect of that dismissal." [emphasis added]
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>
> [5]As an accused cannot be found guilty or not guilty of a specification that does not allege an offense, the military judge's entry of not guilty pleas to the charged offenses in these specifications as without any legal effect, something the military judge appeared to realize by accepting Toles' pleas to the included offenses of disorderly conduct. [JA 253-254, AR 606-607, Toles OB at 7-8.]

The two italicized statements became the *sole* basis for all of the unethical conduct (i.e., intentional false statement) allegations made by the Navy defendants against Partington. When Partington made repeated written requests to the Navy hearing officer to be informed how these statements were false, no answers were forthcoming. Further, the Navy defendants made no allegations of materiality. Relying on footnote 4 of *In re Ruffalo,* 390 U.S. 544, 551, n.4 (1968), Partington refused to participate in the hearing as he had no idea what the falseness was in these materially true statements. The Navy defendants, *inter alia,* refused to respond. No allegations were made against Partington for his conduct at the court-martial. No hearing was actually held.

If these statements are materially true, then Partington cannot be guilty. The Navy has offered no evidence at any time to show the material falseness of these

statements. What the Navy hearing officer did in his findings is critical in the instant appeal.

As to the first statement, the Navy hearing officer acknowledged what the military judge had said (entering findings of not guilty), but ruled that the military judge had misspoken and thus Partington's literally true statement was somehow intentionally false. As to the second statement, the hearing officer first changed the past perfect verb used by Partington (to indicate the lack of an act or omission in the past before another act or omission in the past) to an ordinary past tense (to indicate something that *never* happened in the past) and then found Partington guilty of making an intentional false statement that he *never* made.

When Partington sought judicial review in the district court, the Navy defendants convinced the court that Partington had no right to any relief, including judicial review. *Partington v. Houck*, 840 F.Supp.2d 236 (D.D.C. 2012). On appeal, the Navy defendants confessed error as to the denial of judicial review and the panel ("the panel) who decided the appeal affirmed (Op. at 16-18). Instead of remanding this case to the district court for the judicial review to which Partington was entitled, the panel, without notice to Partington, took upon itself the district court's jurisdiction and duty of judicial review and affirmed the district court finding against Partington on his due process claims. Also, the panel never addressed the Navy's manipulation of the facts in the hearing officer's findings.

ARGUMENT

I. THE COURT OF APPEALS PANEL EXCEEDED ITS JURISDICTION AND DENIED PARTINGTON HIS RIGHT TO PROCEDURAL DUE PROCESS IN DECIDING THE MERITS OF HIS COMPLAINT FOR JUDICIAL REVIEW WHEN THE DISTRICT COURT HAD NEVER JUDICIALLY REVIEWED HIS APA CLAIM, AND THE DISTRICT COURT, NOT THE COURT OFAPPEALS, HAD JURISDICTION TO REVIEW PARTINGTON'S CLAIM IN THE FIRST INSTANCE.

The law on the scope of appeal as it pertains to the courts of appeal has been discussed in depth throughout the federal courts of appeal and for purposes of this case, adequately supports Partington's argument that the panel exceeded the legitimate scope of judicial review of an agency adjudication where the district court *never* decided Partington's APA claim on the merits. The appellate jurisdiction of the court of appeals is prescribed by statute and limited, except in instances not here relevant, to 'final decisions' of the district courts. *Dugan & McNamara, Inc. v. Clark*, 170 F.2d 118, 119 (3d Cir. 1948), *Tye v. Hertz Drivurself Stations*, 173 F.2d 317, 318 (3d Cir. 1949).

The courts of appeal have an independent duty to determine their own jurisdiction. "Because district courts have general federal question jurisdiction under 28 U.S.C. § 1331, the normal default rule is that persons seeking review of agency action go first to district court rather than to a court of appeals. Initial review [of agency decisions] occurs at the appellate level only when a direct-review statute specifically gives the court of appeals subject-matter jurisdiction to

directly review agency action." *Watts v. SEC*, 482 F.3d 501, 505 (D.C.Cir.2007) (internal quotation marks and citations omitted). *See also, Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1287 (D.C. Cir. 2007). Moreover, jurisdiction cannot be conferred by consent. *Indus. Addition Ass'n v. C.I.R.*, 323 U.S. 310 (1945).

Given that the district court *never* reviewed Partington's APA claim, the panel was barred from deciding the issue on the merits in the *first* instance because this issue was not before this court. The panel should have remanded the case to the district court for *initial* judicial review. If Partington had filed the case in the court of appeals, it would have been dismissed because the court of appeals has only appellate jurisdiction unless otherwise provided by statute. In the instant case, Partington filed in district court, but the district court refused to rule on the merits mistakenly holding that Partington had no right to judicial review under 5 U.S.C. § 706. The panel then decided to assume the district court's jurisdiction and decide the APA claim in the first instance without there being any review in the district court. How does this latter situation differ from the first example above? It does not differ at all.

