IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

PATRICK A. SHEA,
Senior Airman (E-4),
United States Air Force,
Appellant.

USCA Dkt. No. 16-0530/AF

Crim. App. Dkt. No. ACM S32225

REPLY

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UNITED STATES,	)	**REPLY**
Appellee,	)	
	)	
v.	)	
	)	
PATRICK A. SHEA,	)	
Senior Airman (E-4),	)	USCA Dkt. No. 16-0530/AF
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TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

Pursuant to Rules 19(a)(7) and 24(b)(3), Appellant respectfully asks that this Honorable Court accept this brief in reply to the government's final brief, which was filed on November 14, 2016.

The government's argument as to the first granted issue is, "simply put, reconsideration of a decision is not the same thing as remand." Government's Final Brief at 12. The government concedes that, when it comes to reconsideration, the Court of Criminal Appeals' rules provide that cases "shall, when practical, be referred to the same numbered panel that last decided the case." *Id*. At 11. But the government contends, without citation to any authority, that a remand should be treated differently. Ultimately, that is the dispute this Court

must answer to resolve the first granted issue, and Appellant stands on the grant brief he filed to address that question.

Whether the government is to blame for its attack on Judge Hecker.

The government spends much of its pleading, even when it is addressing the first granted issue, attempting to blame others for its own attack on Judge Hecker in *United States v. Rivera*. The government admits that "the United States did file a motion for recusal in Rivera," but it asserts that the government was merely "filing the motion previously embraced and initially raised by the appellant in that case." Government's Final Brief at 5, 19. A review of the pleadings in *Rivera* shows that claim to be false. Neither Airman Shea nor Airman Rivera ever filed a motion seeking to have Judge Hecker removed.

The only motion to recuse Judge Hecker that has ever been filed was submitted, unsolicited, to the Court of Criminal Appeals by the government's lawyers on March 11, 2016. *See* J.A. at 54. In that motion, the government launched a broadside assault not merely on Judge Hecker's fitness for judicial service, but also the viability of every judge who had touched *Rivera* while sitting alongside her. *See* J.A. at 54-71.

The government expressly tied its March 11th motion to the motion for clarification it had filed in *Rivera* on February 10, 2016. *See* J.A. at 59.

The government, not Airman Shea, was the first and the only party to move for Judge Hecker's removal. The government's repeated attempts throughout its pleading to argue that Airman Rivera somehow is to blame for the government's decision to take that action makes no sense. The government's lawyers are not automatons. They made their own decision and are responsible for their own pleadings.

Further, even if the government's apparent theory for its actions were true, and if undersigned counsel had somehow managed to goad the government's counsel into filing a pleading in *Rivera* that was against common sense and their better judgment, those circumstances could not be allowed to prejudice Airman Shea. The government is unitary, but Airman Shea and Airman Rivera are living, breathing, separate, and distinct human beings with individual rights. Airman Rivera could not invite error upon Airman Shea.

The propriety of the government's actions in *Rivera*.

The government's brief posits, repeatedly, that to resolve the granted issues this Court must first determine whether the motion the

government filed to remove Judge Hecker in *Rivera* was "proper." *See* Government's Final Brief at 18-21. In fact, the government has affirmatively "invite[d] this Court to examine the pleading for any evidence of impropriety." *Id.* at 14. This Court ought to take the government up on its invitation.

The government does not provide a standard for this Court to employ in conducting such an examination, but a standard does exist. In *United States v. Mitchell*, 39 M.J. 131 (C.M.A. 1994), this Court's predecessor articulated the standard that a reasonable person would employ when determining whether a judge should be recused. The government's lawyers should have employed that same reasonable person standard before filing their motion to remove Judge Hecker and the two jurists who sat with her in *Rivera*.

First, according to *Mitchell*, "[i]n the absence of some evidence to the contrary, [a reasonable government lawyer] must presume not only that the Judge Advocate General and his assistant know the law but also that they follow it." 39 M.J. at 145. There is no evidence government counsel employed a presumption of procedural regularity.

Rather than presuming procedural regularity, on February 10, 2016, the government's lawyers demanded that the Court of Criminal Appeals "clarify" Judge Hecker's detailing status. J.A. at 24-25. The government's lawyers did that even though a member of its trial and appellate counsel division had received full disclosure of her status directly from the Court of Criminal Appeals via an order issued on October 26, 2015. J.A. at 58. The Court of Criminal Appeals answered the government's demand for clarification and offered assurances that measures had been taken to prevent conflicts of interest. J.A. at 42. Even with that clarification, the government's lawyers still refused to presume procedural regularity and instead moved to have Judge Hecker removed, and to have her colleagues removed as well. J.A. at 66-69. The first *Mitchell* factor weighs against a finding that the government's actions were appropriate.

Next, under *Mitchell*, a reasonable government lawyer would consider that Judge Hecker "is a military officer who has sworn to do [her] duty under law, and has taken an oath to dispense justice 'impartially[.]" *Mitchell*, 39 M.J. at 144 (citation omitted). A reasonable lawyer would consider that if Judge Hecker were to surrender to

corrupting temptation, it "would not only constitute a judicial ethical violation but it could also expose [her] to criminal liability under the Uniform Code of Military Justice." *Id.* Neither the government's *Rivera* "clarification" motion nor its recusal motion demonstrate any meaningful consideration of this factor. Accordingly, this factor also suggests that the government's actions were not appropriate.

Third, under *Mitchell*, a reasonable government lawyer contemplating a recusal motion would have considered that "[Judge Hecker] has viable remedies to protect [herself] from untoward influence of the Judge Advocate General or his subordinate." *Id.* at 145. The fact that Judge Hecker did not "avail[] [herself] or attempt to avail [herself] of these remedies" would have been an important factor for a reasonable government lawyer. *Id.* Nothing in the record indicates that government counsel considered this factor prior to attacking Judge Hecker's appointment. Accordingly, this factor indicates that the government's actions were not appropriate.

Finally, a reasonable government lawyer would have found it persuasive is that no Court of Criminal Appeals judge, in *Rivera* or in any other case, "has asserted a belief that the JAG . . . was generally

biased for the prosecution." *Id*. Here, no evidence exists that government counsel ever sought to determine whether Judge Hecker or any other appellate judge had asserted any such claim. Further, there is no evidence that government counsel ever sought to address their concerns directly with the Judge Advocate General. Accordingly, the final *Mitchell* factor also suggests that the government's actions against Judge Hecker were improper.

The government's brief posits that this case turns on whether its motion to remove Judge Hecker and her colleagues in *Rivera* was proper. *Mitchell* provides the lens through which that question should be addressed. Through that lens, to a reasonable observer, the government's assault on Judge Hecker and her colleagues was not only improper, but given her unexplained removal from this case shortly thereafter, it was also an actual and apparent violation of Article 37.

Accordingly, to save Appellant from a sentence that has not been properly reviewed under Article 66(c), and to remedy the appearance of unlawful influence the government has created by manufacturing the removal of an appellate military judge, this Honorable Court should affirm a sentence to no punishment.

Very Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on November 23, 2016.

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