IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	**APPELLANT'S REPLY**
Appellee	Crim.App. Dkt. 202100299
v.	USCA Dkt. 23-0204/MC
Thomas H. TAPP, Private First Class (E-2) U.S. Marine Corps	
Appellant	

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

CHRISTOPHER B. DEMPSEY
LT, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
(202) 685 - 8502
christopher.dempsey2@navy.mil
CAAF Bar No. 37597

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A. "[A] military judge must not become an advocate for a party but must vigilantly remain impartial during the trial."[1] Lieutenant Colonel Norman was an advocate for the Government. As such, his "impartiality might reasonably be questioned."[2]

1. Lieutenant Colonel Norman's pre- and post-trial comments establish at least apparent bias.

This Court held in *United States v. Quintanilla* that "an *ex parte* communication which might have the effect or give the appearance of granting an undue advantage to one party cannot be condoned" as it creates at least an appearance of bias.[3] Therefore, under *Quintanilla*, LtCol Norman's *ex parte* coaching session of trial counsel where he explicitly declined the presence of the Defense and then "blast[ed]" the Trial Counsel for failing to make the Defense pay a "price" for litigating the case alone establishes at least apparent bias.[4]

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[1] *United States v. Burton*, 52 M.J. 392, 396 (C.A.A.F. 1995).
[2] R.C.M. 902(a).
[3] *United States v. Quintanilla*, 56 M.J. 37, 79 (C.A.A.F. 2001) (citation and quotation marks omitted). This Court outlined that an *ex parte* communication will be disqualifying depending on "on the nature of the communication; the circumstances under which it was made; what the judge did as a result of the *ex parte* communication; whether it adversely affected a party who has standing to complain; whether the complaining party may have consented to the communication being made *ex parte*, and, if so, whether the judge solicited such consent; whether the party who claims to have been adversely affected by the *ex parte* communication objected in a timely manner; and whether the party seeking disqualification properly preserved its objection." *Id*. at 44 (internal citations and quotations omitted).
[4] *Id*. at 79; J.A. at 587, 1381-82.

But the Government asks this Court to sidestep its discrete holding in *Quintanilla* in evaluating the impact that an *ex parte* lecture such as LtCol Norman's has in revealing partiality. Instead, it asks this Court to apply the broader test the Supreme Court outlined in *United States v. Liteky*.[5] In *Liteky*, the Supreme Court identified two means of establishing bias: (1) evidence of extrajudicial influence or (2) a "favorable or unfavorable predisposition" that is "so extreme as to display clear inability to render fair judgment" even if that predisposition is developed during the course of trial.[6] In any event, both grounds for finding partiality articulated in *Liteky* exist here as outlined below and in Appellant's Brief.[7]

First, LtCol Norman exhibited extreme extrajudicial bias against defense counsel. Extrajudicial bias is defined simply as bias deriving from "a source outside of the judicial proceeding at hand."[8] As described in Appellant's Brief, [redacted]

[5] Appellee's Ans. at 21 (citing *Liteky v. United States*, 510 U.S. 540 (1994)).
[6] *Liteky*, 510 U.S. at 544-45, 555-56 (articulating that the "extrajudicial doctrine" is more of an "extrajudicial factor").
[7] App. Br. at 38-62.
[8] *Liteky*, 510 U.S. at 545 (citing *United States v. Grinnell Corp.*, 384 U.S. 563 (1966)).
[9] J.A. at 1458-59; App. Br. at 19-21.

[redacted]

When these comments made pre-trial are paired with LtCol Norman's post-trial *ex parte* tirade where he directed Trial Counsel to make the Defense pay a "price" when it takes a case to trial or files motions, it is evident that "a source outside of the judicial proceeding at hand" biased LtCol Norman.[14] That extrajudicial source is LtCol Norman's bias against the defense bar at large.

