IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

United States, Appellee, v. Andrew Witt Senior Airman (E-4) U.S. Air Force, Appellant.	APPELLANT'S BRIEF ON ISSUES SPECIFIED BY THIS COURT USCA Dkt. No. 15-0260/AF Crim.App. No. 36785

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

BRIAN L. MIZER
Senior Appellate Defense Counsel
Bar Number 33030
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4773
brian.l.mizer.civ@mail.mil

DANIEL E. SCHOENI, Major, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 33248
36 Hamilton Street, Building 1436
Hanscom Air Force Base, MA 01731
(781) 225-5799
daniel.schoeni@us.af.mil

THOMAS A. SMITH, Major, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 34160
Air Force Legal Operations Agency
United States Air Force
1500 West Perimeter Road, Suite 1100 Joint Base Andrews, MD 20762
(240) 612-4770
thomas.a.smith409.mil@mail.mil

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STATEMENT OF STATUTORY JURISDICTION

The lower court affirmed Appellant's sentence to death, which continues the mandatory appellate review of this case. 10 U.S.C. § 866(b)(1) (2012); 10 U.S.C. § 867(a)(1) (2012).

STATEMENT OF THE CASE

The statement of the case is set forth in Appellant's opening Brief at page 1 and again below.

STATEMENT OF FACTS

On August 9, 2013, the lower court, sitting *en banc*, set aside the death sentence in this case and authorized a rehearing as to sentence. *U.S. v. Witt*, 72 M.J. 727, 775 (A.F. Ct. Crim. App. 2013) (*en banc*). The opinion was authored by Judge Saragosa, and joined by Chief Judge Stone and Senior Judge Harney. Senior Judge Orr concurred in part and dissented in part, and he was joined by Judge Marksteiner. *Id.* at 735. The lower court was unanimous in holding there was deficient performance by trial defense counsel below, "[p]articularly their reliance upon Dr. BM's advice when deciding not to investigate the potential mitigation evidence resulting from the appellant's motorcycle accident[.]" *Id.* at 776.

Senior Judge Helget and Judges Soybel, Mitchell, Wiedie, and Peloquin "each chose not to participate given their recent assignments to the Court." *Id.* Four other judges, including Senior Judge Roan, recused themselves due to conflicts. *Id.*

With the lower court's jurisdiction at an end, Appellant filed a Petition for Grant of Review with this Court on August 21, 2013. On August 28, 2013, Appellee filed a Motion to Dismiss Appellant's Petition for Review. The government moved for reconsideration of the lower court's decision on September 9, 2013. J.A. 267. Appellant responded on September 16, 2013. On October 8, 2013, this Court granted the government's Motion to Dismiss Appellant's Petition. J.A. 337.

Chief Judge Stone retired two days later on October 10, 2013,[1] before taking action on Appellee's Motion for Reconsideration and Reconsideration En Banc. On October 18, 2013, the Judge Advocate General of the Air Force designated Senior Judge Helget, who had declined to participate in the previous *en banc* decision due to his recent assignment to the lower court, as Chief Judge "in the matter of U.S. v. Senior Airman ANDREW P. WITT, 36785 (recon)." J.A. 202. The Designation Memorandum indicates Senior Judge Roan had been elevated to Chief Judge in the wake of Chief Judge Stone's retirement, and that he remained recused in this case. *Id.*

Just three days later, on October 21, 2013, the lower court, again sitting *en banc*, granted the government's motion

[1] United States Air Force Court of Criminal Appeals Past Judges (hereinafter, "AFCCA Judicial Roster"), dated November 4, 2014, http://afcca.law.af.mil/content/afcca_data/cp/past_judges_-_alphabetical_rev._04_nov_14.pdf.

for reconsideration and vacated its August 9, 2013, opinion. J.A. 338. The order is silent as to which judges, to include those who previously recused themselves or declined to participate, participated in the decision to reconsider and vacate the Court's previous opinion. *Id.*

On October 31, 2013, Appellant filed a Motion to Disclose *En Banc* Court Composition and Vote on Reconsideration. The government filed its Response in opposition to Appellant's Motion the same day. "While [Appellant] may relish the opportunity to roam the halls of this Court's chambers to see what he may learn, Appellant's request lacks any legal authority and should be promptly denied." Government Response to Appellant's Motion to Disclose En Banc Court Composition and Vote on Reconsideration at 2, *Witt*, 72 M.J. 727 (A.F. Ct. Crim. App. Oct. 31, 2013) (No. 36785). On November 6, 2013, the lower court summarily denied Appellant's motion.

