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Brief of Professors of Law, US v. Bergdahl

Joshua E. Kastenberg
University of New Mexico - School of Law

Rachel E. Vanlandingham
Southwestern Law School

Geoffrey S. Corn
South Texas College of Law

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	
	)	AMICUS BRIEF
Appellee,	)	in Support of
	)	APPELLANT
v.	)	
	)	
ROBERT B. BERGDAHL	)	
Sergeant (E-5)	)	Crim. App. Dkt. No
United States Army	)	ARMY 20170582
	)	USCA Dkt. No. 19-0406/AR
Appellant,	)	

AMICUS ARGUMENT OF
PROFESSOR JOSHUA E. KASTENBERG, UNIVERSITY OF NEW MEXICO, SCHOOL OF LAW; PROFESSOR RACHEL E. VANLANDINGHAM, SOUTHWESTERN LAW SCHOOL; AND PROFESSOR GEOFFREY S. CORN, SOUTH TEXAS COLLEGE OF LAW

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

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

PREAMBLE

When scrutinizing executive actions for unlawful command influence, this Court must account for a president's immense power over the military. The extant judicial test for unlawful command influence – a violation of due process in the military setting – is a contextual one, and hence must consider the unique and unparalleled authority of the Commander-In-Chief over the military and individual service-members when the president's actions are at issue. This executive power should also be evaluated in light of its myriad, and historically important, constitutional and statutory constraints – some predating the birth of the United States – that appropriately continue to shape U.S. military law.

A defect in due process of the magnitude associated with this appeal should be directly addressed and cured by an appellate court. Presidential interference in the administration of military justice by the current Commander-In-Chief has reached unprecedented levels.[1] Even recent *lawful* actions by the President in the military justice arena have created potentially broad, harmful ripple effects. *See e.g.*, "Esper to urge Trump not to intervene in cases of service members facing war

[1] In late July 2019, President Trump publicly ordered the Secretary of the Navy to rescind Navy achievement medals for the prosecution in the court-martial "United States v. Chief Petty Officer Eddie Gallagher." President Trump's express reasons for doing so included the inability of the prosecutors to "win." *See, e.g.*, Colby Itkowitz, Trump Orders Lawyers' Achievement Awards Revoked in Navy SEAL Murder Case, Washington Post, July 31, 2019.

crimes allegations," CNN, November 6, 2019. On November 15, 2009, the president exercised his constitutional authority and granted pardons to two service-members regarding war crimes; he also restored the rank of a third service member convicted of a war crime, despite recommendations against such actions from his civilian and military defense leadership. *See, e.g.*, Dave Phillips, "Trump's Pardons for Servicemen Raise Fears That Laws of War Are History," November 16, 2019.

These actions, albeit within the President's scope of lawful authority, triggered substantial criticism and, more importantly, expressions of concern that his interventions will undermine good order and discipline by discrediting the military justice system. If *lawful* presidential interventions in the military justice process create the perception (if not reality) of undermining good order and discipline and corroding confidence in the military justice system, it is axiomatic that *unlawful* interventions will produce a profoundly more troubling effect. It is therefore logical to infer that unlawful executive actions – here, the President's ratification of campaign-trial vilifications of Appellant during Appellant's court-martial, and the President's sentencing-day tweet censuring Appellant's military judge – risk even greater second-order systemic consequences.

The Commander-In-Chief wields far greater authority over military matters than any other commander or civilian defense official. As a result, the presidential

bully pulpit magnifies the deleterious consequences of the Commander-In-Chief's unlawful and improper efforts to influence the military justice system. Presidential conduct such as that associated with this appeal, therefore, most certainly created the appearance of unlawful command influence, no matter how diligent subordinate commanders and members of the military legal profession may have been in seeking to shield the process from this effect. Hence we believe this court should hold that in cases of actual or apparent unlawful command influence resulting from presidential statements or actions, the presumptive remedy must be dismissal. No other remedy matches the powerfully corrosive effect of the executive's erosion of the public's confidence in the military justice system.

INTEREST OF AMICUS

All amici are law professors and veterans. As former judge advocates, we have over 60 years of active-duty service amongst us, including combat zone deployments. We each have also deeply studied military law and its history. We believe the merits of the unlawful command influence at the Appellant's trial and appellate court level have not been properly resolved. We urge this Court to condemn the lack of due process evidenced by President Trump's exercise of apparent unlawful influence in Appellant's court-martial, noting that presidential influence in this case is unique in the annals of United States military history – to the detriment of military law. An objective, disinterested observer would believe

there is an erosion in the fairness of the military justice system when a president acts to influence the outcome of the adjudicative process by issuing statements or pronouncements that, due to his position, carry the imprimatur of authority regarding pending outcomes of a court-martial. As this Court is the first level of review not subject to military orders, it is appropriate now to raise the arguments contained within this brief.