Second, even without considering this extrajudicial influence, LtCol Norman demonstrated both a favorable predisposition toward the Government and an

[10] J.A. at 1440-65.
[11] J.A. at 1456-57.
[12] J.A. at 1459-60.
[13] J.A. at 1460.
[14] *Liteky*, 510 U.S. at 545 (citing *Grinnell Corp.*, 384 U.S. 563).

unfavorable predisposition toward the Defense that rose to a level of "deep-seated favoritism or antagonism . . . ."[15] "A favorable or unfavorable predisposition can . . . deserve to be characterized as 'bias' or 'prejudice' because, even though it springs from the facts adduced or the events occurring at trial, it is so extreme as to display clear inability to render fair judgment."[16] This occurred here. Throughout its Answer, the Government misapprehends the principle evidence supporting LtCol Norman's bias in this manner.

Primarily, the Government consistently misconstrues LtCol Norman's pre-trial comments toward the Defense as frustration "[redacted] The Supreme Court explained in *Liteky* that "expressions of impatience, dissatisfaction, annoyance, and even anger" and "[a]

[15] *Liteky*, 510 U.S. at 555.
[16] *Id*. at 551.
[17] Appellee's Ans. at 17, 27, 34.
[18] J.A. at 1459-60.

judge's ordinary efforts at courtroom administration" are not evidence of partiality.[19] LtCol Norman's comments pre-trial at least began to separate from this level of commentary and establish some amount of predisposition.

It is LtCol Norman's *ex parte*, post-trial tirade that undeniably establishes undue predisposition. The Government dances around the truth of this outburst. He did not simply chastise the Trial Counsel for undervaluing a case and teach them when a pretrial agreement should be agreed upon as the Government suggests.[20] Lieutenant Colonel Norman expressly declined to include the Defense in his "blasting" lecture and proceeded to unambiguously direct Trial Counsel to make the Defense pay a "price . . . for their earlier decisions" in litigating this case on behalf of their client by seeking the maximum punishment.[21] One prosecutor present explained "Lieutenant Colonel Norman just takes military justice very seriously, particularly when you're a trial counsel and your [sic] representing the government."[22] In making these comments, LtCol Norman demonstrated an explicit favoritism for the Trial Counsel and went further by also seeking to punish the Defense (and thereby Appellant).

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[19] *Liteky*, 510 U.S. at 555-56.
[20] *See* Appellee's Ans. at 21-32.
[21] J.A. at 587, 1381-82.
[22] J.A. at 620.

It was this evidence of bias against the Defense that stained all of his decisions and commentary in the case (including those made pre-trial) and revealed his predisposition in a manner establishing a "clear inability to render fair judgment."[23] In other words, LtCol Norman began to depart from "ordinary efforts at courtroom administration" with his pretrial comments but absolutely did so during his *ex parte* diatribe after trial.[24] As this Court held in *United States v. Burton* "a military judge must not become an advocate for a party but must vigilantly remain impartial during the trial."[25] Lieutenant Colonel Norman was an advocate for the Government.

And just because the trial had concluded when LtCol Norman made his *ex parte* comments does not absolve him of the need to remain impartial or mean his partiality did not affect the trial. Principally, the trial was over but the case was not. And as this Court held in *United States v. Greatting*, an *ex parte* communication with the Government on cases pending post-trial action that the military judge believed were dealt for "too low" a sentence "would lead a reasonable person, knowing all the circumstances, to the conclusion that the military judge's impartiality might reasonably be questioned."[26] Indeed, LtCol

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[23] *Liteky*, 510 U.S. at 551.
[24] J.A. at 1440-65; *Liteky*, 510 U.S. at 556.
[25] *Burton*, 42 M.J. at 396.
[26] *United States v. Greatting*, 66 M.J. 226, 230-32 (C.A.A.F. 2008).

Norman's commentary here was far more indicative of bias than the comments made in *Greatting*.[27] As such, the Government does not appreciate that LtCol Norman's commentary reveals the "deep-seated" bias he held throughout trial. And it was not until these revealing statements were made that the Defense understood the scope of LtCol Norman's partiality (and acted accordingly).