On June 30, 2014, the lower court, sitting *en banc*, affirmed the findings and sentence. *U.S. v. Witt*, 73 M.J. 738, 824 (A.F. Ct. Crim. App. 2014) (*en banc*). Senior Judge Marksteiner, who had joined since-retired Senior Judge Orr's concurrence and dissent in the Court's previous decision, now wrote for a four-member majority. *Id.* He was joined by Chief Judge Helget, Senior Judge Harney, and Judge Mitchell. *Id.* Judge Saragosa, who had authored the court's previous majority

opinion, now dissented. *Id.* at 825. She was joined by Judge Peloquin, who retired on June 1, 2014. *Id.* at 752. Senior Judge Harney did not write separately.

SUMMARY OF ARGUMENT

Courts of Criminal Appeals have no authority to reconsider an *en banc* decision, and the lower court's opinion purporting to do so is *void ab initio* and must be vacated. The plain language of Article 66, UCMJ, does not authorize reconsideration of *en banc* decisions, and its legislative history, in addition to this Court's precedent, reflect a congressional intent to prevent a second, coequal set of appellate judges from overturning a previous decision favorable to an Appellant.

Second, although this Court long ago recognized the inherent authority of a *panel* of a Court of Criminal Appeals to reconsider a previous *panel* decision where reconsideration was not requested by the Judge Advocate General, *U.S. v. Reeves*, 3 C.M.R. 122, 125-26 (C.M.A. 1952), this Court has also held that "generally, and whenever possible, an appellant should receive review of his case by a board of review constant in membership." *U.S. v. Robertson*, 17 U.S.C.M.A. 604, 606 (C.M.A. 1968). The government has obtained a death sentence by "'shopping around' among the various boards to obtain a decision agreeable to them", and that decision must be reversed. *Reeves*, 3 C.M.R. at 126.

ARGUMENT

I.

A COURT OF CRIMINAL APPEALS SITTING EN BANC CANNOT RECONSIDER A PREVIOUS EN BANC DECISION OF THAT COURT PURSUANT TO STATUTORY AUTHORITY, APPLICABLE PRECEDENT, OR INHERENT AUTHORITY.

Standard of Review

This Court reviews issues of jurisdiction and statutory interpretation *de novo*. *U.S. v. Vargas*, 74 M.J. 1, 6 (C.A.A.F. 2014).

Law and Analysis

"The courts of criminal appeals are courts of limited jurisdiction, defined entirely by statute." *U.S. v. Arness*, 74 M.J. 441, 442 (C.A.A.F. 2015); *U.S. v. Beatty*, 64 M.J. 456, 458 (C.A.A.F. 2007) ("The Courts of Criminal Appeals, like this Court and indeed the entire system of military justice, are creatures of statute[.]") "[T]heir power and authority—like that of the court-martial itself—must be found within the confines of the creating legislation." *U.S. v. Simmons*, 6 C.M.R. 105, 107 (C.M.A. 1952). Like all military tribunals, "it must be convened and constituted in entire conformity with the provisions of the statute, or else it is without jurisdiction." *McClaughry v. Deming*, 186 U.S. 49, 63 (1902); *Ctr. for Constitutional Rights v. U.S.*, 72 M.J. 126, 128 (C.A.A.F. 2013)

(observing military tribunals must exercise their jurisdiction in strict compliance with authorizing statutes).

A. Neither the Plain Language of Article 66(a), UCMJ, Nor its Legislative History Reflect Congressional Intent to Authorize *En Banc* Reconsideration of *En Banc* Decisions.