ARGUMENT

I. PRESIDENTIAL POWER OF PERSUASION IS MAGNIFIED IN COMMAND CONTEXT AND ITS ABUSE IS WITHIN SCOPE OF STATUTORY PROHIBITION

The power of the President, according to Professor Neustadt, is the power to persuade.[2] While this observation generally applies to the citizenry as a whole, the Constitution empowers the President to command the nation's military forces. U.S. Const. art. II, § 2, cl. 1. Hence, in the military context, his power to persuade becomes the power to demand obedience. When and where the presidential power of persuasion exercised within the military justice system violates due process by eroding the legitimacy of the system, or by unlawfully reducing the independence of its players, are questions appropriately before this Court. While we agree with the facts and argument raised by Appellant, as well as with the conclusions found

[2] RICHARD E. NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP, 30 (1990).

in Judge Ewing's dissent, we separately argue for a context-appropriate approach to extending the prohibition of and remedies for unlawful command influence to situations involving presidential interference with military justice process – application of which merits Appellant relief.

When charting the contours of lawful executive action in military justice, it is essential to first note that Congress possesses the constitutional authority "to make Rules for the Government and Regulation of the land and naval forces." U.S. Const. art. I, § 8, cl. 14. *See also Solorio v. United States*, 483 U.S. 435, 438 (1987). Exercising this power, Congress has delegated to the President the authority to create procedural rules over military personnel subject to the Uniform Code of Military Justice (UCMJ). *See, e.g., United States v. Tanner*, 61 M.J. 649, 651 (N.M.C.C.A. 2005).[3] Thus, the President has not only the authority to issue orders to the armed forces, he or she may also exert a substantial measure of control over the military's judicial processes. Finally, this Court has the authority to address the impact of presidential conduct on courts-martial. *See, e.g., Ortiz v. United States*, 585 U.S. __ (2018).

Pursuant to its constitutional power, in 1950 Congress enacted Article 37 of the UCMJ prohibiting "unlawful command influence." Congress did so for the

[3] *See, e.g.*, 10 U.S.C. § 836 (2019). It must be noted that the President's power is limited to issuing rules consistent with the Constitution. *See, e.g.*, United States v. Kelson, 3 M.J. 139 (C.M.A. 1977).

purpose of ensuring due process for service-members tried in courts-martial without weakening the military's critical need to field disciplined and trained force. *Mundy v. Weinberger*, 554 F. Supp. 811, 820 (DC DC 1983); and *United States v. Lattrice*, 3. U.S.C.M.A. 487, 491 (C.M.A. 1953). *See* Rachel E. VanLandingham, MILITARY DUE PROCESS: LESS MILITARY & MORE PROCESS, 94 TUL. L. REV. 1, 65 (2019).

In prohibiting unlawful command influence, Congress did not specifically list the president, secretary of defense, or service-secretary; however, each of these civilian positions may serve as a convening authority and each is vested with the mantle of authority to issue lawful orders. *See, e.g.*, 10 U.S.C. § 822 (2019); *Martin v. Mott*, 25 U.S. 19, 30 (1827); *Fleming v. Page*, 50 U.S. 603, 615 (1850); and *Closson v. United States ex rel Armes*, 7 App. D.C. 460, 476-77 (CA DC 1896). When the traditional executive power (*e.g.*, the power to persuade) is injected into the military justice system by the president or any of the other civilian authorities in a manner intended to or having the effect of compromising an accused service-member's right to a fair trial, a clear opportunity for unlawful command influence exists. In such situations Article 37 and the Constitution's Fifth Amendment vest this Court with the duty to remedy it. *See e.g.*, *United States v. Boyce*, 76 M.J. 242, (C.A.A.F. 2017).

Additionally, R.C.M. 104(a)(1) as accepted by the Army Court of Criminal Appeals in its decision, *United States v. Bergdahl*, governs persons not subject to the U.C.M.J. but nonetheless vested with the mantle of command authority. It has long been demanded that executive branch agencies, including their leaders, comport with the rules of the agency when not in conflict with law. *See, e.g.*, *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Harmon v. Brucker*, 355 U.S. 579 (1959); and, *United States v. McDonald*, 55 M.J. 173, 175 (C.A.A.F. 2001). Thus, by the Department of Defense's own rules, as promulgated by the president, the president is required to refrain from interfering in any respect to the detriment of an accused service-member facing a court-martial or in the post-trial processing of a court-martial in which judge advocates and relevant officers perform the duties of assessing the results of the court-martial.

II. THE PROHIBITION AGAINST UNLAWFUL COMMAND INFLUENCE, A MANIFESTATION OF DUE PROCESS, PREDATES THE UCMJ

Due process in courts-martial is governed by the unique regime of law as applied to the necessities of military service and the national defense. *See, e.g. Middendorf v. Henry*, 425 US 25, 43 (1976). Unlawful command influence has been considered the "mortal enemy of military justice" because it undermines the fairness of military trials and the public's confidence in the same. *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986). Such influence exists if a reasonable

citizen, knowing all of the facts of a given case, would believe the military justice system to be unfair and, as such, lose confidence in the entire system. *N.G. v. United States*, 94 Fed. Cl. 375, 386 (Fd. Ct. Cl. 2010), citing *United States v. Lawson*, 33 M.J. 946, 950 (N.M.C.M.R. 1991). Public confidence may be undermined by the appearance of unlawful command influence as well. *United States v. Stoneman*, 57 M.J. 35, 42 (C.A.A.F. 2002). Most recently, in *United States v. Boyce*, 76 M.J. 242 (C.A.A.F. 2017), this Court reaffirmed that the appearance of unlawful command influence is a toxin equal to that of actual unlawful command influence. *Id.* at 248. Legitimacy of the rule of law has long been part of due process protections; apparent unlawful command influence erodes such systemic legitimacy of the military's criminal justice processes and hence requires redress (even absent Article 37).

