23-7263 ORIGINAL

No. 24-

IN THE

Supreme Court of the United States

EVERALD S. ALLEN, JR.
Petitioner,

v.

KEVIN PAYNE.,
Respondents.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

EVERALD S. ALLEN, JR
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QUESTION PRESENTED

The question presented is:

Whether the trial and conviction of Everald Allen Jr. was tainted as a direct cause of actual Unlawful Command Influence (UCI), appearance of unlawful command influence, or perceived unlawful command influence stemming from then-President Obama media comments in May 7, 2013, three weeks before the trial at issue whether there should be a separate strict liability standard applied to certain UCI simply due to what comments, who says them, when, and to what audience?

RELATED PROCEEDINGS

Allen v. Payne et al,. No. 23-3138, U.S. Court of Appeals for the Tenth Circuit, panel rehearing, judgment entered on January 25, 2024

Allen v. Payne et al,. No. 23-3138, U.S. Court of Appeals for the Tenth Circuit, judgment entered on December 4, 2023

Allen v. Payne et al., No. 23-3061-JWL, U.S. District Court, District of Kansas, judgment entered on June 30, 2023

Allen v. Payne et al., No. 23-3061-JWL, U.S. District Court, District of Kansas, reconsideration, judgment entered on August 7, 2023

United States v. Allen, No. 20130521, Army Court of Criminal Appeals, judgment entered on March 28, 2016

United States v. Allen, No. 16-0571/AR, Court of Appeals for the Armed Forces, judgment entered on July 25, 2016

United States v. Allen, No. 16-0571/AR, Court of Appeals for the Armed Forces, Reconsideration, judgement entered on August 29, 2016

United States v. Allen, No. 20130521, Army Court of Criminal Appeals, extraordinary relief pro se writ of habeas corpus, judgment entered on June 21, 2017

United States v. Allen, No. 20130521, Army Court of Criminal Appeals, pro se motion for reconsideration en banc, judgment entered on January 31, 2018

United States v. Allen, No. 20130521, Army Court of Criminal Appeals, motion for reconsideration, judgment entered on March 23, 2018

United States v. Allen, No. 16-0571/AR, Court of Appeals for the Armed Forces, motion for reconsideration, judgment entered on June 26, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page(s)**

TABLE OF AUTHORITIES (continued)

Page(s)

CONSTITUTIONAL PROVISION

STATUTES

RULES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Everald S. Allen, Jr. respectfully petitions for a writ of certiorari to review the judgment of the Army Court of Criminal Appeal, Court of Appeals for the Armed Forces, and the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals for the Tenth Circuit is reported at 2023 U.S. App. 23-3138 and reprinted in the Appendix to the Petition ("Pet. App.") at 1b. The decision from the district court is reported at 2023 U.S. Dist LEXIS 113943 and reprinted at Pet. App. 1c. The decision from the army court of criminal appeals is reported at 2016 CCA LEXIS 185 and reprinted at Pet. App. 1d.

JURISDICTION

The court of appeals entered its judgment on December 4, 2023, Pet. App. 1b and denied a timely petition for rehearing en banc on January 25, 2024, id. at 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Make Rules Clause authorizes Congress "[t]o make rules for the government and regulation of the land and naval forces." U.S. CONST. art. I, § 8, cl. 14.

The Due Process Clause of the Fifth Amendment prohibits the federal government from depriving any person of "life, liberty, or property, without due process of law." Id. Amend V.

Title 10 U.S.C. § 837; Article 37, U.C.M.J., *Unlawfully influencing action of court* (2012)

> No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. The foregoing provisions of the subsection shall not apply with respect to (1) general instructional or informational courses in military justice if such

courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial, or (2) to statements and instructions given in open court by the military judge, president of a special court-martial, or counsel.

In the preparation of an effectiveness, fitness, or efficiency report, or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced, in grade, or in determining the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person subject to this chapter may, in preparing any such report (1) consider or evaluate the performance of duty of any such member as a member of a court-martial, or (2) give a less favorable rating or evaluation of any member of the armed forces because of the zeal with which such member, as counsel, represented any accused before a court-martial.