The jurisdictional statute that must be strictly construed in this case is Article 66, UCMJ, which only permits *en banc* reconsideration of panel decisions: "Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules." 10 U.S.C. § 866 (2012). While strict construction of the plain language of this statute should resolve the issue specified by this Court, a review of the legislative history of Article 66, UCMJ, and this Court's precedent, reveals that the statutory language enacted by Congress was quite deliberate.

1. As originally enacted, the UCMJ did not provide for *en banc* review and instead created boards of review that were separate coequal tribunals within each service.

The current language found in Article 66, UCMJ, is ultimately rooted in the legislative debate surrounding Article 66(e), which as initially proposed provided: "Within ten days after any decision by a board of review, the Judge Advocate General may refer the case for reconsideration to the same or another board of review." *Bill to Unify, Consolidate, Revise, and Codify the Articles of War, the Articles for the Government*

of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearings on S. 857 & H.R. 4080 Before a Subcomm. of the Comm. on Armed Forces, 81st Cong. 17 (1949) (hereinafter, Hearings on S. 857). Condemnation of this provision came from all quarters during the legislative debate regarding Article 66, UCMJ.[2]

Congressman Charles H. Elston summed up criticism of the proposed statute: "If the Judge Advocate General wasn't satisfied with the decision of the board of review he could just send it to another board and it would give him too much authority. There ought to be something final about the action of a board of review. As long as he is not satisfied he sends it to another board." *Bill to Unify, Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the Comm. on Armed Forces*, 81st Cong. 650 (1949) (hereinafter, Hearings on H.R. 2498).

As a result of this debate, Congress authorized the Judge Advocates General to "establish one or more boards of review, each composed of not less than three officers or civilians[.]"

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[2] A more extensive recitation of the legislative history of Article 66(e) is set forth in Appellant's opening brief at pages 222-26.

10 U.S.C. § 866(a) (1950). As originally enacted, "the boards of review were separate and relatively autonomous; they were not constituents of a larger consolidated entity." *U.S. v. Chilcote*, 20 U.S.C.M.A. 283, 285 (C.M.A. 1970). "This organizational arrangement continued until enactment of the Military Justice Act of 1968." *Id.*

2. The Military Justice Act of 1968, created the Courts of Criminal Appeals, and allowed them to sit *en banc*, but did not authorize *en banc* reconsideration of panel decisions.

In 1968, Congress amended Article 66, UCMJ, and established a Court of Military Review for each service. Article 66(a), UCMJ, was amended to authorize these courts to "sit in panels or as a whole in accordance with the rules prescribed under subsection (f)." 10 U.S.C. § 866 (1968); S. REP. NO. 90-1601, at 3 (1968) ("Subsection (a) of article 66 would be amended to permit the judge advocate generals to establish one court of military review for each service which would sit en banc or in panels, to replace the several boards of review that presently exist in each service.")

One year later, a three-judge panel of the Navy Court of Military Review set aside the findings and sentence in *U.S. v. Chilcote*. 20 U.S.C.M.A. at 284. Citing Rule 19(b) of the Courts of Military Review Rules of Practice and Procedure, which provided the procedures for reconsideration, the government

successfully petitioned the Court for reconsideration *en banc*, and the Court, sitting *en banc*, reversed the decision of the panel. *Id*; 3 M.J. at CI.

Citing both the plain language of Article 66(a), UCMJ, and the legislative history of the originally proposed Article 66(e), this Court reversed the Navy Court. "The unembellished words of Article 66(a) of the Code do not support authority for en banc reconsideration of a panel decision." This Court found "not a trace of an intent to reverse the 1950 congressional" rejection of Article 66(e). *Chilcote*, 20 U.S.C.M.A. at 286. This Court also rejected the government's argument that Article 66(a), UCMJ, jurisdiction could be "substantively enlarged by the provisions of 66(f), which permit the Judge Advocates General to prescribe uniform rules of procedure for proceedings in and before courts of military review." *Id.* "Article 66(f) is not an independent grant of substance that would broaden the authority contained in Article 66(a)." *Id.*

3. The Military Justice Act of 1983, allowed for *en banc* reconsideration, but only of panel decisions. The long-standing prohibition of reconsideration by coequal divisions of the Courts of Criminal Appeals remains.

