IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee

v.

Eric S. GILMET
Chief Hospital Corpsman (E-7)
U.S. Navy,

Appellant

AMICUS CURIAE BRIEF
OF UNITED STATES
ARMY AND AIR FORCE
DEFENSE APPELLATE DIVISIONS

IN SUPPORT OF APPELLANT

Crim. App. Dkt. No. 202200061

USCA Dkt. No 23-0010/NA

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IN THE UNITED STATES COURT OF APPEALS
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UNITED STATES, *Appellee* v. Eric S. GILMET Chief Hospital Corpsman (E-7) U.S. Navy, *Appellant*	*AMICUS CURIAE* BRIEF OF UNITED STATES ARMY AND AIR FORCE DEFENSE APPELLATE DIVISIONS **IN SUPPORT OF APPELLANT** Crim. App. Dkt. No. 202200061 USCA Dkt. No 23-0010/NA

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

Pursuant to Rule 26 of this Honorable Court's Rules of Practice and Procedure, the Army Defense Appellate Division (Army DAD) and the Air Force Appellate Defense Division (AF/JAJA) respectfully submit their brief in support of Chief Eric Gilmet's (Appellant's) Petition for Grant of Review, filed on 3 November 2022.

INTEREST OF AMICUS CURIAE

The Army DAD represents Soldiers on appeal before the Army Court of Criminal Appeals (ACCA), this Court, and the Supreme Court of the United States. AF/JAJA similarly represents Airmen before its service Court, this Court, and the Supreme Court of the United States.

Unlawful command influence (UCI) continues to cause inherently pernicious effects on the administration of justice in the armed forces. All servicemembers must be afforded criminal proceedings free of actual and apparent UCI at every stage of their criminal prosecution.

Ultimately, all military justice practitioners have an interest in deterring UCI. However, this case presents an even more pressing issue for those, like amici, who are assigned to defend military accused: military defense counsel must be free to provide zealous, loyal, and conflict-free representation without negative repercussions, personally or professionally, imposed by those in power. Thus, amici have an inherent interest in the disposition of this, yet another case involving UCI. Specifically, this case focuses on the harmful impact that threats to career placement and progression directed at *trial defense counsel* can have on the representation of service members.

INTRODUCTION AND SUMMARY OF ARGUMENT

In November 2021, as Appellant awaited trial, Colonel Christopher Shaw told one of Appellant's trial defense counsel, Captain Thomas, that serving in a defense billet could have negative consequences for career advancement and promotion. At that time, Col. Shaw, a representative of the Staff Judge Advocate to the Commandant of the Marine Corps, was involved with assigning Marine Corps judge advocate billets. Appellant ultimately filed a Motion to Dismiss for

UCI, stating that the Government had materially altered his right to individually chosen military counsel and destroyed the attorney-client relationship he had with his defense counsel. The military judge granted the motion and dismissed the case with prejudice. When questioned regarding his comments, Col. Shaw refused to give a sworn statement and indicated that if required to testify, he would invoke his right against self-incrimination.

In order to provide competent and zealous representation of accused service-members, military defense counsel must operate unconstrained by any real or perceived personal or professional tensions outside of the courtroom. Col. Shaw's comments explicitly informed a subordinate attorney that his chances for promotion would be negatively impacted, specifically due to his continued representation of Appellant, thus materially altering Appellant's right to individually chosen military counsel. Col. Shaw's comments, widely publicized within and outside the military community, erode the public's confidence in the administration and integrity of the military justice system, as well as the fundamental practice of law. Additionally, these comments erode the confidence that past, current, and future service-members have in the loyalty and dedication of their assigned military counsel. This loss of public confidence in the system also impacts other judge advocates.

Unlawful command influence has been a longstanding issue in military justice, even prior to the 1950 enactment of the Uniform Code of Military Justice (UCMJ). The Court of Appeals for the District of Columbia found "improper" command influence tainted a World War II court-martial under the 1920 Articles of War, which contained no proscription of UCI. *Homcy v. Resor*, 455 F. 2d 1345 (D.C. Cir. 1971). This concern has persisted over the past several decades and has even occurred at the highest levels of the military justice system. More recently, this Court has concluded that a sitting President and Senator could both commit UCI. *United States v. Bergdahl*, 80 M.J. 230 (C.A.A.F. 2020). The Senator's status as a retired member of the Navy was essential to the Court's finding as to his ability to commit UCI. *Id*. at 234-35. However, no such limitation exists for a President, one vested with the mantle of command authority and who, as Judge Sparks wrote, "enjoys a position atop the military justice system that allows his voice to be heard far and wide." *Id*. at 246 (Sparks, J., concurring in part and dissenting in part). Courts must be ever vigilant that those who wield power over the administration of justice, and who hold a grip over the career placement and advancement of military attorneys, not abuse that power to deprive any accused of his or her constitutional right to counsel.