Per this Court's doctrine, once an accused presents a colorable claim of unlawful command influence the government must prove, beyond a reasonable doubt, that (1) the predicate facts do not exist; (2) the facts do not constitute unlawful influence; or (3) the unlawful influence did not affect the findings or sentence. *United States v. Barry*, 78 M.J. 70, 77 (C.A.A.F. 2018) citing to *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013). Proof beyond a reasonable doubt is the highest burden of law in the American system of law. *See, e.g.*, *Leland v. Oregon*, 343 U. S. 790, 795 (1952); *Holland v. United States*, 348 U. S.

121, 138 (1954); *Speiser v. Randall*, 357 U.S. 513, 525-526 (1958). While the standard of proof beyond a reasonable doubt is not quantifiable, uncertainty regarding facts that are central to an issue before a court inherently undermine the government's ability to meet this high bar. *See, e.g*., *Burrage v. United States*, 134 S.Ct. 881 (2014). When the source of unlawful command influence is powerful, such as the president, proof that presidential actions did not taint the fairness of the proceedings or undermine public confidence in them must be more than outcome determinative or the judicial acceptance of statement, including those taken under oath, from witnesses, counsel, military judges, or potential jurors.[4]

While Article 37 represents specific Congressional condemnation of this variant of due process corruption in the military justice setting, there is judicially-recognized evidence that the prohibition against unlawful command influence predates the UCMJ. In *Homcy v. Resor*, 455 F. 2d 1345 (CA DC 1971), the Court of Appeals for the District of Columbia determined that improper command influence had tainted a World War II court-martial under the 1920 Articles of War – to the point of requiring the defense establishment to issue an honorable discharge to Homcy. *Id.* at 1352.[5] *Homcy* demonstrates that Congress did not

[4] Although the creation of the military judge position in 1968 was intended to ensure due process, and military judges are statutorily protected from unlawful command influence, Weiss v. United States, 510 U.S. 163, 179-180 (1994), they too may be subjected to it. *See, e.g.*, United States v. Salyer, 72 M.J. 415, 424 (C.A.A.F. 2013).

[5] For more information, *see e.g*., "World War II Army Officer, Albert C. Homcy Dies at 71" Washington Post, April 3, 1987; and Fred Borch, *Misbehavior Before the Enemy and Unlawful Command Influence in World War II: The Strange case of Albert C. Homcy*, 1 (Army Lawyer, 2014).

create a new protection in 1950; the protection already existed to deprive a court-martial of its jurisdiction as a matter of due process. The 1920 Articles (under which Homcy was court-martialed) did not articulate a prohibition against unlawful command influence; there is no mention of such influence in any of the UCMJ's predecessor Articles of War. *See, e.g.*, Luther C. West, *A History of Command Influence on the Military Justice System*, 18 UCLA L. REV. 1, 16 (1970).[6] Yet unlawful command influence formed the basis for a United States District Court to grant relief, and for the Court of Appeals to uphold said decision. *Homcy*, 455 F. 2d at 1356.

Colonel William Winthrop, in his MILITARY LAW AND PRECEDENTS, observed that military law is partly formed by an unwritten *lex non scripta*. WINTHROP, MILITARY LAW AND PRECEDENTS, 42 (1895). A small part of this unwritten American military law originated in the military experience of the Netherlands. *Id*. at 5-6.[7] The Dutch case of Colonel Moise Pain et Vin highlights the incompatibility of executive interference in the military justice process. During

[6] Others have noted the lack of a statutory prohibition against unlawful command influence prior to the Code. *See, e.g.*, Walter T. Cox, *The Army, the Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV 1, 10-14 (1987). Judge Cox noted "Unlike the professional armies of the first century and a half of our history, the World War II soldier was a regular citizen…. Almost everyone became exposed in some way or another to the military justice system, and many came away not liking what they saw. Some … were also lawyers by profession who were shocked at what they experienced, particularly by what they considered to be improper command influence." *Id*., at 11.

[7] It should also not be missed that the military reforms of the early Dutch Republic influenced the Swedish military of Gustavus Adolphus, and the French military of both Louis IIV and Napoleon Bonaparte. *See, e.g.*, John A. Lynn, *Forging the Western Army in Seventeenth Century Franc*e, 35-49, in MCGREGOR KNOX, THE DYNAMICS OF MILITARY REVOLUTION, 1300-2050 (2001).

the Franco-Dutch War (1672-1678), a Dutch court-martial sentenced Colonel Pain et Vin to be removed from the military for surrendering his command without resistance.[8] A public outcry demanded Stadtholder William III mete out "the most severe punishment against the colonel;" William therefore required that the high military court sentence Pain et Vin to death. The high military court complied, re-sentencing Pain et Vin to death.[9] Anti-monarchist Republicans later used William III's actions as proof that a stadtholder could not be entrusted with commanding the prosecution of crimes through military court; subsequently-elected Dutch governments removed common crimes from the military courts, required that sentences of death adjudged in military trials, and mandated that stadtholder pardons had to be approved by the highest civil court of the Dutch Republic. The Pain et Vin example signifies that even in an emerging democracy, particularly one whose practice influenced our military law, sovereign interference in courts-martial was viewed as degrading both the rights of the accused and of the nation.[10]