The Government's portrayal of the facts asks this Court to suspend reality in the same way Col Woodard did. LtCol Norman's comments undoubtedly demonstrated an extrajudicial influence against defense counsel, animosity for the Defense, and favoritism for the Government. Lieutenant Colonel Norman abandoned his impartial role and sought to encourage the Government to punish the Defense. This is precisely why "an *ex parte* communication which might have the effect or give the appearance of granting undue advantage to one party cannot be condoned."[28] He deliberately sought to administer the Government's case, not just his courtroom. Under *Liteky* and R.C.M. 902, LtCol Norman's "impartiality might reasonably be questioned."[29]

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[27] *See id*. at 230-31 (finding that the military judge "told the SJA that the convening authority had sold [a companion] case 'too low' and mentioned that the younger marines [involved] 'were perhaps more guided or motivated by misguided loyalty to the staff NCO's [(including appellant)] that they worked for.'").
[28] *Quintanilla*, 56 M.J. at 79 (citation and quotation marks omitted).
[29] R.C.M. 902(a).

2. Lieutenant Colonel Norman's comments and rulings contribute to the appearance of bias.

Aside from the explicit bias demonstrated by LtCol Norman's comments discussed above, his on-record comments and rulings should be "called into question by th[is] appearance of bias."[30] This is particularly true where, as here, the bias in question is in part LtCol Norman's desire to punish Defense Counsel for raising motions.[31] It is difficult to measure how a military judge's bias may have impacted a trial, but as articulated in *United States v. McIlwain* "every time [he] ruled on evidence, asked questions, responded to member questions, or determined instructions, the military judge exercised [his] discretion . . . ."[32] "[W]here, as here, there is an indication of . . . bias, each questionable adverse ruling by the trial judge tends to magnify the appearance of injustice."[33] Appellant outlines these actions in his Brief not because he has "[a] mere disagreement with Lieutenant Colonel Norman's rulings."[34] Rather, when evidence of his bias is juxtaposed with LtCol Norman's commentary and rulings made during the trial, it is clear his bias led him to "prejudge[] the facts or the outcome of the dispute."[35] And it is

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[30] *United States v. Kish*, No. 201100404, 2014 CCA LEXIS 358, at *11-14 (N-M. Ct. Crim. App. June 17, 2014) (unpublished) (J.A. at 47-48).
[31] J.A. at 602-05, 610, 620-21, 625, 640, 1381-82.
[32] *United States v. McIlwain*, 66 M.J. 312, 316-17 (C.A.A.F. 2008) (alterations omitted).
[33] *United States v. Edwardo-Franco*, 885 F.2d 1002, 1006 (2d Cir. 1989).
[34] Appellee's Ans. at 41.
[35] *Franklin v. McCaughtry*, 398 F.3d 955, 926 (5th Cir. 2005).

important to note that he ruled against the Defense on essentially every critical motion.[36] When paired with his pre- and post-trial comments discussed above, LtCol Norman's impartiality should only more "reasonably be questioned" in examining his rulings.[37]

B. Colonel Woodard abused his discretion in finding LtCol Norman was impartial.

Colonel Woodard abused his discretion in finding no actual or apparent bias. The Government's arguments otherwise do not address the evidence directly. Appellant will supplement the arguments made in his Brief and address each counterargument the Government made in turn below as necessary.

1. Lieutenant Colonel Norman wanted the Trial Counsel to seek more confinement. This was corroborated by all the Trial Counsel present.

As to the first incorrect finding of fact identified in Appellant's Brief, the Government is incorrect in stating there is some evidence to support Colonel Woodard's finding that LtCol Norman "never stated that the trial counsel should have asked for more than the 11 years of confinement."[38] Critically, all people present corroborated Major Michel's memorandum of LtCol Norman's outburst, which establishes this fact is uncontroverted.

In the first portion of the memorandum, it was noted:

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[36] *See* App. Br. at 21-29.
[37] R.C.M. 902(a).
[38] J.A. at 1415; Appellee's Ans. at 33.