Article 66(a) remained unchanged until the Military Justice Act of 1983, when the General Counsel of the Department of Defense testified it required "some fine tuning." *The Military Justice Act of 1982: Hearings on S. 2521 Before Subcomm. on*

Manpower and Personnel of the S. Comm. on Armed Services, 97th Cong. 19 (1982) (hereinafter, Hearings on S. 2521). "Under current case law, the Courts of Military Review cannot order a rehearing en banc to resolve disagreements among panels. This leads to unnecessary delay in obtaining a clear statement of the law." *Id.*

Representatives from the American Bar Association also supported the amendment: "We are also pleased to support the provision included in S. 2521 and endorsed by the Department of Defense to allow rehearings en banc by the Courts of Military Review. Such rehearings would expedite the resolution of conflicts among panels in the military justice system and would promote finality of Court of Review decisions within the respective systems." *Id.* at 192. And so did the Bar of the City of New York. "It appears that such an en banc consideration would promote uniformity of appellate interpretation at the court of military review level within each service and it might also reduce the need for consideration of cases by the court of military appeals to resolve conflicts among particular panels of the lower court." *Id.* at 278.

The Judge Advocate General of the Army noted the proposed amendments would "streamline the review process." *Id.* "The proposed legislation also provides for en banc reconsideration by the Courts of Military Review of decisions by single

panels[.]" *Id.* With the goal of ensuring final, *en banc* review of *panel* decisions, Congress amended Article 66, UCMJ, to provide for exactly that: "Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules." 10 U.S.C. § 866(a) (2012).

However, just as with the earlier statutory amendment at issue in *Chilcote*, there is "not a trace of an intent to reverse the 1950 congressional" rejection of Article 66(e). *Chilcote*, 20 U.S.C.M.A. at 286. *Chilcote* was decided "against a background of congressional opposition to the reversal of a panel decision favorable to an accused by another panel of the same court." *U.S. v. Wheeler*, 20 U.S.C.M.A. 595, 596 (C.M.A. 1971). "An accused is entitled to have his case reviewed in a manner authorized by the statute. If an accused is adversely affected by a review under a procedure the statute does not permit, that review is beyond the power of the unit conducting it." *Maze v. U.S. Army Court of Military Review*, 20 U.S.C.M.A. 599, 601 (C.M.A. 1971).

Because Appellant's case was reconsidered in a manner not authorized by statute, this Court must vacate the lower court's second *en banc* decision and remand this case for reinstatement of the original *en banc* decision. *U.S. v. Lohr*, 21 U.S.C.M.A. 448 (C.M.A. 1972); *Seelke v. U.S.*, 21 U.S.C.M.A. 299, 300 (C.M.A. 1972).

B. The Courts of Criminal Appeals Rules of Practice and Procedure Cannot Confer Jurisdiction in the Courts of Criminal Appeals.

Appellant concedes that Rule 17(c) of the Court of Criminal Appeals Rules of Practice and Procedure purports to authorize *en banc* reconsideration of *en banc* decisions. *See* 44 M.J. LXX (1996). However, this Court long ago rejected the argument that the jurisdiction afforded by Article 66(a) could be "substantively enlarged by the provisions of 66(f), which permit the Judge Advocates General to prescribe uniform rules of procedure for proceedings in and before courts of military review." *Chilcote*, 20 U.S.C.M.A. at 286; *see also, U.S. v. Shavrnoch*, 47 M.J. 564, 569 (A.F. Ct. Crim. App. 1997) ("Of course, neither USCAAF's nor our own rules of appellate procedure can enlarge or restrict jurisdiction.")