Moving west, American military law primarily derives from British military law. There have long been constraints against monarchal interference in courts-

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[8] *See* DONALD HAKS, FATHERLAND AND PEACE: PUBLICITY ABOUT THE DUTCH REPUBLIC AT WAR, 1672-1713. (Ttitle translated from Vaderland & Vrede: Publiciteit over de Nederlandse Republiek in oorlog, 1672-1713), 50. The passage is translated from "Men eiste het hoofd de kolonel Pain et Vin als straf voor het verlaten van zjin post." Id., at 50. *See also* OLAF VAN NIMWEGEN, THE DUTCH ARMY AND THE MILITARY REVOLUTIONS, 1588-1688, 343 (2010).

[9] HAKS, AT 23. (Translated from: "Januari werd Pain et Vin in Alphen onthoofd. Het oorpronkelijke vonnis en het verzoek William III tot herziening werden via de drukker van overheid public gemaak.").

[10] *See, e.g.*, H.H.A. de Graaf, Some Problems of Military Law Which have arisen as a consequence of the use of Armies of international Composition by the Republic of the Netherlands, 7 MIL. L. & L. WAR REV. 229, 234 (1968).

martial, including at the time America was founded. Limitations on the Crown existed beginning with the annual requirement on Parliament to renew the Mutiny Acts. See e.g., ALEXANDER TYTLER. AN ESSAY ON MILITARY LAW, AND THE PRACTICE OF COURTS MARTIAL, 113 (1806). In 1689 the Crown's secretary at war insisted that soldiers – as "free citizens" – only surrendered so much of their rights as such rights were "incompatible with the discharge of duty as a loyal soldier, serving a Constitutional Sovereign." See e.g. CHARLES M. CLODE, THE MILITARY FORCES OF THE CROWN: THEIR ADMINISTRATION AND GOVERNMENT, 144 (1869) [citing to 1689 War Office Circular XXXVIII.].[11]

In 1715, the Earl of Bath, serving as secretary at war, determined that even during the 1715 Rebellion, the Crown's interference in courts-martial through revisions of sentences was "terrible" to the law. CLODE, AT 164-65. Bath further determined "[n]othing can be more terrible that that of detaching the military from the civil part of our Constitution and establishing in the former a blind obedience to the order of their Commander-in-Chief." [12] *Id*. In 1728, the United Kingdom's Attorney General advised that the Crown could not increase the numbers of capital offenses unless Parliament first permitted it to do so. *Id*., at 148. Thus, prior to

[11] Winthrop cites to Clode throughout Military law and Precedents. *See e.g*., Military Law and Precedents, 58
[12] Clode, citing to Earl of Bath, 165. Bath also apparently noted: "A commander in chief who orders a court-martial to revise their sentence and thereby shows himself displeased with it, has an almost irrestistable influence over every member of the Court-martial so that the order of revision is, and often proves to be, an order for altering the sentence and making it more severe." Id.

1789, while the British monarch remained commander-in-chief of the United Kingdom's armed forces, his or her powers over courts-martial were viewed as dangerous and in need of policing within the framework of the unwritten British Constitution.

Closer to home, domestic examples of restraints on the president's military justice powers predate the UCMJ. Article III review of courts-martial prior to *Burns v. Wilson*, 346 U.S. 147 (1953) operated on the strict habeas test which limited judicial review to the singular question of whether a court-martial possessed jurisdiction over the military accused.[13] Despite this limitation, the Supreme Court held that presidential and War Department deficiencies could deprive a court-martial of jurisdiction. In *Runkle v. United States*, 122 U.S. 543 (1887) the Court found that in the absence of a presidential approval of a dismissal, a retired court-martialed officer was entitled to retain retired status and commensurate pension. In a broad sense, the Court determined that a president's non-compliance with procedural rules rendered a court-martial's cashiering sentence into a nullity. Hence when law (Article 37), regulation (R.C.M. 104), or *lex non scripta* as it applies to the military law (historic practice), impose a duty on the Commander-In-Chief, a presidential failure to refrain from conduct which

[13] *See, e.g.*, Dynes v. Hoover, 61 U.S. 65 (1857); In re Grimley, 137 U.S. 147 (1890); and In re Morrissey, 137 U.S. 157 (1890).

undermines the fairness of a court-martial, even if in appearance only, divests the court-martial of jurisdiction. In *McClaughry v. Deming*, 186 U.S. 49 (1902), the Court held that when the Army did not comply with the statutory right of a "volunteer officer" accused in a court-martial to have the court-martial composed of militia officers, the court-martial was defective so as to deprive it of jurisdiction, even where the president had approved the sentence. *Id*. at 69.[14]