Title 10 U.S.C. § 822; Article 22 U.C.M.J., *Who may convene general courts-martial* (2012)

(a) General courts-martial may be convened by—

(1) the President of the United States;

(2) the Secretary of Defense;

(3) the commanding officer of a unified or specified combatant command;

(4) the Secretary concerned;

(5) the commanding officer of an Army Group, an Army, an Army Corps, a division, a separate brigade, or a corresponding unit of the Army or Marine Corps;

(6) the commander of a fleet; the commanding officer of a naval station or larger shore activity of the Navy beyond the United States;

(7) the commanding officer of an air command, an air force, an air division, or a separate wing of the Air Force or Marine Corps, or the commanding officer of a corresponding unit of the Space Force;

(8) any other commanding officer designated by the Secretary concerned; or

(9) any other commanding officer in any of the armed forces when empowered by the President.

(b) If any such commanding officer is an accuser, the court shall be convened by superior competent authority, and may in any case be convened by such authority if considered desirable by him.

Manual for Courts Martial (2012)

Rule 104. Unlawful command influence

(a) General prohibitions.

(1) Convening authorities and commanders. No convening authority or commander may censure, reprimand, or admonish a court-martial or other military tribunal or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court-martial or tribunal, or with respect to any other exercise of the functions of the court-martial or tribunal or such persons in the conduct of the proceedings.

(2) All persons subject to the code. No person subject to the code may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case or the action of any convening, approving, or reviewing authority with respect to such authority's judicial acts.

INTRODUCTION

This petition presents an important question of constitutional law: Whether President Obama's May 2013 comments tainted court-martial proceedings of service members within a certain timeframe with actual Unlawful Command Influence (UCI), the appearance of UCI, or perceived UCI? If so, should there be a separate strict liability standard applied to certain UCI simply due to what comments, who says them, when, and to what audience.

On May 7, 2013, the President and Secretary of Defense (SECDEF) made a statement to national media about the problem of sexual assault in the military; the President at the press conference expressed his intent and the result he wanted, "I expect consequences," "So I don't just want more speeches or awareness programs or training, but ultimately folks look the other way. If we find out somebody's engaging in this, they've got be held accountable prosecuted, stripped of their positions, court-martialed, fired, and dishonorably discharged." Three weeks after President made these comments Petitioner was facing a court-martial at Fort Bragg, North Carolina for sexual assault. Court-martial panel members admitted during *voir dire* to hearing President Obama's and SECDEF's statement. Some of the members characterized the President's statements as a military directive to take a more aggressive stance on sexual abuse, and some believed not enough was being done to prosecute allegations of sexual assault. Some members even voiced that they should do what the President asked them to do. Later this same panel of officers who are directly accountable to the President convicted Petitioner of sexual

assault solely based on the uncorroborated testimony of an alleged victim – a servicemember and friend of Petitioner, who claimed she was "incapacitated" or "drunk" when a sexual assault occurred. However, her testimony does not match the evidence presented at trial — no physical evidence whatsoever was found to connect Petitioner to the alleged sexual assault. According to the alleged victim, Petitioner disrobed her and sexually assaulted her on bedsheets – despite an extensive sampling of the alleged crime scene, Petitioner's DNA was not found. Also, the alleged victim testified at the time of the assault, she was on her menstrual cycle, but no menstrual fluid was found on the bedsheets.

Additionally, extensive swabbing and sampling was performed to collect DNA on the alleged victim's body, vulva, vagina, etc. only hours after the alleged sexual assault. However, the forensic lab did not find Petitioner's DNA. Military investigators from Criminal Investigation Division (CID) testified on the record there was no evidence or anything of evidentiary value to both charges against the petitioner.

STATEMENT

A. Legal Background

In the case of *United States v. Boyce, 76* MJ 242; 2017 CAAF LEXIS 494, No. 16-0546, provides a comprehensive history of UCI, established the standard for what UCI is and standard of review for court-martial cases that allege UCI. Petitioner extensively quotes *Boyce* as it authoritatively captures all essentials of command influence and how it poisons the military justice process by creating bias in court-martial panel members by skewing judgment of other servicemembers in order to please superiors in the chain of command:

> It has long been a canon of this Court's jurisprudence that "[unlawful] [c]ommand influence is the mortal enemy of military justice." *United States v. Thomas,* 22 M.J. 388, 393 (C.M.A. 1986).). "Indeed," as Chief Judge Everett noted in Thomas, "a prime motivation for establishing a civilian Court of Military Appeals was to erect a further bulwark against impermissible command influence." Id. And importantly, our Court's fulfillment of that responsibility "is fundamental to fostering public confidence in the ... fairness of our system of justice." *United States v. Harvey,* 64 M.J. 13, 17 (C.A.A.F. 2006). Two types of unlawful command influence can arise in the military justice system: actual unlawful command influence and the appearance of unlawful command influence. From the outset, actual unlawful command influence has commonly been recognized as occurring when there is an improper manipulation of the criminal justice process which negatively affects the fair handling and/or disposition of a case. See *United States v. Allen,* 33 M.J. 209, 212 (C.M.A. 1991); see also *United States v. Allen,* 31 M.J. 572, 584 (N.M.C.M.R. 1990) ("Unlawful command influence ... is impermissible command control."). As reflected below, however, it took decades for this Court's jurisprudence to define the contours of what constitutes a meritorious claim of an appearance of unlawful command influence. Initially our Court did not differentiate between actual unlawful command influence and the appearance of unlawful command influence. Over the years, however, we have explored the distinctions between the two.
> The first known acknowledgment of the impropriety of an appearance of unlawful command influence arose in 1954. In a concurring opinion in *United States v. Knudson, 4 C.M.A. 587, 598, 16 C.M.R. 161, 172 (1954)* (Brosman, J., concurring in the result), Judge Brosman wrote: [T]he unfortunate

circumstance that the convening authority had previously and openly damned one of these functionaries as an abuser of discretion gives the conduct of the trial an especially unpleasant aroma. Viewing the record as a whole, I am fortified in my belief that the appearance of "command influence" is vivid enough here to require reversal. (Emphasis added.)

The first time that a majority of the Court of Military Appeals cited an **appearance of unlawful command influence as a basis for reversing the conviction of a servicemember occurred ten years later**. In *United States v. Johnson, 14 C.M.A. 548, 551, 34 C.M.R. 328, 331 (1964)*, the Court stated:

In approaching a problem of this nature, the apparent existence of "command control," through the medium of pretrial communication with court members, is as much to be condemned as its actual existence. As a matter of principle, any doubt in the matter must be resolved in favor of the accused. (Emphasis added.)

The Court further stated, **"The appearance, or the existence, of command influence provides a presumption of prejudice."** Id. (emphasis added).

It took another three decades for the standard that we now use in determining whether there was an appearance of unlawful command influence to emerge. Once again, it was a separate opinion that led the way. Judge Wiss stated:

One judge even went so far as to suggest [that] "[t]he practice of ranking ... appellate judges should be discontinued. In the absence of specific objective criteria, an objective, disinterested observer fully informed of the facts would entertain a significant doubt that justice was being done" and would perceive an appearance of command influence. *United States v. Mitchell*, 39 M.J. 131, 151 (C.M.A. 1994) (Wiss, J., concurring in part, dissenting in part, and concurring in the result) (alteration in original) (quoting *United States v. Mitchell*, 37 M.J. 903, 930 (N.M.C.M.R. 1993) (Reed, J., concurring in the result)). This language was adopted in a majority opinion four years later. See United States v. Calhoun, 49 M.J. 485, 488 (C.A.A.F. 1998) ("[We] decline to enshrine a right to private civilian counsel paid for by the Government unless an objective, disinterested observer, with knowledge of all the facts, could reasonably conclude that there was at least an appearance of unlawful command influence over all military and other government defense counsel." (emphasis added)).

A further refinement of this Court's jurisprudence regarding the appearance of unlawful command influence occurred a few years later. Quoting *United States v. Rosser*, 6 M.J. 267, 271 {76 M.J. 248} (C.M.A. 1979), and citing "'the spirit of the Code,'" this Court in *United States v. Stoneman* favorably cited our previous observation that "'**[t]he appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial.**'" 57 M.J. 35, 42 (C.A.A.F. 2002). And importantly, in *Stoneman* we more explicitly explained the distinction between actual unlawful command influence and the appearance of unlawful command influence:

The question whether there is an appearance of unlawful command influence is similar in one respect to the question whether there is implied bias, because both are judged objectively, through the eyes of the community.... **Even if there was no actual unlawful command influence, there may be a question whether the influence of command placed an "intolerable strain on public perception of the military justice system."** See *United States v. Wiesen*, 56 MJ 172, 175 (2001).Id. at 42-43 (emphasis added) (citations omitted).

Chief Judge Erdmann wove together the various strands of our jurisprudence on this topic a decade ago in *United States v. Lewis*, 63 M.J. 405, 413 (C.A.A.F. 2006). In doing so, he first stated that in order for a claim of actual unlawful command influence to prevail, an accused must meet the burden of demonstrating: (a) facts, which if true, constitute unlawful command influence; (b) the court-martial proceedings were unfair to the accused (i.e., the accused was prejudiced); and (c) the unlawful command influence was the cause of that unfairness. Id.