This case offers a unique opportunity to examine if a highly-ranked and influential judge advocate commits UCI by directly warning a lower-ranking judge

advocate his assignment as defense counsel in Appellant's court-martial would threaten his career progression. This case also provides an opportunity to evaluate the interplay between UCI and an accused's constitutional rights, including the right to conflict-free counsel, as well as a lawyer's duties of loyalty, zeal, and independent judgment. The Court should take this opportunity to analyze the effects of a senior judge advocate leader in the Marine Corps unlawfully influencing a court-martial by threatening a subordinate attorney's career solely due to the fact the subordinate attorney is a defense counsel.

Forcing a defense counsel to zealously advocate on behalf of his client under the fear and threat of professional retribution is antithetical to the fair administration of military justice. When the government materially alters the defense attorney-client relationship by causing a conflict of interest through UCI, the accused loses his or her right to effective assistance of counsel, and as here, the right to have counsel of his or her choice. This material alteration is particularly detrimental to an accused when a judge advocate, and not a commander, influences the proceedings, or when a defense counsel is on the receiving end of the UCI.

ARGUMENT

I. Colonel Shaw's comments threaten the independence of defense counsel.

The Sixth Amendment to the Constitution guarantees an accused the right to the effective assistance of counsel. *United States v. Cronic*, 466 U.S. 648, 653-56

(1984). In addition to the right to counsel, "there is also a correlative right to representation that is free from conflicts of interest." *Wood v. Georgia*, 450 U.S. 261, 271 (1981).

Under the Army's Rules of Professional Conduct for Lawyers, "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." Army Regulation 27-26, Rules of Professional Conduct for Lawyers [AR 27-26], Rule 1.7(a) (2018); *see also* Air Force Instruction (AFI) 51-110, *Professional Responsibility Program* (Dec. 11, 2018), at Attachment 2, Rule 1.7(a). The comment to Rule 1.7 in AR 27-26 states a conflict exists if there is "significant risk that a lawyer's ability to consider, recommend, or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests." AR 27-26, Rule 1.7, Comment (7). Operating under personal conflicts of interest undercuts a defense lawyer's relationship in one essential element – loyalty.

The Army Rules also note that conflicts of interest can arise from personal transactions, commercial relationships, and future employment opportunities for an Army defense lawyer, resulting in the client's likely feelings of betrayal. Specifically, the Comment to Rule 1.7 notes, "when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client . . . such discussions could materially limit the lawyer's representation of the client." AR

27-26, Rule 1.7, Comment (1). This is analogous to a discussion regarding a military promotion or promotion board, which is at issue in this case. Army regulations prohibit an Army lawyer's personal interests, regardless of the source, from adversely affecting a client. AR 27-26, Rule 1.7, Comment (7); *see* AFI 51-110 at Attachment 7 (Air Force Standards for Criminal Justice), Standard 4-3.5.[1]

The distinct organizational structure of the Army Trial Defense Service (TDS) and the individual supervision of TDS defense counsel are designed to promote independence and avoid conflicts of interest. Army defense counsel are supervised, managed, and rated *solely* by their respective TDS supervisory or "technical" chain, and not the local Office of the Staff Judge Advocate (OSJA) or the local organization or chain of command. Army Regulation 27-10, Military Justice [hereinafter AR 27-10], Chapter 6-3, a.(1). Additionally, Army defense counsel "will not perform duty as installation or command staff duty officers or wear the shoulder patch or distinctive insignia of the local organization or command," instead wearing the unique TDS shoulder patch and insignia. AR 27-10, Chapter 6-8, b.(1).[2]

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[1] Additionally, defense counsel must be cognizant of the professional rules of conduct as promulgated by the state of their licensure.

[2] *See* AFI 51-201, *Administration of Military Justice* (Apr. 14, 2022), para. 33.1 ("The [Area Defense Counsel] is one of the great strengths of the military justice system and will continue to be so as long as the defense function is, and is perceived to be, independent.").