Swaim v. United States 165 U.S. 553 (1897), a case often cited by adherents of executive authority, does not, despite inaccurate contrary claims, uphold presidential power to interfere in courts-martial by ordering new sentences. This fundamental misunderstanding regarding *Swaim* is most recently evidenced in the dissent in *Ortiz v. United States*, 138 S. Ct. 2165, 2201 [Alito J., dissenting]. Justice Samuel Alito argued that "until 1920 the President and commanding officers could disapprove a court-martial sentence and order that a more severe one be imposed instead, for whatever reason. We twice upheld the constitutionality of this practice." In addition to Justice Alito's erroneous "for whatever reason" assertion, he missed the important fact that the *Swaim* Court never addressed the constitutionality of the practice of disapproving a court-martial sentence: it simply focused on the limited jurisdiction of federal courts and on the Army's adherence

[14] The requirement of service of militia officers on courts-martial was due to the nation's fears of presidential power over a standing army.

to its own procedures.[15] It did so because the Court had earlier established in *Keyes v. United States*, 109 U.S. 336 (1883), that as long as a court-martial possessed lawful jurisdiction over an accused, the federal judiciary could not collaterally review the findings or sentence imposed on the accused, even with evidence of procedural irregularities to the accused's detriment. *Id*. at 340.[16]

Stated plainly, in *Swaim* the Court did *not* uphold the constitutionality of President Arthur's actions; the Court merely held that Arthur's actions did not violate prescribed extant regulations, and therefore the federal judiciary did not possess habeas jurisdiction over Swaim's claim. Nor did the Court, in either *Swaim* or *Ex Parte Reed*, 100 U.S. 13 (1879) (Justice Alito's second cite), hold that an order for a court-martial to reconvene for the purpose of issuing a stricter punishment comported with the Constitution. To the contrary, the Court in *Reed* held that as long as a naval court-martial had not been "dissolved," a commander could reconvene the court-martial to reconsider a sentence because of a mistake of law made by the court-martial. *Id*. at 22.

III. TEST FOR PRESIDENTIAL UNLAWFUL COMMAND INFLUENCE INFORMED BY EXECUTIVE'S BROAD POWER AND ITS HISTORICAL RESTRAINTS

[15] Moreover, "[t]he Court in Swaim did not indicate what limits, if any, exist on the President's power to act with respect to courts-martial absent statutory authority." *See* Gregory Maggs, *Judicial Review of the Manual for Courts-Martial*, 160 MIL. L. REV. 96, 132 (1999).

[16] Earlier, in Wise v. Withers, 7. U.S. 331 (1806), the Court determined that where a court-martial did not possess jurisdiction, the judiciary could exercise jurisdiction through habeas.

The central focus of the traditional test of determining unlawful command influence is whether an accused service-member's court-martial has been improperly influenced by a military commander, or carries the appearance of such corrosion. Remedies available to a military judge, short of dismissal, include removing a convening authority from oversight of the court-martial and ordering the offending party to cease actions likely to undermine the fairness of the court-martial. *See, e.g., United States v. Douglas*, 68 M.J. 349 (C.A.A.F. 2010); and, *United States v. Rivers*, 49 M.J. 434 (C.A.A.F. 1998). Importantly, the arsenal of remedial measures a military judge would typically consider to counteract the appearance of unlawful command influence resulting from the actions or statements by commanders in an accused's hierarchy are simply inadequate to mitigate this appearance when the source of the unlawful command influence is the President or one of his civilian secretaries. In such a case, these typical remedies will be neither understood nor appreciated by the public, nor even by most members of the military's special society. All that will be considered with regard to the unlawful command influence will be the *outcome* of the court-martial, no matter how diligent the military judge may have been in implementing curative measures. Accordingly, a military court should presume that the only remedy that can meaningfully neutralize the pernicious appearance of unlawful command influence in such situations is dismissal; it should be ordered absent compelling

evidence presented by the government that rebuts the presumed necessity for this remedy.

(A) Broad Presidential Power Includes More Than Ordinary Power to Command

An officer, service secretary, secretary of defense, and president are vested with the authority to command their forces to conform to orders. *See, e.g.*, *United States v. Obligenhart*, 3 U.S.C.M.A. 627 (C.M.A. 1954); and *United States v. Johnson*, 17 C.M.A. 246 (C.M.A. 1967). A service-member subject to the orders of a command from a person within their chain of command may be required, for example, to exercise at certain hours of the day or wear a certain uniform. A service-member may also be required to report for duty to participate in an unpopular conflict. However, commander-in-chief authority is far more expansive than the general authority to command, and not only because a president can order forces into foreign lands, remove officers from duty, and depart from the military personnel laws in wartime. *See, e.g.*, 10 U.S.C. § 123 (2019).