- "[T]he military Judge criticized Trial Counsel for asking for eleven years of confinement, and implied that Trial Counsel should have asked for more confinement, up to and including the maximum punishment."[39]

- "[H]e was displeased that Trial Counsel unilaterally decided to 'cap' the sentence in this case by only asking for eleven years of confinement."[40]

Captain O'Connell testified that LtCol Norman "did disagree with" our sentencing recommendation to the members during the sentencing argument.[41] He explained that LtCol Norman was frustrated the prosecutors "independently" put a "cap" on the sentence.[42] Captain O'Connell understood this to mean that they had incorrectly "capped . . . the confinement by asking for 11 years."[43] Lieutenant Colonel Norman expressed "I don't know if you guys know what right looks like" in discussing the sentencing in this case.[44] And when Capt O'Connell stated he thought eleven years was reasonable, LtCol Norman replied, "Captain O'Connell, I'm surprised at you."[45]

First Lieutenant Bridges echoed these comments. She said that LtCol Norman "sounded angry with what we asked for."[46] Lieutenant Colonel Norman

[39] J.A. at 1381.
[40] J.A. at 1381.
[41] J.A. at 617, 623.
[42] J.A. at 617-18.
[43] J.A. at 623.
[44] J.A. at 629.
[45] J.A. at 630.
[46] J.A. at 591, 610, 613.

"did not agree" that asking for eleven years was appropriate.[47] She understood LtCol Norman's comment about a "cap" to mean that "he did not agree with us" and that "we were self-capping the sentence by asking when the sentence for what the accused did was, you know, a max of 30, we were capping it unilaterally at 11."[48]

Major Michel elaborated on his memorandum during his testimony. He explained that LtCol Norman "was telling us how we could have argued for more confinement."[49] He concurred that LtCol Norman was "specifically referring to this case."[50]

In other words, LtCol Norman undeniably "stated the trial counsel should have asked for more than the 11 years of confinement."[51] The Government's assertion that "Assistant Trial Counsel testified Colonel Norman never told them 'to ask for a specific sentence'" is incorrect, as he asked them to seek the maximum punishment.[52] Nonetheless, LtCol Norman's finding was that LtCol Norman "never stated that the trial counsel should have asked for more than the 11 years of confinement," not that he did not ask for a specific sentence.[53]

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[47] J.A. at 594-95.
[48] J.A. at 603.
[49] J.A. at 636, 642-43.
[50] J.A. at 642.
[51] J.A. at 1415; Appellee's Ans. at 33.
[52] J.A. at 1381.
[53] J.A. at 1415; Appellee's Ans. at 33.

And the Government's conclusion that he "did not tell them they should have asked for more confinement" is not supported by the record in any capacity.[54] The Joint Appendix cite the Government provided explicitly provides "I mean that his comments were about how we could have asked for more confinement . . . ."[55] Indeed, the Government's quotation of the Court Report's testimony establishes this finding was erroneous: "He testified that Lieutenant Colonel Norman said something like '[w]hy didn't you ask for the maximum punishment?'"[56]

This summary of the record also undercuts the Government's argument against the fifth erroneous finding of fact identified in Appellant's brief that "LtCol Norman did not express displeasure or disagreement with the adjudged sentence."[57] Frustration with a requested sentence implicitly means frustration with an adjudged sentence. This finding was also erroneous.

2. Lieutenant Colonel Norman wanted Appellant to pay a price for taking his case to trial and the actions of his counsel. Finding otherwise was erroneous.

The Government also contends that the second incorrect finding of fact identified in Appellant's Brief is correct: that "Lieutenant Colonel Norman never stated or suggested that any accused or specifically the accused in this case,

[54] Appellee's Ans. at 33.
[55] J.A. at 643.
[56] Appellee's Ans. at 6-7 (quoting J.A. at 586).
[57] J.A. at 1415.

[Appellant], should pay a price."[58] But Major Michel's memorandum explicitly outlined how LtCol Norman expressed frustration with the Defense's tactics during trial and expressly told Trial Counsel to exact a "price" in the form of seeking the maximum amount of confinement for that behavior:

- "The Military Judge discussed the actions taken by the Defense in this case, including filing untimely motions, forcing the Government to file a response mid-trial at midnight, and going to a contested trial."[59]

- "The Military Judge also stated that it should make Trial Counsel angry when the Defense Counsel files late or untimely motions."[60]

- "The military Judge stated that when Trial Counsel 'caps' the sentence by asking for less than the maximum amount of confinement, the Defense have no incentive to avoid contested trials, and that there is then no 'price' to be paid by the Defense for their earlier actions."[61]