Next, in regard to an **appearance of unlawful command influence**, Chief Judge Erdmann wrote:

Congress and this court are concerned not only with eliminating actual unlawful command influence, but also with "eliminating even the appearance of unlawful command influence at courts-martial." *United States v. Rosser, 6 M.J. 267, 271 (C.M.A. 1979).* **[T]he "appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial."** *Simpson, 58 M.J. at 374 (quoting Stoneman; 57 M.J.* at 42-43). Thus, **"disposition of an issue of unlawful command influence falls short if it fails to take into consideration ... the appearance of unlawful command influence at courts-martial."** Id.

Whether the conduct of the Government in this case created an appearance of unlawful command influence is determined objectively. *Stoneman, 57 M.J. at 42. "Even if there was no actual unlawful command influence, there may be a question whether the influence of command placed an 'intolerable strain on public perception of the military justice system.'"* Id. at 42-43 (quoting United States v. Wiesen, 56 M.J. 172, 175 (C.A.A.F. 2001)). The objective test for the appearance of unlawful command influence is similar to the tests we apply in reviewing questions of implied bias on the part of court members or in reviewing challenges to military judges for an appearance of conflict of interest. We focus upon the perception of fairness in the military justice system as viewed through the eyes of a reasonable member of the public. Thus, the appearance of unlawful command influence will exist where an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding. Id. at 415 (alteration in original) (citations omitted).

As can be seen from the above, unlike actual unlawful command influence where prejudice to the accused is required, no such showing is required for a meritorious claim of an appearance of unlawful command influence. Rather, the prejudice involved in {76 M.J. 249} the latter instance is the damage to the public's perception of the fairness of the military justice system as a whole and not the prejudice to the individual accused. Consequently, consistent with Chief Judge Erdmann's opinion in Lewis, it is sufficient for an accused to demonstrate the following factors in support of a claim of an appearance of unlawful command influence: (a) facts, which if true, constitute unlawful command influence; and (b) this unlawful command influence placed an "intolerable strain" on the public's perception of the military justice system because "an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." Id. (internal quotation marks omitted) (citation omitted).

In light of these two factors, the following process ensues when an appellant asserts there was an appearance of unlawful command influence. The appellant initially must show "some evidence" that unlawful command influence occurred. *Stoneman*, 57 M.J. at 41 (internal quotation marks omitted) (citation omitted); see also *United States v. Ayala*, 43 M.J. 296, 300 (C.A.A.F. 1995) ("The quantum of evidence necessary to raise unlawful command influence is the same as that required to submit a factual issue to the trier of fact [i.e., "some evidence]."). This burden on the defense is low, but the evidence presented must consist of more than "mere allegation or speculation." *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013); see also Allen, 33 M.J. at 212 ("Proof of [command influence] in the air, so to speak, will not do." (internal quotation marks omitted) (citation omitted)).

Once an appellant presents "some evidence" of unlawful command influence, the burden then shifts to the government to rebut the allegation. Specifically, the government bears the burden of proving beyond a reasonable doubt that either the predicate facts proffered by the appellant do not exist, or the facts as presented do not constitute unlawful command influence. *Salyer*, 72 M.J. at 423; see also *Biagase*, 50 M.J. at 151 ("[R]egarding the quantum of proof required: once an issue of unlawful command influence is raised, **the Government must persuade the military judge and the appellate courts beyond a reasonable doubt that there was no unlawful command influence or that the unlawful command influence did not affect the findings and sentence.**"). If the government meets its burden, the appellant's claim of unlawful command influence will be deemed to be without merit and no further analysis will be conducted. See *Salyer*, 72 M.J. at 423; *Biagase*, 50 M.J. at 151.

If the government does not meet its burden of rebutting the allegation at this initial stage, then the government may next seek to prove beyond a reasonable doubt that the unlawful command influence did not place "'an intolerable strain'" upon the public's perception of the military justice system and that "'an objective, disinterested observer, fully informed of all the facts and circumstances, would [not] harbor a significant doubt about the fairness of the proceeding.'" {76 M.J. 250} *Salyer*, 72 M.J. at 423 (quoting *Lewis*, 63 M.J. at 415). If the government meets its evidentiary burden at this stage of the analysis, then the appellant merits no relief on the grounds that there was an appearance of unlawful command influence. See, e.g., *United States v. Villareal*, 52 M.J. 27, 30-31 (C.A.A.F. 1999) (this Court affirming the decision of the court below after finding that any appearance of unlawful command influence was cured by the military judge's actions at court-martial). If the government does not meet its evidentiary burden, however, this Court will fashion an appropriate remedy. *Lewis*, 63 M.J. at 416.