The court of appeals has no jurisdiction to adjudicate claims which had never been adjudicated in the first instance. Where the court of appeal holds that a district court erred in holding that there is no judicial review, the court of appeals

only has jurisdiction to remand the case back to the district court for the initial review on the merits. The court of appeals can then review that issue *only* on a new appeal following review in the district court.

Discretionary considerations of "fairness or efficiency" do not authorize the panel to disregard plain statutory terms assigning a different court *initial* subject-matter jurisdiction over a suit. [The court of appeals is] "not at liberty to displace, or to improve upon, the jurisdictional choices of Congress." *Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1287-88 (D.C. Cir. 2007) *quoting Five Flags Pipe Line Co. v. Dep't of Transp*., 854 F.2d 1438, 1441 (D.C.Cir.1988).

28 U.S.C. § 1291 provides the scope of the court of appeals' exclusive jurisdiction in hearing cases on appeal and states:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

In the instant case, Partington's APA claim had never been adjudicated in the district court and reading the "plain statutory terms" of §1291, the terminology of which is to be strictly construed, is clear evidence that the panel exceeded the bounds of its jurisdiction under §1291 and denied Partington his right to an appeal from the district court's judgment on the merits of his APA claim.

By deciding the APA claim for the first time on the merits without the district court ever having decided it, the panel specifically denied Partington fundamental due process rights as follows:

- Had the Navy defendants been forced to answer, they would have been forced to admit the truth of Partington's first statement and that the verb tense in the second statement had been changed from the past perfect tense to the past tense;

- Had the Navy defendants refused to admit the above, Partington could have moved for rule 11 sanctions.

- The panel gave Partington no notice that they were going to assume the district court's jurisdiction to decide Partington's APA claim on the merits when Partington had requested that the Panel remand the case to the district court for judicial review.[3]

- Partington has been denied any *appeal* from judicial review by the panel, something that would have been available had the district court decided the APA claim in the first instance.

- Partington could have appealed the court of appeal's decision (if made in the district court) impliedly stating that there was a standard of proof requirement for the Navy hearing in the Navy regulation when in truth there is no such standard of proof in the Navy regulation.[4]

- If the district court had ignored the fact (as the panel did) that, as to the second allegedly false statement, that the Navy had changed the verb Partington used, from a past perfect tense to the past tense and then found him guilty of making an intentionally false statement that he never made, Partington could have appealed raising this omission as a central point of his appeal.

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[3] Partington's Opening Brief (at 55) and Reply Brief (at 26) sought the relief of remand to the district court. At oral argument, Partington specifically argued that the district court was the court that has judicial review in the first instance.

[4] The section of the Navy regulations cited by the court of appeals (at 11) refers to the standard of proof at the "preliminary investigation", not at the Navy hearing.

- If the district court had ignored the fact (as the panel did) that the Navy never alleged that any of Partington's allegedly false statements were material, Partington could have appealed and raise this omission as a central point of his appeal.

- If the district court had ignored the fact (as the panel did) that the Navy defendants had failed, despite repeated requests, to give notice as to how the allegedly false statements were false, Partington could have appealed, raising this omission as a central point of his appeal.[5]

- If the district court had ignored the fact (as the panel did) that Partington was constitutionally obligated to raise the issue arising out of the first allegedly false statement, Partington could have raised this point citing *McCoy v. Court of Appeals of Wisconsin, Dist. 1*, 486 U.S. 429, 442 (1988). Further, Partington was under an ethical obligation not to do harm to his client by informing the government before he did that the video voyeurism specifications possibly failed to allege the charged offenses.

II. THE PANEL ERRED IN HOLDING THAT THE NJAG HAS STATUTORY AUTHORITY TO IMPOSE DISCIPLINE UPON CIVILIAN DEFENSE ATTORNEYS WHO APPEAR AT NAVAL COURTS-MARTIAL

UCMJ Art. 36(a) (10 U.S.C. § 836(a)), the *sole* source of the President's power to prescribe regulations on the subject in issue, is *limited* to "*cases arising under this chapter* [the UCMJ] in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry…" [Emphasis added].

Under Art. 2(a)(10 U.S.C. §802(a)), the persons *subject to this chapter* are clearly

[5] This failure to inform Partington how his materially true statements were false denied him due process because he was placed in the identical situation as the respondent in *In re Ruffalo*, 390 U.S. 544, 551 n.4 (1968). In other words, the Navy defendants wanted Partington to testify at the Navy hearing so that it could then, based on his testimony, decide how his statements were false.

set out,[6] not one subsection of which applies to civilian attorneys who appear in courts-martial in the United States nor is there any subsection which states one consents to such jurisdiction under the circumstances.