Despite a regulatory structure that seemingly would prevent such concerns, the ACCA was forced to address a similar threat to a defense counsel's future employment or assignments and how that can cause a detrimental effect on an accused's rights during trial. In *United States v. Williams*, the ACCA examined whether comments from a senior Army JAG Corps leader caused a conflict of interest for the trial defense counsel. *United States v. Williams*, No. 20160231, 2019 CCA LEXIS 288, at *17 (A. Ct. Crim. App. July 3, 2019), *rev. denied*, 80 M.J. 159 (C.A.A.F. 2020).

In *Williams*, a senior Army JAG Corps leader commented on, and perhaps interfered with, a trial defense counsel's practice, his upcoming permanent change of station (PCS), his follow-on assignments, and his reputation within the Army. Before trial, defense counsel had a tentative post-TDS follow-on assignment as a senior Special Victims' Counsel. He ultimately lost that position and was then given a different post-TDS position and location. *Id*. at *6. This change in the defense counsel's follow-on assignment was set in motion by a conversation between the Staff Judge Advocates (SJAs) at his current and prospective duty locations. *Id*. at *5.

Post-trial, the trial defense counsel raised the issue of a possible conflict of interest he had between representing his client during the trial and professional self-preservation because of the conversation about his follow-on assignment. *Id*.

The ACCA concluded that the defense counsel did not have any conflict of interest because *he did not have a genuine belief* that the Army JAG Corps would ultimately take some future action to negatively impact his career. *Id*. at *13.

Although the court in *Williams* found that there was not a conflict of interest, its analysis is relevant here. In particular, the ACCA observed the comments pertaining to the defense counsel's career and follow-on assignment had fueled a desire in the defense counsel to "stick it" to the government and advocate even more zealously for his client at trial. *Id*. at *14. The ACCA also found the defense counsel had opposed government motions, made several well thought-out and appropriate objections at trial aimed at destroying the prosecution's case, and preserved issues for appeal. *Id*. at *16.

In this case, the defense counsel was unable to continue to represent his client because of defense counsel's genuine belief that the Marine Corps would ultimately take some future action to negatively impact his career, simply for his filling the billet of a defense counsel. This Court should acknowledge those concerns here and should recognize that senior JAG Corps leader comments pertaining to a defense attorney's career can create a conflict of interest, and when such a conflict exists there will be consequences for the case. This case demonstrates what the *Williams* Court feared. There is no guarantee that defense counsel, when faced with serious professional warnings from a senior judge

advocate with the presumptive clout to see those threats through, will be compelled to "stick it" to the government.

Defense attorneys cannot labor while under a conflict of interest between their duty to zealously advocate for clients and their own professional advancement. Col. Shaw's comments in this case were far from harmless professional banter, but instead, were direct threats to a subordinate attorney's career precisely *because* he was a defense counsel. If by representing an accused at court-martial, a defense counsel is at risk of professional retribution, that defense counsel cannot perform his or her duties. This not only erodes the independence of that defense counsel, but also presents an existential threat to military justice. Defense counsel will be faced with the untenable choice of simultaneously representing the interests of his or her client to the best of their ability and protecting himself or herself. No counsel should be faced with such a dilemma, as it violates professional rules as well as cornerstone ideas of due process.

Even if comments such as those made by Col. Shaw would not undermine the entire role of a defense counsel, they could still pose a distinct and palpable threat to a fair trial. For an attorney-client relationship to be effective, counsel must be actively engaged in all phases of trial, including the investigation and preparation phases. *See United States v. Spriggs*, 48 M.J. 692, 696 (A. Ct. Crim. App. 1998) ("Analysis of case law reveals that a viable attorney-client relationship

for the purpose of entitlement to counsel is one in which the counsel has engaged actively in the preparation and pretrial strategy of the case.") (internal citations omitted). If counsel feared for their professional future, they may choose not to interview certain witnesses or may choose not to request expert assistance. Additionally, these conflicts may consciously or unconsciously lead to counsel changing how they choose a panel, select witnesses, question witnesses, file motions, or deliver arguments.