It is these precedents, principles, and procedures which have been articulated by this Court over the course of more than six decades which serve as our touchstone as we analyze Appellant's claims of unlawful command influence in the instant case. Essentially, according to *Boyce*, the courts can reverse a conviction even if the accused was not prejudiced personally by the apparent unlawful command influence.

2) Law applied to President Obama's UCI in context of Petitioner's Court Martial.

Military Courts have recognized UCI created by President Obama and his SECDEF's comments from May 7, 2013, on sexual assault prosecutions in the military — both are the military's top leadership; the President personally appoints military officers who serve as court-martial panel members, they serve at the pleasure of the President, they can also be removed by the President at any time; and both the President and SECDEF have the authority to convene a General Court Martial according to 10 U.S.C. § 822. The military courts recognized the prejudicial affect the President and SECDEF's comments on sexual assault in the military had on officers serving as court-martial panel members, see below:

1. In June 2013, a Military Judge at Shaw Air Force Base, SC dismissed charges of sexual assault against an Army Officer, noting the Command Influence Issue created by President Obama's comments on sexual assault in the military[1];
2. In June 2013, in the case of ***United States v. Averell***, Commander John Maksym, Navy Judge, found President Obama and General Dempsey's comments "constituted apparent [unlawful command influence] and granted the defense extra preemptory challenges;[2]"
3. In June 2013, ***United States v. Fuentes*** and ***United States v. Johnson***, Navy Judge Commander Marcus Fulton, peremptorily determined two defendants in military sexual assault cases could not be punitively discharged, if found guilty, because of "unlawful command influence" derived

[1] See Appendix F "University of Illinois Law Review" Pg 227
[2] See Appendix F "University of Illinois Law Review" Pg 227

from the comments made by President Barack Obama. Judge Fulton was also quoted[3] saying:

> **A member of the public would not hear the President's statement to be a simple admonition to hold members accountable,"** he stated. **"A member of the public would draw the connection between the 'dishonorable discharge' required by the President and a punitive discharge approved by the convening authority." "The strain on the system created by asking a convening authority to disregard [Obama's] statement in this environment would be too much to sustain public confidence.**

4. In August 2013, Secretary of Defense Chuck Hagel, recognized the prejudice he and the President's comments caused to military officers and commanders and issued a "corrective" memorandum that was dispersed far and wide to cure the UCI he and the President comments created in the minds of military leaders and the public – the SECDEF "reminded" military leaders to be impartial and neutral in the administration of military justice.[4]

3) How the law was not applied to the Petitioner's case and possibly other service members Courts-Martial.

Petitioner's trial was on May 28, 2013 President's Comments were May 7, 2013 only three weeks separated from ultimate effect. The President and Secretary of Defense decided guilt in the Petitioner's case by creating bias in the minds of the panel members and put pressure to convict regardless of evidence. The pressure created by the President not only extended to the court-martial trial process but throughout the military appellate review process because their comments were seen

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[3] See Appendix F "University of Illinois Law Review" Pg 227; Appendix H News Articles

[4] See Appendix G Secretary of Defense Memorandum: "Integrity of the military Justice Process"; Appendix H News Articles

by officers as an "order" or a "directive" from the commander-in-chief dictating what he results expected of military leaders. This presumption of guilt fundamentally changed constitutional law where a person is innocent until proven guilty beyond a reasonable doubt, and made court-martial convening authorities and court-martial panel members afraid to go against the publically announced directive of the President and SECDEF. Unfortunately for Petitioner, since these comments immediately preceded the court-martial the damage was done to the mind of the panel member — the Presidential directive presumptively set the legal conditions for implied bias, actual, or apparent UCI. This presumption of bias existed in a narrow window of time before a corrective memorandum was issued by the SECDEF, as demonstrated on record of Petitioner's court-martial:

1. Panel Members admitted to hearing President Obama's Comments on intolerance of military sexual assault and that he expected prosecutorial results (Record of Trial (ROT) Vol. III, pg 33-132);
2. Some of the panel members characterized the President's statements as a military directive to take a more aggressive stance on sexual abuse (Record of Trial (ROT) Vol. III, pg 33-132);
3. Some believed not enough was being done to prosecute allegations of sexual assault (Record of Trial (ROT) Vol. III, pg 33-132);
4. Some members voiced they should do what the President asked them to do (Record of Trial (ROT) Vol. III, pg 33-132).