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[6] UCMJ Art. 2(a) provides:

(a) The following persons are subject to this chapter:

(1) Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of their actual induction into the armed forces; and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it.

(2) Cadets, aviation cadets, and midshipmen.

(3) Members of a reserve component while on inactive-duty training, but in the case of members of the Army National Guard of the United States or the Air National Guard of the United States only when in Federal service.

(4) Retired members of a regular component of the armed forces who are entitled to pay.

(5) Retired members of a reserve component who are receiving hospitalization from an armed force.

(6) Members of the Fleet Reserve and Fleet Marine Corps Reserve.

(7) Persons in custody of the armed forces serving a sentence imposed by a court-martial.

(8) Members of the National Oceanic and Atmospheric Administration, Public Health Service, and other organizations, when assigned to and serving with the armed forces.

(9) Prisoners of war in custody of the armed forces.

(10) In time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field.

(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

(12) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons within an area

If Congress intended to grant disciplinary jurisdiction over civilian defense attorneys, it would have done so expressly. The fact that it has not done so is no doubt the result of a realization that serious constitutional issues would arise. See *Reid v. Covert*, 354 U.S. 1 (1957); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960); *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960). Congress could possibly vest this jurisdiction in the Court of Appeals for the Armed Forces. It is at least a court and a civilian court at that, albeit an Article I court. The fundamental principle of civilian supremacy over the military prevents it from being invested in a court staffed by military officers such as the Navy-Marine Court of Criminal Appeals or with a military officer as in the instant case.[7]

The panel relied upon R.C.M. 109(a) as its authority for Navy disciplinary jurisdiction over civilian attorneys. However, the R.C.M. is part of the Manual for

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> leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.
> **(13)** Individuals belonging to one of the eight categories enumerated in Article 4 of the Convention Relative to the Treatment of Prisoners of War, done at Geneva August 12, 1949 (6 UST 3316), who violate the law of war.

[7] The Navy defendants claim that Partington consented to Navy disciplinary jurisdiction and the panel so found (at 10-11). The Navy defendants falsely claim that Partington "consented" to Navy disciplinary jurisdiction (AB at 22) when all he did was "agree to abide by" the JAGINST. The JAGINST contains the Navy Rules of Professional Conduct. One is not bound by the Rules of Professional Conduct by consent, but as a matter of law.

Courts-Martial which constitutes the regulations promulgated by the President under UCMJ Art. 36. These regulations cannot expand the limitations on the President's power imposed by Art. 36. The panel's findings that the President has this power by implication is contradicted by the fact that Congress has only granted such power before by *express* authorization. (Op. at 10)

Further, the panel just ignored the constitutional implications of this power. Civilian supremacy over the military is fundamental to American constitutional law. Giving military officers the power instead of giving it to civilians could have frightening implications to that fundamental principle.

CONCLUSION

Since this case has gone to court, the Navy defendants have used the full resources of the United States Government to paint Partington as an unethical lawyer, something which he is not. By denying him his right to judicial review in the district court and an appeal there from, the Navy defendants have been able to maintain this misinformation campaign against Partington. Further, Partington has been prevented from showing that it is the Navy defendants who are playing fast and loose with the truth, not Partington. For all of the foregoing reasons, petitioner requests that this court stay the mandate until the relief requested in the remainder of the petition is adjudicated (i.e. reconsideration and/or rehearing en banc) which he requests the court to grant.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. PARTIES

Earle A. Partington is the petitioner in this case. The respondents are James W. Houck, Vice Admiral (Ret.), JAGC, USN, Robert A. Porzeinski, Captain, JAG, USN, C.N. Morin, Captain, JAG, USN, and the United States Court of Appeals for the Armed Forces. Amici supporting Partington include: Arthur B. Spitzer and Daniel M. Gluck of the American Civil Liberties Union of the Nation's Capital, *et al*.

II. RULINGS UNDER REVIEW

The ruling under review in this case is the decision of the United States district court affirming NJAG's disciplinary proceedings against Partington. On July 23, 2013, a panel of this court affirmed the district court's decision and order in *Partington v. Houck*, 840 F. Supp. 2d 236 (D.D.C. 2012) which dismissed his case for the lack of judicial review. The panel's opinion is appended to this petition.

DATED: July 30, 2013.

EARLE A. PARTINGTON
Plaintiff-Appellant

By his attorneys,

/s/ JEFFREY A. DENNER
Jeffrey A. Denner

/s/ CHARLES W. GITTINS
Charles W. Gittins

/s/ EARLE A. PARTINGTON
Earle A. Partington, Appellant-Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of July, 2013, the foregoing Petitioner's Petition for Reconsideration and/or a Rehearing En Banc was served via this Court's Electronic Case Filing System.

Jeffrey A. Denner