More importantly, the Judge Advocates General cannot end run the congressional rejection of their power to order reconsideration of judicial decisions by simply having the appellate government divisions, over which they exercise complete control, submit motions for reconsideration to courts, over which the Judge Advocates General wield considerable control[3], pursuant to rules they have promulgated.

[3] *Edmond v. United States*, 520 U.S. 651, 664 (1997).

C. The Courts of Criminal Appeals Possess Limited Inherent Authority, But This Does Not Confer the Power to Conduct Reconsideration of a Previous *En Banc* Decision, And Certainly Not When Requested by the Government or the Judge Advocate General.

This Court has long recognized the inherent authority of panels of the Courts of Criminal Appeals to reconsider decisions. *U.S. v. Henderson*, 52 M.J. 14, 19 (C.A.A.F. 1999). In *Henderson*, this Court relied upon *Reeves*, 3 C.M.R. 124-25, which stated that "boards of review must clothe themselves with some of the powers inherent in courts," including "the right to correct clerical errors, inadvertently entered decisions, and those decisions which are clearly wrong as a matter of law." *Id.*

Notably, in *Reeves* this Court again acknowledged the legislative history of Article 66(e). *Reeves*, 3 C.M.R. at 126. "[T]he discussions before the committee convince us that the proposed provision was deleted to prevent the Judge Advocates General from 'shopping around' among the various boards to obtain a decision agreeable to them." *Id.* "The reason which caused Congress to delete the contemplated provision cannot possibly apply to those instances where the request for reconsideration comes directly from the accused or his counsel, or where the board of review acts on its own initiative." *Id.*

Unlike in *Henderson*, this is not a case where "nothing in the legislative history of this codal provision" expressly states that Congress intended to bar reconsideration by coequal

divisions of the Courts of Criminal Appeals. *Henderson*, at 20. And given the long, circuitous route by which the Courts of Criminal Appeals were given the narrow authority to conduct *en banc* reconsideration of panel decisions, it cannot be said that *en banc* reconsideration of *en banc* decisions is "within the direct or reasonably implied scope of the powers given to [the Courts of Criminal Appeals] by the Uniform Code." *U.S. v. Lanford*, 6 U.S.C.M.A. 371, 376 (C.M.A. 1955).

While panels may possess inherent authority to reconsider their decisions, the very purpose of an *en banc* decision is "promoting finality of decision[.]" *Chilcote*, 20 U.S.C.M.A. at 287; *U.S. v. Kilpatrick*, 2000 CCA LEXIS 305 (N-M. Ct. Crim. App. 2000) ("These arguments were previously considered and ultimately rejected with finality by this Court.") (*citing U.S. v. Quiroz*, 53 M.J. 600 (N-M. Ct. Crim. App. 2000) (*en banc*)); *see also, U.S. v. American-Foreign S.S. Corp.*, 363 U.S. 685, 689 (1960) ("Finality of decision in the circuit courts of appeal will be promoted.").

However, even if courts sitting *en banc* do not issue final decisions, and may reconsider previous decisions when "clearly wrong as a matter of law", that does not describe what occurred below. What occurred below was nothing more than one group of judges supplanting their judgment for that of their predecessors at the government's request.

Conclusion

The lower court is a judicial body lacking inherent power to conduct *en banc* reconsideration of previously issued *en banc* decisions, and Article 66(a), UCMJ, does not so empower it. *See generally, U.S. v. Darville*, 5 M.J. 1, 3 (C.M.A. 1978) ("The Court of Military Review is a judicial body which has no inherent power to suspend sentences, and Articles 71 and 74, UCMJ, do not so empower it.") The lower court's second *en banc* decision was not authorized by statute, applicable precedent, or its limited inherent authority, and the decision must be vacated.

WHEREFORE, Appellant respectfully requests this Court set aside the lower court's unauthorized second opinion and remand this case to the lower court for affirmance of *U.S. v. Witt*, 72 M.J. 727 (A.F. Ct. Crim. App. 2013) (*en banc*).

II.

A DECISION OF A COURT OF CRIMINAL APPEALS SITTING EN BANC CANNOT BE RECONSIDERED EN BANC WHEN THE COMPOSITION OF THE EN BANC COURT HAS CHANGED.