Consequently, this bias manifested into the court-room where the alleged victim – a female noncommissioned officer in the U.S. Army Judge Advocate General Corps, lied to panel members about the only conscious indicator she was allegedly sexually assaulted by Petitioner because "it burned" after she douched. However,

defense counsel utterly failed to impeach her because forensic reports and her own self-report indicate she did not "douche." Also, despite the vague descriptions of how the alleged sexual assault occurred there was absolutely no DNA from Petitioner. Also, U.S. Army Criminal Investigation Division (CID) agents testified there was nothing of evidentiary value found connecting petitioner to alleged crime. Based on the paucity of evidence and the false statement that went uncorrected as a to material fact, the alleged crime was clearly not proven "beyond a reasonable doubt." In addition, to the fact Petitioner was found guilty of one charge of sexual assault based on completely uncorroborated and testimony that was not descriptive and questionable, the panel members were particularly harsh by sentencing Petitioner to 20-years of confinement.

The prejudice Petitioner experienced at the trial court did not end, it continued into the military appellate process where under Article 66(d) UCMJ the Army Court of Criminal Appeals (ACCA) is statutorily required to conduct a *de novo* review of the entire court-martial record to determine if the trial findings and sentence are legally and factually sufficient to sustain a conviction. After the Petitioner's trial there were a number of precedents in the military courts showing that the President and SECDEF's comments on sexual assault in the military amounted to command influence. However, the prejudice continued against Petitioner as the ACCA did apply the relevant precedent in reviewing Petitioner's case for command influence which required the findings and sentence to be set aside. The following precedents were applicable, but were not applied in the review of Petitioner's case:

United States v. Corcoran, 2014 CCA LEXIS 901 (N-MCCA, 2014) No. 201400074, the military judge indicated in his findings of fact that there may have been apparent command influence up until the SECDEF memo was published on 6 Aug 2013.

United States v. Bergdahl, 79 MJ 512; 2019 CCA LEXIS 297; ARMY 20170582 the court said: The military judge also found that as the commander-in-chief of all the armed forces, he has the power to fire or take adverse administrative action against any military officer involved in the trial of this case from sentencing forward (i.e. himself, the SJA, the convening authority, and the judges of the Army Court of Criminal Appeals). The military judge therefore found appellant met his initial burden showing some evidence of UCI. The military judge found this a close call.

United States v. Bergdahl, 80 M.J. 230; 2020 CAAF LEXIS 489, No. 19-0406, the Court said: a sitting president of the United States can commit both apparent and actual unlawful command influence. The same held true for the late Senator McCain. Therefore, statements by such persons about a pending case are perilous. Because of their capacity to influence decision makers in a court-martial, comments about a pending criminal matter pose a grave risk to the goal of ensuring that justice is done in every case. Specifically, improper statements could cause an innocent accused to suffer adverse criminal consequences such as a wrongful conviction or an increased sentence, or could cause a guilty accused to walk free-despite the commission

of heinous crimes-if the actual or apparent unlawful command influence results in the dismissal of {80 M.J. 239} charges. See, e.g., *Barry*, 78 M.J. at 80 (dismissing sexual assault charge with prejudice for actual unlawful command influence); *United States v. Riesbeck*, 77 M.J. 154, 167 (C.A.A.F. 2018) (dismissing charges of making a false official statement, rape by force, and communicating indecent language with prejudice for actual unlawful command influence); *Boyce*, 76 M.J. at 253 (dismissing charges of rape and assault consummated by a battery without prejudice for apparent unlawful command influence).

The above precedents were not the only source of authority requiring Petitioner's case be set aside for UCI, there are other scholarly reports published that outlined the corrosive effect upon the military justice process.

5. In a Subcommittee justice report it was reported that:[5] "Judge Advocates overwhelmingly report a perception of pressure on the convening authorities to refer sexual assault cases to court martial, regardless of merit. According to many of the judge advocates interviewed on site visits, this pressure extends to weak cases that civilian jurisdictions would not prosecute and, in some cases have already declined to prosecute. The vast majority of prosecutors and defense counsel who spoke with the Subcommittee have the impression that this pressure causes convening authorities to favor referral to court-martial rather than deal with the potential adverse ramifications of

[5] See Appendix E "Report of Barriers to the fair administration of Military Justice is sexual assault case" Pg 14

not referring a sexual assault case, such as career setbacks, media scrutiny, the possibility of their non-referral decisions being subjected to elevated review, or questions about why the case was not referred. These lawyers suspect that commanders may feel that the cast of sending a case to trial, regardless of merit, is perceived as "safe" and harmless with respect to the parties involved and the justice system as a whole.... When asked what if any, pressure is on commander replied that he felt the need to 'do something immediately' or face harm to his career."