In addition to calling into question the fairness of the trial, such threats also adversely affect recruitment and retention of future defense counsel and the future posture of military justice. The number of officers willing to serve as defense counsel could shrink. If left unaddressed, the type of UCI that occurred here will hollow out the JAG Corps of the various services, depriving them of some of their most gifted and zealous advocates, while also encouraging military accused to rely solely on the services of civilian defense counsel, who will be perceived as untainted by such military-specific threats. This, in effect, will negate the value, or practical effect, of the congressional right to have military counsel detailed to a court-martial, free of charge. Article 27(b), UCMJ; Article 38(b). For those most junior among the ranks who may not be able to afford civilian counsel, those accused will be left with no option but tainted counsel. That cannot be.

II. Colonel Shaw's comments also threaten an accused's participation in the court-martial process.

"Congress has provided members of the armed forces facing trial by general or special court-martial with counsel rights broader than those available to their civilian counterparts." *United States v. Spriggs*, 52 M.J. 235, 237 (C.A.A.F. 2000). An accused has the right to detailed military counsel or military counsel of choice if that counsel is reasonably available. Article 38(b), UCMJ.

Every person facing criminal liability must be confident he or she will have a defense counsel who is completely independent of the prosecution and unafraid of professional retaliation. This idea is critical to the definition of fairness for the American system of criminal justice. The attorney-client relationship must be based on loyalty, openness, honesty, and transparency, both because of the stakes of a court-martial and the vulnerable stage in which the relationship is formed.

Additionally, an accused is intimately familiar with the facts, circumstances, issues, and people involved in his or her case. As such, an accused is normally in the best position to provide information and assist with the development of strategy at trial. Candid and thorough discussions on these subjects are necessary to defend a client. If an accused loses trust in his or her attorney's loyalty, the accused will stop participating fully in providing these most private, personal, and essential details. Without the accused's full participation in his or her own case, the defense

is less robust, meaningful, or purposeful, and consequently far less likely to succeed.

Maintaining independence from the local unit and chain of command assures clients that a defense counsel is separate from the larger governmental entity that is pursuing prosecution. The previously mentioned authority chain of Army TDS ensures that, although defense counsel might wear the same uniform as a convening authority, an accused can nevertheless trust and confide in the independent counsel. Thoroughly explaining these important principles and rapport-building is required at every stage of the attorney-client relationship, as clients are sometimes less sophisticated and less capable of immediately understanding the nuances in the ethical obligations of loyalty and independent judgment. The tangible differences in organization, supervision, and insignia between defense counsel and other legal officers can greatly help in convincing the client that his or her attorney is not aligned with the command.

Our system of justice cannot allow for an accused to be afraid to speak freely with counsel. Rather, an accused must be confident to share openly with counsel and be fully assured that attorney is properly motivated to succeed on his or her behalf. A defense attorney's intentional, professionally self-preserving submission to threats like those of Col. Shaw violates basic principles of criminal

defense work, destroys trust in the attorney-client relationship, and ultimately harms an accused.

CONCLUSION

Unlawful command influence remains the "mortal enemy of military justice." *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986). Affirming the decision below in this case will, in all practical effect, condone Col. Shaw's threats. Ultimately, this loss will be felt most strongly by an accused, who will lose effective assistance of counsel. Colonel Shaw, acting directly within the scope of his duties of managing the assignment process for all Marine judge advocates, "should have known better." *United States v. Horne*, 82 M.J. 283, 288 (C.A.A.F. 2022). Should this retribution for representing criminally accused be tolerated, each service will suffer losses in the recruitment and retention of capable and tenacious defense counsel.

Left undisturbed by this Court, the decision below of the Navy-Marine Corps Court of Criminal Appeals speaks loudly and clearly to accused service-members, current defense counsel, prospective defense counsel, and the public. Its message is that the Marine Corps, and ostensibly the armed forces, does not really care about providing accused service-members with a full, fair, and competent defense. Instead, they mean to pay only lip-service to the guarantees of the

Constitution, en route to a speedy and painless conviction and sentence.

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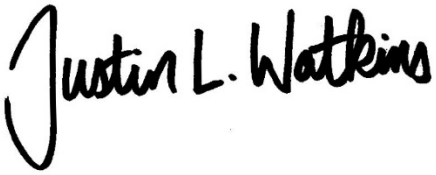

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Certificate of Compliance with Rules 24(c) and 37

1. This Brief on Behalf of Appellant complies with the type-volume limitation of Rule 24(c) because it contains 3088 words.

2. This Brief on Behalf of Appellant complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of United States v. Gilmet, Crim. App. Dkt. No. 202200061, USCA Dkt. No. 23-0010/NA was electronically filed with the Court and Government Appellate Division on November 14, 2022

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