IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee v. Sergeant (E-5) **DAYTRON ABDULLAH** United States Army Appellant	REPLY BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20230223 USCA Dkt. No. 25-0070/AR

Issue Presented

WHETHER A RETIRED APPELLATE JUDGE AND AN APPELLATE JUDGE ON TERMINAL LEAVE IMPERMISSIBLY PARTICIPATED IN AN EN BANC DECISION OF THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS.

In its brief, the Government mischaracterizes Appellant's argument and also demonstrates it does not understand this Court's decision in *United States v. Witt*, 75 M.J. 380 C.A.A.F. 2016). In *Witt*, this Court looked to the "problem of appearances and public perception" in determining that the *en banc* court in that case was improperly composed. *Id.* at 383. That too was the approach Appellant took in his brief. How would the public perceive a retired judge and a judge on terminal leave participating in the *en banc* opinion in Appellant's case? The government's brief shows little concern for public perception.

Demonstrating its misunderstanding, the Government took a rhetorical question in Appellant's brief about public perception as an accusation. The Government "quotes" Appellant's brief as stating that Chief Judge Smawley was "brought in just to provide vote". (Gvt. Br. at 18). But, not only does the Government omit the word "his" in quoting Appellant's brief, it also omits the question mark that provides the context to the question that Appellant asked in his brief. That question remains: Would an outside observer perhaps believe Chief Judge Smawley was merely brought in to provide a vote?

The Government also states that Appellant's claim Chief Judge Smawley and Judge Walker "somehow influenced the independent judgment of the other appellate judges is without evidence and delves into the deliberative process of the Army Court." The Government again misses the point. For the sake of appearances and public confidence in the military appellate process, this Court should not assume the two judges' participation in Appellant's case made no difference, especially since one of the judges authored the Army Court's opinion and the other was the Chief Judge and a general officer, in addition to both of those judges providing two votes.

The Government also asserts that Appellant is "ask[ing] this Court to engage in an inflexible line drawing exercise that, [sic.] not only ignores the historical practices of the service courts of appeals, but also fails to address the question of

when the judges were supposed to recuse themselves." (Gvt. Br. at 14). Appellant is not asking this Court to draw "inflexible lines," rather he is asking that the judges participating in his appeal be active service judges assigned to the Army Court, not retired judges or judges who have completed all their "operational requirements." *See* Army Regulation 600-8-10, Ch. 4-9b (JA071). Neither Chief Judge Smawley nor Judge Walker met the appropriate criteria when the Army Court decided Appellant's case. However, if boundaries need to be established, Appellant proposes a few straightforward ones: (1) Judges sitting on service courts must not be retired; and (2) Judges sitting on service courts should be active judges assigned to the service court, not judges who have completed all operational requirements, out-processed from the service, and began civilian employment.

The Government attempts to distinguish *Witt*, arguing that the judges in *Witt* were disqualified at the get-go (Gvt. Br. at 17), which is true. But the Government then strays with its analysis, stating that if Chief Judge Smawley or Judge Walker "disqualify[ied] themselves after participating in the case, Appellant would be materially prejudiced and the case and *en banc* proceedings would be required to begin anew." But it was the Government that asked for reconsideration and suggested *en* banc. Furthermore, Chief Judge Smawley and Judge Walker only

became "disqualified" because they were retired and no longer assigned to the service court.

Witt's admonition that disqualified judges produce a risk of undermining public confidence (*see Witt*, 75 M.J. at 384, citing *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864 (1988)) would likely not, logically speaking, apply if judges recused themselves from voting on a case due to a change in life circumstance, such as retirement. If that were to happen, the service court would have any number of options, depending on the circumstance. It could re-vote. If the remaining judges meet the particular service court's *en banc* rules, they could retain the existing vote count. If the assigned author of the opinion retires, the authorship of the opinion could be reassigned. Service courts should be mindful of how the public perceives them and plan accordingly, particularly given that many judges retire from these courts.

The Government chides Appellant for citing *United States v. American-Foreign S.S. Corp.*, 363 U.S. 686 (1960). "This use of a case citation from 1960 ignores the fact that Congress, in 1963, amended this statute to prevent the exact result Appellant argues for in the present case." (Gvt. Br. at 14). Aside from the notion that this case may not seem particularly dated to some, the Supreme Court relied on it in *Yovino v. Rizo* in 2019. 586 U.S. 181 (2019). "Our holding in *American-Foreign S. S. Corp.* applies with equal force if not greater force here."

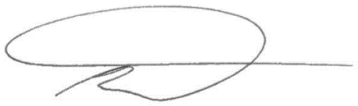
586 U.S. at 185. Congress may have amended the statute, but certain principles remain the same.

The Government apparently believes that because Chief Judge Smawley receives retirement pay, he is subject to recall to the Army Court. "Because he continued to receive pay he was, and still is today, a part of the armed forces and subject to recall. *See United States v. Begani*, 81 M.J. 273, 277 (C.A.A.F. 2021)." (Gvt. Br. at 17)[1]. *Begani* addressed court-martial jurisdiction for retirees, not judicial qualifications for retired judge advocates. It would certainly be a peculiar situation if the Army was to recall Brigadier General(R) Smawley to cast a vote for the *en banc* Army Court. Indeed, this is an issue of appearance and public perception, but it may also lead to a disgruntled retiree.

Tellingly, the Government fails to address Appellant's argument; even if Judge Walker was not officially retired, she was on terminal leave after fulfilling all her operational requirements and had indeed taken on civilian employment. The status of both her and Chief Judge Smawley negatively affects the appearance and public perception of the service courts, as well as the broader framework of

[1] The Government apparently views *Begani* as critical to its argument. *See* "Retired judges of all branches of service of the armed forces who continue to receive pay are still a part of the land and naval forces and subject to the UCMJ. Citing *Begani*, 81 M.J. at 277). (Gvt. Br. at 9); "Both Judge Walker and Judge Smawley retired following their actions in this case. Both judges remained part of the armed forces due to the fact they continue to receive pay. See *United States v. Begani*, 81 M.J. 273, 277 (C.A.A.F. 2021)." (Gvt. Br. at 15).

military justice. Accordingly, this Court should vacate the Army Court's *en banc* opinion.



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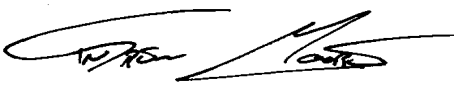

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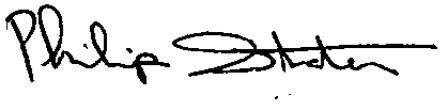

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of United States v. Abdullah, Crim. App. Dkt. No. 20230223, USCA Dkt. No. 25-0070/AR was electronically filed with the Court and Government Appellate Division on July 16, 2025.

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