"No litigant deserves an opportunity to go over the same ground twice, hoping that the passage of time or changes in the composition of the court will provide a more favorable result the second time." *Disimone v. Browner*, 121 F. 3d 1262, 1266 (9th Cir. 1997) (citation omitted). As discussed above, Congress

expressly rejected a statutory provision that would allow a second panel to review an earlier decision that was favorable to an accused. Against this statutory backdrop this Court strictly applied Article 66(a) and invalidated *en banc* review of panel decisions. *Wheeler*, 20 U.S.C.M.A. at 596. The change in the *en banc* court's composition below merely substituted one panel's judgment for another, which has always been prohibited by the UCMJ and this Court. *Id.*

A. This Court's Precedent Prohibits a Case from Being Decided by Two Different, Coequal Groups of Judges Within a Court of Criminal Appeals.

In the wake of *Chilcote*, both the Army and Air Force Courts of Military Appeals either established or continued a practice in which panel decisions were circulated to the entire court either orally or in writing before an official opinion issued. *Id.*; *Coleman v. U.S.*, 21 U.S.C.M.A. 171, 174 (C.M.A. 1972). "If one of the judges suggests en banc consideration, and if a majority of the whole court agrees, the panel's proposed decision and proposed opinion are withdrawn." *Wheeler*, 20 U.S.C.M.A. at 596.

The government argued this practice didn't violate *Chilcote* because "*Chilcote* disapproved en banc reconsideration of panel *decisions* and that under Army practice the draft of a panel determination that is circulated among members of the whole court is not a decision in any sense of the word." *Id.* at n. 4.

This Court rejected the lower court's attempt to circumvent both *Chilcote* and Article 66(a), UCMJ, by changing the composition of the court before a formal decision was issued.

"As in *Chilcote*, we construe Article 66(a) as meaning that cases are to be reviewed and decided by panels of the court or by the entire court, but that the same case may not be decided by two different groups of judges within a Court of Military Review." *Wheeler*, 20 U.S.C.M.A. at 598. While *Wheeler* has been superseded, in part, by the 1983 amendment to Article 66(a), UCMJ, Congress only authorized the *en banc* review of panel decisions in that amendment.

Congress did not authorize reconsideration of a panel decision by another panel as contemplated in the rejected version of Article 66(e), UCMJ. *U.S. v. Riley*, 55 M.J. 185, 189 (C.A.A.F. 2001) ("Article 66 was amended to specifically authorize *en banc* reconsideration of a panel decision, but it does not authorize reconsideration by one panel of another panel's decision.") Nor did it authorize *en banc* reconsideration of a previous *en banc* decision, much less a second *en banc* review with a new slate of appellate judges merely labeled reconsideration. "Unless pleadings, briefs, and arguments are directed to the group of judges that decides the case, some of the normal attributes of appellate review are missing." *Wheeler*, 20 U.S.C.M.A. at 598.

In *U.S. v. Felix*, 40 M.J. 356 (C.M.A. 1994), this Court affirmed the *en banc* reconsideration of a three-judge panel's decision favorable to the accused. The original panel dissented, calling the reconsideration a "judicial mugging." *U.S. v. Felix*, 36 M.J. 903, 913 n. 11 (A.F. Ct. Crim. App. 1993). "Surely this excursion into a seldom visited back alley of military justice is not what the Congress and the Judge Advocates General had in mind when they gave us permission to shoot our toes off." *Id.*; *U.S. v. Pierce*, 40 M.J. 584, 590 (A.C.M.R. 1994) (*en banc*) (Russell, J., concurring) ("In sum, the fact that interloping judges may disagree with the honest and principled weighing of the evidence by other judges appointed under oath to do so certainly does not make the latter's decision 'wrong'[.]") However, as this Court held in both *Felix* and *U.S. v. Flowers*, 26 M.J. 463 (C.M.A. 1988), Congress expressly authorized *en banc* reconsideration of *panel* decisions.