6. In late 2013, Lieutenant General (Lt. Gen) Franklin was criticized by then Senator McCaskill for not sending a case of sexual assault to Court Martial. Lt. Gen Franklin's lack of judgment was called into question as well as his ability to hold command; he ultimately retired.[6]
7. Also in 2013, Senator McCaskill blocked the confirmation of Lt. Gen Helms to Vice Commander, Air Force Space Command, because Lt. Gen Helms overturned a sexual assault conviction she deemed unlawful[7].

B. Proceedings Below

1. In May 2013, then President Obama at a press conference made comments on sexual assault in the military. During a press conference he stated "I expect consequences," "So I don't just want more speeches or awareness programs or training, but ultimately folks look the other way. If we find out somebody's

[6] See Appendix E "Report of Barriers to the fair administration of Military Justice is sexual assault case" Pgs 12-13
[7] See Appendix E "Report of Barriers to the fair administration of Military Justice is sexual assault case" Pg 13

engaging in this, they've got be held accountable prosecuted, stripped of their positions, court-martialed, fired, and dishonorably discharged."

2. Three weeks after the Presidents directives, the Petitioner went to a General Court Martial with an enlisted panel. Petitioner contrary to his plea was found guilty of aggravated sexual assault, abusive sexual contact, and obstruction of justice. The military panel adjudged confinement for 20 years, to be reduced to Pay Grade E-1, to forfeit all pay and allowance, to be reprimanded, and to dishonorably discharged. Petitioner raised on 1105/1106 matter to Convening Authority raising the facts of Unlawful Command Influence, the unknown male DNA, and that CID Agents testified about nothing of evidentiary value found connecting petitioner to crime. Convening Authority action was denied.

3. Appellant's trial defense and appellate counsel did raise legal error to the Army Court of Appeals (ACCA) and the Court of Appeals for the Armed Forces (CAAF) that President Obama's and Secretary Hagel's verbal directives to military commanders established a presumption for implied bias of court-martial panel members in military sexual assault cases. The Army Court of Criminal Appeal denied petitioner's appeal on March 28, 2016, *United States v. Allen*, No. 20130521. The Court of Appeals for the Armed Forces denied review on July 25, 2016, *United States v. Allen*, No. 16-0571/AR.

Petitioner applied for reconsideration to The Court of Appeals for the Armed Forces on judgment August 29, 2016, *United States v. Allen*, No. 16-0571/AR. However, the initial legal briefs raising legal error did not contain the latest binding

legal precedent from military courts that specifically addressed the President Obama's verbal order on sexual assault prosecutions in the military. Petitioner requested extraordinary relief pro se writ of habeas corpus from Army Court of Criminal Appeals, judgment entered on June 21, 2017, *United States v. Allen*, No. 20130521. Petitioner requested pro se motion for reconsideration en banc, from Army Court of Criminal Appeals, judgment entered on January 31, 2018. Petitioner motion for reconsideration to the Army Court of Criminal Appeals, denied judgment entered on March 23, 2018, *United States v. Allen*, No. 20130521. Petitioner motion for reconsideration to Court of Appeals for the Armed Forces, denied judgment entered on June 26, 2018, *United States v. Allen*, No. 16-0571/AR.

Appellant subsequently conducted research and found legal precedent only acknowledge after initial briefs specifically relating to prejudicial legal error caused by President Obama's and the SECDEF's comments on sexual assault in "Report of Barriers to the fair administration of Military Justice is sexual assault case" a Subcommittee of the Judicial Proceedings Panel report that was published in May 2017 and a University of Illinois Law Review, "Justice is no longer Blind," dated 29 January 2016. **These reports cited cases that granted relief** in courts-martial on the basis President Obama and the SECDEF's comments on sexual assault prosecutions biased panel members were used in Appellant's Motion for Reconsideration in March 2018 to the Army Court of Criminal Appeal and Motion for Reconsideration Court of Appeal for Armed Forces, submitted May 2018. Both military courts of review abused their discretion in failing to apply the relevant case

law that established a presumption of bias existed in the minds of court-martial panel members based on the totality of the circumstances creating bias and actual UCI in the minds of the panel members by their commanding officer – the commander-in-chief, the President.