These statements were corroborated by the other counsel present. Captain O'Connell explained that LtCol Norman questioned them about the Defense's motions practice in the case and asked them "how it made [them] feel."[62] He testified "[a] price or paying a price was mentioned."[63]

First Lieutenant Bridges testified that LtCol Norman told them that actions like filing a motion "should affect our decision" on making a sentencing

[58] J.A. at 1414-15; Appellee's Ans. at 34.
[59] J.A. at 1381.
[60] J.A. at 1381-82.
[61] J.A. at 1382.
[62] J.A. at 620-21.
[63] J.A. at 625.

recommendation.[64] She also confirmed that LtCol Norman told them the Defense needed to pay a "price" for "the motion practice that happened in this case."[65] This included a late Defense-filed M.R.E. 412 motion and a motion to reconsider made mid-trial.[66]

And Major Michel confirmed that LtCol Norman "talked sort of about some of the things that occurred during the trial, for example filing motions outside of TMO milestones [and] filing motions during trial."[67] Lieutenant Colonel Norman said the prosecutors "should feel angry when the defense does those things."[68] He testified that what he put in the memorandum "was accurate."[69] He specifically recalled LtCol Norman saying "there's not a price to be paid by the defense . . . for sort of their prior tactics during the trial."[70] This included "motion filing or untimely motions[.]"[71]

Thus, LtCol Norman explicitly advocated for the Government to seek the maximum confinement as a "price." Such a "price" would only impact Appellant.

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[64] J.A. at 602-03.
[65] J.A. at 604-05, 610.
[66] J.A. at 605-06.
[67] J.A. at 638.
[68] J.A. at 639.
[69] J.A. at 639.
[70] J.A. at 640.
[71] J.A. at 640.

The Government's argument is not supported by the record. This finding was erroneous.

3. Lieutenant Colonel Norman's unsworn statement is due no weight as evidence of impartiality.

Lieutenant Colonel Norman's unsworn statement craftily avoids confessing to the most critical facts supporting his partiality. As such, it supports Appellant's contention that he merely "bent over backwards to make it seem as though he had not acted as a result of such bias."[72] It is not due the weight Col Woodard afforded it. Beyond those instances outlined in Appellant's Brief and contrary to the Government's assertions otherwise, the below further underscores why Col Woodard abused his discretion in relying on it.[73]

In addition to repeatedly asserting that he was impartial, Lieutenant Colonel Norman merely confessed that he: (1) agreed he discussed the "aggravating evidence presented in this case;" (2) encouraged pretrial negotiations; (3) believed the Government "undervalue[d] their case" in a manner that created a "self-imposed cap;" (4) advised he had previously counseled the Defense regarding their

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[72] *Quintanilla*, 56 M.J. at 43-44 (internal quotations and citation omitted); *see United States v. Bremer*, 72 M.J. 624, 626-68 (N-M. Ct. Crim. App. May 23, 2013) (finding that the military judge's comments in a post-trial hearing evidence that he "bent over backwards" to defend his impartiality and thereby made himself appear partial) (quoting *Quintanilla*, 56 M.J. at 43-44).

[73] App. Br. at 61-62; Appellee's Ans. at 38.

sentencing case; (5) regretted the *ex parte* nature of the lecture; and (6) articulated how valuable feedback is to development as a litigator.[74]

Critically, LtCol Norman *never addressed* his comments expressing anger with the Defense litigating the case or requesting the Government to make the Defense pay a "price" for doing so. Indeed, he appeared to prevent himself from admitting as much when he stated "I pointed out that there were significant aggravating—aggravating evidence presented in this case."[75] That he failed to address the most damning—and partial—aspect of his *ex parte* tirade means no weight should be given to his repeated statements that he was impartial. Instead, the limited nature of his confession—rebutted by all counsel present—should be held against him. He transparently "bent over backwards to make it seem as though he had not acted as a result of such bias" by not acknowledging his inflammatory remarks.[76] Even if he did not recuse himself because he believed he was partial,[77] his statement on the matter was not a "full disclosure" done out of a "sense of prudence," but rather to apparently twist the facts in his favor.[78] His