In *Flowers*, late Chief Judge Everett, who testified before Congress in support of the 1983 amendment to Article 66(a), UCMJ, concurred in the result. He noted that before the statute was amended, "[N]o means existed—short of an appeal to this Court—for resolution of conflicts between separate panels of the same Court of Military Review." 26 M.J. at 466 (Everett, C.J., concurring in the result).

Today, no means exist—short of an appeal to this Court—for resolution of conflict within a Court of Criminal Appeals once it has issued its decision *en banc*.

B. The Legislative History of Article 66, UCMJ, Reflects a Congressional Rejection of Reconsideration by Two Different, Coequal Groups of Appellate Judges Within the Same Court.

This was recognized by Subcommittee Chairman Overton Brooks in 1949. "If one board decides one way and another one decides the other way, you are going to weaken your whole system of justice. It is not a case where you have a divided court, 2 to 1, but here you have two separate tribunals rendering a decision on the same case, and the decisions may be diametrically opposed to each other. I think that hurts the whole system of justice." Hearings on H.R. 2498 at 1205-06. After the Navy representative countered that the second decision would "necessarily" be considered final, Chairman Brooks replied, "Still they have the same authority, and there is the same number of persons, and it is assumed of the same competency, and one decision is one way and the other decision is the other way." *Id.* at 1206. Moments later, Article 66(e) was stricken from the statute. *Id.* at 1207.

C. This Court has Previously Relied Upon Civilian Precedent Holding that Courts Will Not Entertain Motions to Reconsider After a Change in Court Composition, or That Any Motion to Reconsider Must be Directed to the Court as Originally Composed.

In *U.S. v. Robertson*, 17 U.S.C.M.A. 604, 606 (C.M.A. 1968), this Court held that "generally, and whenever possible, an appellant should receive review of his case by a board of review constant in membership." *Id.* at 606. In reaching its holding that boards of review should "whenever possible" remain "constant in membership", this Court relied upon *Rohlfing v. Moses Akiona, Ltd.*, 45 Haw. 440, 441-42 (Haw. 1962) (*overruled on other grounds by Greene v. Texeira*, 54 Haw. 231 (Haw. 1973).

In *Rohlfing*, the petitioners advanced the same argument advanced by the government below, "that the newly appointed justice should participate in passing upon the petition for rehearing." *Id.* This request was denied: "The real effect of such a conclusion that the newly appointed justice should participate, and possibly reverse the previous decision, in the opinion of all the Justices, would be to establish a precedent that might have mischievous and unfortunate results." *Id.* (*citing Gas Products Co. v. Rankin*, 63 Mont. 372 (Mont. 1922)).

The decision before this Court is the result, "not from a conviction upon the part of the members of the court by which the case was originally heard and determined that the decision was erroneous, nor from the consideration of reasons and arguments not before advanced and considered, but solely from the change in the composition of the court." *Woodbury v. Dorman*, 15 Minn. 341, 342 (Minn. 1870). Permitting reconsideration after

a change in the composition of the court, "would, in our opinion, be a violation of proprieties in the administration of justice which it is the duty of a court to maintain, and would tend to destroy that respect for and confidence in judicial tribunals, the loss of which every good citizen would deplore." *Id.* at 343; *Flaska v. State*, 51 N.M. 13 (N.M. 1947); *Golden Valley County v. Estate of Greengard*, 69 N.D. 171 (N.D. 1939); *Cordner v. Cordner*, 91 Utah 474 (Utah 1937); *McCutcheon v. Common Council of Homer*, 43 Mich. 483 (Mich. 1880); *People v. The Mayor and Alderman of the City of New York*, 25 Wend. 252 (N.Y. 1840); *but see State ex rel. Nelson v. Jordan*, 104 Ariz. 103 (Ariz. 1969); *Glasser v. Essaness Theatres Corp.*, 346 Ill. App. 72 (Ill. App. Ct. 1951).