The President can do far more. For example, in 1957, the Court in *Wilson v. Girard*, 354 U.S. 524 (1957), unanimously determined that there was no constitutional impediment for a president to cede court-martial jurisdiction to foreign criminal jurisdiction, even when such cession was contrary to a status of

forces agreement.[17] The Court concluded that the 1951 security agreement recognizing the military's primary jurisdiction did not afford Private Girade protection against being transferred to Japanese jurisdiction, despite the congressional outcry at the time.[18] Further examples abound: for example, the vast presidential authority regarding the military can send National Guard forces to foreign nations for the purpose of training. *See, e.g., Perpich v. Department of Defense*, 496 U.S. 334 (1990); and a service-member may be court-martialed in a military operation in foreign lands even when the operation is not sanctioned by Congress. *See, e.g., Collins v. McDonald*, 258 U.S. 416 (1922).[19]

Indeed, the federal judiciary will not take up challenges to jurisdiction over questions involving the use of the military overseas. *See, e.g., Campbell v. Clinton*, 203 F. 3d 19 (CA DC 2000). Nor will the federal courts grant congressional standing to challenge a president's refusal to comply with international agreements such as United Nations sanctions against an unpopular or "illegal regime." *See, e.g., Diggs v. Shultz*, 470 F. 2d 461 (CA DC 1972). Each of these decisions enable the possibility of the president ordering military forces into

[17] *Girard* originated from a challenge to the Eisenhower Administration transfer of an America soldier into Japanese jurisdiction. Id., at 525.
[18] 354 U.S.., at 530.
[19] In *Collins*, the Appellant raised secondarily the fact that he was ordered to Vladivostok in a mission not directly a part of the war against Germany. Though the Court did not directly address this issue, the majority called it "trivial." Collins, 258 U.S. at 421. *See* JOSHUA E. KASTENBERG, TO RAISE AND DISCIPLINE AN ARMY: MAJOR GENERAL ENOCH CROWDER, THE JUDGE ADVOCATE GENERAL'S OFFICE AND THE REALIGNMENT OF CIVIL AND MILITARY RELATIONS IN WORLD WAR I, 242 (2017).

a foreign conflict where they remain subject to presidential orders as well as the full jurisdiction of the UCMJ. This is because the President may also send military forces into an undeclared war without judicial determination. *See Mora v. McNamara*, 389 U.S. 934 (1967) [Stewart J., dissenting].

In this light, the President may also order service-members to wear uniforms with insignia not a part of the United States. *See United States ex rel. New v. Rumsfeld*, 448 F.3d 403 (CA DC 2006). And, with a congressional authorization, the president may proscribe rules compelling citizens into military service. *See Rostker v. Goldberg*, 453 U.S. 57 (1981). Apart from constitutional and statutory Commander-In-Chief authorities known to this Court, the president also has apparent powers resulting from the non-justiciable political question doctrine to include removing the United States from a treaty obligation. *See Goldwater v. Carter*, 444 U.S. 966 (1979).[20] A failure of a service-member to comply with presidential authority in such instances remains a refusal to follow orders.

(B) *Lex Non-Scripta*: Earlier Presidents Respected Unlawful Influence Rubicon

Regarding *lex non-scripta*, several presidents determinedly remained publicly aloof from military trials, courts of inquiry, and investigations. In 1942, President Franklin Roosevelt asked Supreme Court Justice Owen Roberts to lead

[20] Absent a judicial role in foreign policy disputes, *Goldwater's* political question doctrine can potentially affect where the military is sent.

an investigation into the Japanese attack on Pearl Harbor. Roberts's presence on such an important board (while implicating judicial ethics and separation of powers), gave confidence to the public that Roosevelt would be unable to direct the investigation to a specific result. *See* John J. McCloy, *Owen J. Roberts Extra Curiam Activities*, 104 U. PENN. L. REV., 350, 352 (1955).[21]

Harry S. Truman was president during the well-publicized court-martial of Major General Robert Grow, who was accused of permitting Soviet capture of classified information. The historic record contains no substantive statements from Truman regarding the court-martial; in response (during trial) to a reporter's questions on the political activities of generals, Truman responded: "I have no comment. The Army is handling that."[22] Three other historic examples are important in this regard.

First, following the Army's defeat at Battle of the Wabash on November 4, 1791, President George Washington had the opportunity to subject General Arthur St. Clair to public approbation or court-martial, but did neither.[23] St Clair sought a court of inquiry to clear his name; this could have resulted in a court-martial. *See*

[21] *See* HEARINGS BEFORE THE JOINT COMMITTEE ON THE INVESTIGATION OF THE PEARL HARBOR ATTACK, 79th Cong., 1st Sess., pt. 7, at 2967 (1946). That Roberts dissented in Korematsu v. United States, 323 U.S. 214, 225 [Roberts J., dissenting] evidences that he was independent in assessing Roosevelt's wartime decisions. Roosevelt was not alone in appointing justices to serve on military investigations. We do not argue that the Roberts inquiry was "full and fair," but rather, only that Roberts's leadership likely prevented direct presidential interference.
[22] Public Papers of the Presidents of the United States, Harry S. Truman, 1952, 416 (1959).
[23] For a recitation on the defeat and Congress' actions, *see*, John Yoo, *George Washington and the Executive Power* 5 U. St. Thomas J.L. & Pub. Pol'y 1, 19-21 (2010).

WILEY SWORD, PRESIDENT WASHINGTON'S INDIAN WAR: THE STRUGGLE FOR THE OLD NORTHWEST, 201-02 (1974). The Wabash defeat was troubling to the nation's security and to the public's confidence in the military; hence Congress, for the first time, investigated the War Department. Washington, who could have turned St. Clair into a scapegoat, instead stated that "General S. Clair shall have justice, I will hear him without prejudice, he shall have full justice." *Id*.