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[74] J.A. at 503-07.
[75] J.A. at 503.
[76] *Quintanilla*, 56 M.J. at 43-44 (internal quotations and citation omitted).
[77] *See United States v. Gorski*, 48 M.J. 317 (C.A.A.F. 1997) (outlining that when "the issue of recusal is interjected into the proceedings . . . [t]he judge involved must then decide whether the circumstances warrant recusal as a matter of discretion, even if not required as a matter of law") (internal citation omitted).
[78] *United States v. Sullivan*, 74 M.J. 448, 454, 454 n.8 (C.A.A.F. 2015); *United States v. Wright*, 52 M.J. 136, 142 (C.A.A.F. 1999).

statement is thus only due weight as evidence of partiality.

And it is obvious why he did not admit to his entire *ex parte* statement: these facts uncontrovertibly reveal that he was biased. This is presumably the same reason why the Government does not address them head on, that Colonel Woodard avoided them, and the Navy-Marine Corps Court of Criminal Appeals (NMCCA) pretended they did not exist.[79] But his *ex parte* tirade cannot be whitewashed. Lieutenant Colonel Norman wanted to punish Appellant for taking a case to trial and for his counsel filing motions by having prosecutors seek the maximum amount of confinement. And not only did this infect his approach to Appellant's trial, but he wanted that to be government policy going forward. It was an abuse of discretion to not consider this overt evidence of favoritism and bias properly.

C. Colonel Woodard abused his discretion in finding reversal was not warranted under *Liljeberg v. Health Servs. Acquisition Corp.*[80]

In light of this bias, this Court should reverse under *Liljeberg v. Health Servs. Acquisition Corp.*[81] In conducting this analysis, Colonel Woodard's conclusions should be given no deference as he erroneously found that LtCol

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[79] Notably, the NMCCA never mentions the word "price" in their opinion and described the *ex parte* session as merely that "[t]he military judge was critical of the trial counsel's sentencing presentation." J.A. at 8, 26.
[80] *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988).
[81] *Id.*; *see* App. Br. at 62-70.

Norman was impartial prior to finding reversal was not warranted under *Liljeberg*.[82] For the following reasons, reversal remains warranted.

First, Appellant suffered a specific injustice. As noted above, "every time [LtCol Norman] ruled on evidence, asked questions, responded to member questions, or determined instructions, the military judge exercised [his] discretion."[83] Indeed, as the Government highlighted on this point, "a military judge is charged with making a number of decisions, any one of which could affect the members' decision as to guilt or innocence, or with regard to the sentence."[84] As outlined in Appellant's Brief, LtCol Norman ruled on several critical motions at trial.[85] All were tainted by his bias and even if his decisions were not an abuse of discretion, they were discretionary and could have been ruled on in Appellant's favor. Unlike the personal socialization that resulted in a finding of apparent bias in *United States v. Uribe*, the bias here undercut the military judge's ability to give Appellant a fair trial because he actively sought to punish him for litigating the case.[86] This was a specific injustice. As in *Greatting*, "the record establishes a

[82] J.A. at 1425-27.
[83] *McIlwain*, 66 M.J. at 316-17.
[84] Appellee's Br. at 43 (quoting *McIlwain* 66 M.J. at 315).
[85] App. Br. at 21-29, 64-65.
[86] *United States v. Uribe*, 80 M.J. 442, 444-49 (C.A.A.F. 2021).

risk" that LtCol Norman's bias impacted the outcome of the case, supporting the first *Liljeberg* factor.[87]

Second, as to whether inaction will promote injustice in other cases, the Government inappropriately relies on the half-true unsworn statement of LtCol Norman vice the uncontroverted memorandum provided by Major Michel to assert it does not.[88] But this Court should make an example of what happens when a military judge exhibits the level of bias demonstrated in Appellant's case. Unlike the out-of-court contact between the military judge and trial counsel in *United States v. Butcher* that centered on social subjects, LtCol Norman's *ex parte* tirade was explicitly linked to Appellant's case and exhibited extreme favoritism for the trial counsel and animosity towards the Defense.[89] As in *Greatting*, the case here is distinguishable from *Butcher* and reversal "may prevent a substantive injustice in some future case by encouraging a military judge to more carefully examine possible grounds for disqualification."[90]