The government may argue that *Robertson* permitted, "in the case at hand", the judicial substitution of a third judge to a board of review in the wake of the retirement of one of the judges assigned to the board. *Robertson*, 17 U.S.C.M.A. at 606. At the outset, it is not clear what remains of *Robertson's* fact-specific conclusion in light of the Military Justice Act of 1968, and *Wheeler*, which was issued three years later. More recently, in *Riley*, citing both *Chilcote* and the legislative history of Article 66, UCMJ, this Court stated the issue of whether "a reconstituted panel composed of only one of the three

judges who made the initial findings of fact" violated *Chilcote* need not be decided. 55 M.J. at 189.

Further, while there may be valid reasons to ensure a three-judge panel considers a capital case in the first instance, *See, Walker v. U.S.*, 60 M.J. 354, 359 (C.A.A.F. 2002), it is wholly unnecessary to alter the composition of the court sitting *en banc* during the period of reconsideration of its previously issued opinion. Indeed, the lower court's Rules of Practice and Procedure provide for the substitution of an appellate judge when the composition of a panel has changed due to the unavailability of a judge, but the Rules are rightly silent on the need to do so when the court is sitting as a whole. Rule 19.2(d), Air Force Court of Criminal Appeals Rules of Practice and Procedure (August 13, 2014).

Finally, this Court found the record in *Robertson* was "completely devoid of anything that suggests or smacks of command influence." *Id.* at 606. There, Captain Kiracofe had been chairman of the board since 1965, and appears to have joined the newly constituted board independent of any subsequent action by the Judge Advocate General of the Navy. Of course, as set forth on pages 217-30 of Appellant's opening brief, that is not what occurred here, which "smacks of command influence." *Id; Walker*, at 358 ("Panel composition, however, is a responsibility committed to the judiciary, not the parties.")

Conclusion

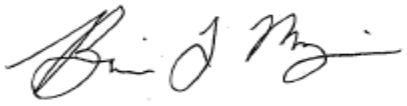
"Military judges, no less than judges of other Federal courts, are required to exercise their independent judgment in all cases properly before them. There is no more certain way to destroy that independence than to encourage a procedure whereby appellate military judges refer all disagreements for resolution by others." *Coleman*, 21 U.S.C.M.A. at 174; *Lincoln Nat'l Life Ins. Co. v. Roosth*, 306 F. 2d 110, 114 (5th Cir. 1962) (*en banc*) ("We think that in a multi-judge Court it is most essential that it acquire an institutional stability by which the immediate litigants of any given case, and equally important, the bar who must advise clients or litigants in situations yet to come, will know that in the absence of most compelling circumstances, the decision on identical questions, once made, will not be re-examined and re-decided merely because of a change in the composition of the Court or of the new panel hearing the case.")

In accordance with *Coleman* and *Wheeler*, and in light of the well-developed legislative history of Article 66, UCMJ, if permitted at all, petitions for reconsideration may only be considered by the *en banc* court as it was composed at the time of its original decision.

WHEREFORE, Appellant respectfully requests this Court set aside the lower court's unauthorized second opinion and remand

this case to the lower court for affirmance of *U.S. v. Witt*, 72 M.J. 727 (A.F. Ct. Crim. App. 2013) (*en banc*).

Respectfully Submitted,



Brian L. Mizer
Senior Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 33030
Air Force Legal Operations Agency
U.S. Air Force
1500 W. Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4773

THOMAS A. SMITH, Major, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 34160
Air Force Legal Operations Agency
U.S. Air Force
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4770
thomas.a.smith409.mil@mail.mil

DANIEL E. SCHOENI, Major, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 33248
36 Hamilton Street, Building 1436
Hanscom Air Force Base, MA 01731
(781) 225-5799
daniel.schoeni@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify I electronically filed a copy of the foregoing with the Clerk of Court on January 5, 2016, pursuant to this Court's order dated July 22, 2010, and that a copy was served via electronic mail on the Air Force Appellate Government Division on January 5, 2016.

Respectfully submitted,

Brian L. Mizer
Senior Appellate Defense Counsel
Air Force Legal Operations Agency
U.S. Air Force
1500 W. Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4773