Second, from November 25, 1862 through January 22, 1863, the Army court-martialed General Fitz John-Porter for disobeying lawful orders and misbehavior before the enemy at the Second Battle of Manassas. While Judge Advocate General Joseph Holt's conduct (as well as Secretary of War Stanton's) during and after the trial has come under question, at no time did President Abraham Lincoln issue a public statement on the trial to Porter's detriment or demand the court-martial reach a specific result. *See* DONALD R. JERMANN, FITZ-JOHN PORTER: SCAPEGOAT OF SECOND MANASSAS, 190 (2009).[24]

Finally, on April 1, 1971, White House Counsel John Dean advised President Richard Nixon (a president with less respect for the law then Washington and Lincoln) to refrain from taking action before the Army Court of Military

[24] *See* REVERDY JOHNSON, REPLY TO THE REVIEW OF THE JUDGE ADVOCATE GENERAL JOSEPH HOLT, OF THE PROCEEDINGS, FINDING, AND SENTENCE OF THE GENERAL COURT-MARTIAL: IN THE CASE OF MAJOR GENERAL FITZ JOHN PORTER, AND A VINDICATION OF THAT OFFICER (1863); and JOSHUA E. KASTENBERG, LAW IN WAR, LAW AS WAR: BRIGADIER GENERAL JOSEPH HOLT AND THE JUDGE ADVOCATE GENERAL'S DEPARTMENT IN THE CIVIL WAR AND EARLY RECONSTRUCTION, 78-93 (2011).

Review and convening authority had acted on Lieutenant William Calley's conviction. Among the reasons Dean listed for refraining from presidential action was Article 37. Dean warned, "[a]ny presidential statement about the specifics of this case would be subject to criticism as an exertion of unlawful command influence."[25] Although Nixon later granted Calley some relief (in that he ordered Calley into house arrest), he refrained from making public comments that had the potential to affect the military appeal process either to the detriment of Calley or the prosecution.[26] In comparison, in 1971, Nixon publicly commented on his belief of Charles Manson's guilt in his pending California murder trial. However, his aide Ronald Zeigler quickly disavowed any presidential intent to influence the jury.[27] When juxtaposing Nixon's conduct toward Calley with his Manson

[25] While Dean did not conclude that a president was bound by Article 37, he cautioned that presidential statements that could be taken as a directive to the military chain of command involved in the Calley court-martial "would run counter to the spirit of the prohibition against unlawful command influence." *See* Dean to Nixon, April 1, 1971 on file with authors and *available at* https://www.dropbox.com/sh/2qmjg2oc20fp296/AAA25VjGws_EggH6N0rkDsg8a?dl=0 We agree with the "spirit" of Dean's advice, but believed his conclusion that Article 37 did not apply to the President to be in error.

[26] *See*, Calley v. Callaway, 519 F.2d 184, 214-220 (CA 5, 1975). On December 8, 1970, in response to a reporter's question, Nixon conceded that a "massacre" had occurred and then stated: "That's why I'm going to do everything…to see that all the facts in this incident are brought to light and that those who are charged, if they are found guilty, are punished." Nixon did not name Calley in this statement. On April 16, 1971 Nixon, in a press conference, in response to a question predicated on the prosecutor claiming he had undermined military justice by not requiring Calley to be imprisoned, stated "Captain Daniel is a fine officer, and incidentally, the six members of that court had very distinguished military records. Five of the six, as you know, Mr. Risher, served with distinction in Vietnam." On April 29, 1971 in response to another press conference question on why he intervened in the Calley case, Nixon responded. "Well Mr. Jarriel, to comment on the Calley case, on its merits, at a time when it is up for appeal would not be a proper thing for me to do, because, as you know, I have indicated I would review the case at an appropriate time in my capacity as the final reviewing officer." Public Papers of the Presidents of the United States, Richard M. Nixon, 537 (1971).

[27] *See* Ken W. Clawson, "Nixon Slips Refers to Manson as Guilty: Criticizes Coverage of Trial," Washington Post, August 4, 1970, pg 1.

statements, a degree of presidential caution over influencing the military justice system is apparent.

(C) Fear of Standing Armies Is Fear of Unrestrained Commander-In-Chief

Congress and the federal judiciary have acknowledged that the fear of standing armies was an original fear of the framers and shaped military law. *See, e.g., United States v. Miller*, 307 U.S. 174, 179 (1939)[28]; and *United States v. Culp*, 14 U.S.C.M.A. 199, 202 (C.M.A. 1963).[29] This fear emanated from similar English Whig concerns.[30] *See* Earl F. Martin, *America's Anti-Standing Army Tradition and the Separate Community Doctrine*, 76 MISS. L. J. 135, 145-147 (2005); and, THOMAS COOLEY, A TREATISE OF CONSTITUTIONAL LIMITATIONS, 350 (1868). The Founders' concern extended beyond textual checks on a standing army; the framers were equally fearful of a potential Commander-in-Chief who abused his constitutional authority over the Army they provided, and afraid how such abuse could suppress democracy. *See, e.g.*, James Madison, "Speech at the

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[28] In *Miller*, the Court recognized "the sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia – civilians primarily, soldiers on occasion." United States v. Miller, 307 U.S. 174 (1939).