And last, as also in *Greatting*, the third *Liljeberg* factor is met because "interference by a judicial officer into matters entirely within the discretion of the [Government] is not only inappropriate, it gives the appearance that [the military

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[87] *Greatting*, 66 M.J. at 231-32.
[88] Appellee's Ans. at 41-43.
[89] *United States v. Butcher*, 56 M.J. 87, 93 (C.A.A.F. 2001).
[90] *Greatting*, 66 M.J. at 232 (quoting *Liljeberg*, 486 U.S. at 868) (internal alterations and quotations omitted).

judge] was aligned with the Government."[91] LtCol Norman intentionally excluded the Defense and then explicitly sought to provide circuit policy for the Government on what sentences were appropriate in an effort to punish the Defense for litigating cases. This gives "the appearance . . . that [LtCol Norman] was aligned with the Government" and satisfies the third factor.[92]

Furthermore, in reviewing "the entire proceedings" as required under the third *Liljeberg* factor, it is unclear why Col Woodard did not require LtCol Norman's testimony on the matter.[93] While Col Woodard later did say he would accept briefing on how the fifth amendment right against self-incrimination and judicial deliberation privilege were implicated, he never challenged LtCol Norman's invocation.[94] And Col Woodard conducted no analysis under M.R.E. 509, 605, 606, 611, or any other rules regarding how a rule would have prevented LtCol Norman's testimony on these matters at the post-trial hearing.[95] He simply found "[t]he [c]ourt understands that Lieutenant Colonel Norman has the right to invoke and I accept that he . . . would invoke if asked any questions" and later blamed the defense for LtCol Norman not testifying: "[i]t was a defense filed

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[91] *Id*.
[92] *Id*.
[93] *Uribe*, 80 M.J. at 449 (alterations in original) (quoting *United States v. Martinez*, 70 M.J. 154, 160 (C.A.A.F. 2011)).
[94] J.A. at 573-82, 663, 1418.
[95] J.A. at 33 n.169, 573-82, 1418.

professional responsibility complaint."[96] This is significant, because although there is no definitive ruling on the issue, this Court has identified that "a judge may be permitted to testify where a credible showing of judicial misconduct exists" and the fifth amendment right against self-incrimination only applies "wherever the answer might tend to subject to *criminal* responsibility him who gives it."[97] Colonel Woodard's limited inquiry into LtCol Norman's ability to testify, his blame towards the Defense for filing an appropriate ethical complaint, and the NMCCA's implicit approval of those actions does not help strengthen public confidence in military justice.[98]

Thus, for these reasons and those outlined in Appellant's Brief, all three factors of the *Liljeberg* test were met here.[99] This Court should reverse the findings as a result.

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[96] J.A. at 578, 663.
[97] *United States v. Matthews*, 68 M.J. 29, 40-41 (C.A.A.F. 2009) (internal citation omitted); *McCarthy v. Arndstein*, 266 U.S. 34, 41 (1924) (emphasis added)
[98] J.A. at 33, 663, 1418.
[99] App. Br. at 62-70.

CHRISTOPHER B. DEMPSEY
LT, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
(202) 685 - 8502
christopher.dempsey2@navy.mil
CAAF Bar No. 37597

CERTIFICATE OF FILING AND SERVICE

I certify that the Brief was delivered to the Court, to Deputy Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on February 22, 2024.

CHRISTOPHER B. DEMPSEY
LT, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
(202) 685 - 8502
christopher.dempsey2@navy.mil
CAAF Bar No. 37597

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This Reply complies with the type-volume limitations of Rule 24(c) because it contains 4,728 words, and complies with the typeface and style requirements of Rule 37. Undersigned counsel used Times New Roman, 14-point type with one-inch margins on all four sides.

CHRISTOPHER B. DEMPSEY
LT, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
(202) 685 - 8502
christopher.dempsey2@navy.mil
CAAF Bar No. 37597