[29] Delegate Edmund Randolph noted at the Virginia ratifying convention "there was not a member of the federal convention who did not feel indignation" at the idea of a standing army. 3 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 401 (1901).

[30] Furthermore, these concerns were deeply rooted in the Framers' English legal heritage. In 1697 John Trenchard warned that where there is a standing army, "the King is a perpetual General, may model the Army as he pleases, and [it] will be high treason to oppose him." TRENCHARD, AN ARGUMENT SHEWING THAT A STANDING ARMY IS INCONSISTENT TO THE CONSTITUTION OF THE ENGLISH MONARCH (1687). Trenchard also argued that a sovereign's use of standing armies could lead to the destruction of a constitution. In 1642 John March articulated Parliament's claim that the Crown could not be considered a supreme commander over the militia. *See e.g.*, JOHN MARCH, AN ARGUMENT, OR DEBATE IN LAW, OF THE GREAT QUESTION CONCERNING THE MILITIA, AS IT IS NOW SETTLED BY ORDINANCE OF BOTH THE HOUSES OF PARLIAMENT (1642). Note: This treatise is available for viewing at the Library of Congress, Rare Books Collection,

Constitutional Convention in Philadelphia," 26 June 1787, in Max Farrand, ed., The Records of the Federal Convention of 1787, vol. I (1911), 465; and, Elbridge Gerry, 1st Congress, 17 August 1789, in Annals of Congress, vol. 1 (1834), 750.[31]

The founders understood that it was not the standing army *per se* that presented a danger to liberty, but instead the exploitation of that army by those in high authority. This was indeed their bitter experience under the authority of the Crown. Coupled with the fear of standing armies, and only for the purposes of this argument, is the ancient principle that neither a monarch nor a president is above the law. In *Entick v Carrington*, 95 Eng. Rep R 807 (1765), Lord Camden established the rule important to constitutional law that a sovereign may only act in accordance with the established law. While *Entick* has usually been cited in Fourth Amendment analysis, it has also been incorporated into military law. *See, e.g*., *United States v. Hillan*, 26 C.M.R. 771 (N.M.C.M.R. 1958).[32] It is for this reason that this court must be especially vigilant in response to *any* abuse of authority by the President acting in his capacity as Commander-in-Chief that relates to the

[31] *See also* David S. Barron and Martin S. Lederman, The Commander in Chief at the Lowest Ebb – A Constitutional History, 114 Harv. L. Rev, 941, 1017-1019 (2008); *see also* Reid v. Covert, 354 U.S. 1, 23-27 (1957). Justice Black's recitation of the historic fear of standing armies is applicable here; he noted that the framers understood that military trials possess a greater danger of being arbitrary in the application of due process than civilian criminal trials. In Appellant's case, President Trump's declaratory statements against Appellant evidence a Commander-In-Chief willing to ignore other constitutional constraints important to the command and supervision of the Armed Forces.

[32] United States v. Burr, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) is an early judicial ruling in which a United States court determined that a President was subject to the law of the courts. Chief Justice John Marshall, while acting as a circuit judge, determined that President Jefferson was not immunized from giving testimony on important matters under adjudication. *See*, Archibald Cox, *Executive Privilege*, 122 U. PENN. L. REV.1383, 1385 (1974).

administration of military justice. Such vigilance plays a vital role in the mosaic of checks and balances our founders believed would prevent such abuses of power.

CONCLUSION

President Trump's statements in regard to Appellant have, at a minimum, created the aura of a military order directing a specific result and have undermined public confidence in the military justice system. Because of the immensity of presidential power over the military and the magnitude of the influence his statements and actions have on the perception of fairness in the military justice process, due process and its incarnation in the unlawful command influence test must consider the historic and constitutional concerns of presidential power over the military. Dismissal should accordingly serve as the presumptive remedy when a president, such as here, commits apparent unlawful command influence. As such, in this instance, the Court should afford Appellant the relief he seeks on the certified unlawful command influence issue.

CERTIFICATE OF COMPLIANCE WITH RULES

We certify that this brief complies with the maximum length authorized by Rule 26(d) because this brief contains 6994 words not including front matter. This brief complies with the typeface and type style requirements of Rule 37 because it was prepared using Microsoft Word with Times New Roman 14-point font.

//ELECTRONICALLY SIGNED//

CERTIFICATE OF FILING AND SERVICE

We certify that a copy of the foregoing was transmitted by electronic means on December 11, 2019, to the Clerk of the Court; Government Appellate Division, and Counsel for Appellant.

//ELECTRONICALLY SIGNED//

Joshua E. Kastenberg
CAAF Bar. No. 30605
Assistant Professor of Law
University of New Mexico, School of Law
1117 Stanford NE MSC11 6070
Albuquerque, NM 87131-0001
(703) 725-0420
Joshua.kastenberg@law.unm.edu

Rachel E. VanLandingham
CAAF Bar No. 32852
Professor of Law
Southwestern Law School
3050 Wilshire Blvd
Los Angeles, CA 90010
213-738-6864
rvanlandingham@swlaw.edu

Geoffrey S. Corn
Professor of Law
South Texas College of Law
1303 San Jacinto Street, Houston, Texas 77002-7006
713-659-8040
gcorn@stcl.edu