In the case of **United States v. Wiesen**, 56 M.J. 172, 174 (C.A.A.F. 2001) As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel. United States v. Mack, 41 M.J. 51, 54 (CMA 1994); see RCM 912(f)(1)(N), Manual for Courts-Martial, United States (2000 ed.). Indeed, "impartial court-members are a sine qua non for a fair court-martial." United States v. Modesto, 43 M.J. 315, 318 (1995). That is not to say that an accused has a right to the panel of his choice, just to a fair and impartial panel. Id.

After Petitioner submitted more evidence of UCI where other military courts have said that then President Obama's comments constituted apparent UCI and placed an intolerable strain on the military justice system Petitioner then went to the federal system because military court would not review the submitted documents.

4. The Petitioner case was denied in the federal courts because it did not meet the Dodson factors and the court believed full and fair consideration was given by the military. The U.S. District Court, District of Kansas, denied review, judgment entered on June 30, 2023, *Allen v. Payne et al.*; No. 23-3061-JWL. Request for reconsideration was denied, by U.S. District Court, District of Kansas,

judgment entered on August 7, 2023, *Allen v. Payne et al.*, No. 23-3061-JWL. Petitioner requested for the Tenth Circuit to review case but was denied, *Allen v. Payne et al,*. No. 23-3138, judgment entered on December 4, 2023. Petitioner request for a panel rehearing was denied on January 25, 2024, *Allen v. Payne et al,*. No. 23-3138, U.S. Court of Appeals for the Tenth Circuit, judgment entered on January 25, 2024.

REASONS FOR GRANTING THE PETITION

Again, in the case of ***United States v. Bergdahl*** 80 M.J. 230; 2020 CAAF LEXIS 489; No. 19-0406, the Court stated: "The concept of constitutional due process is rooted in the notion of fundamental fairness, and this Court has long recognized this concern as it pertains to unlawful command influence. "The exercise of command influence tends to deprive servicemembers of their constitutional rights." *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986). "[I]n the military justice system both the right to a trial that is fair, and the right to a trial that is objectively seen to be fair, have constitutional dimensions sounding in due process." Boyce, 76 M.J. at 249 n.8. Congress's "prime motivation for establishing a civilian Court of Military Appeals was to erect a further bulwark against impermissible command influence." Thomas, 22 M.J. at 393." Actual unlawful command influence occurs when, under the totality of the circumstances, the evidence would lead a reasonable person to conclude that command influence affected the disposition of a case and prejudiced the accused. Based on this legal standard, the President influencing officers about court-martial findings and sentences is not just limited to

the deliberating room, it also affects senior leaders who convene court-martials and are ultimately responsible to approve and disapprove the findings and sentence pursuant to approve or disapprove the findings and sentences pursuant to Article 60 UCMJ. A general court-martial convening authority Rear Admiral (Ret) Patrick Lorge was quoted as saying, "he felt pressured by his staff attorneys, Cmdr. Dominic Jones and Lt. Cmdr. Jon Dowling, to rubber stamp the [court-martial] decision, but that he also fretted 'about the impact to the Navy if I were to disapprove the findings.'" Rear Adm. Lorge was also quoted saying "At the time, the political climate regarding sexual assault in the military was such that a decision to disapprove findings, regardless of merit, would bring hate and discontent on the Navy from the president, as well as senators including Senator Kirsten Gillibrand."[8]

This was a "close" case, Petitioner and the alleged victim were both noncommissioned officers in the U.S. Army and both military legal specialists attending a class at the Judge Advocate General's Legal Center and School in Charlottesville, VA when the alleged sexual assault occurred. The alleged victim claimed she was incapacitated by excessive drinking of alcoholic beverages and then sexually assaulted by Petitioner. However, despite her description of the alleged event and extensive sampling for DNA upon her and the crime scene, there was no DNA from Petitioner found. U.S. Army Criminal Investigation Division (CID) investigators testified at the court-martial nothing of evidentiary value was found connecting Petitioner with the crime. Otherwise, there was no other evidence other

[8] Appendix H News Article

than uncorroborated testimony of the alleged victim whose testimony was not credible or improbable based on the utter lack of physical evidence connecting Petitioner with her vague description of events, and the alleged victim lied to court-martial panel members about how she "recollected" a sexual assaulted occurred – because after the alleged event she, "douched" and it burned when she "douched." However, evidence clearly shows the alleged victim in her own sexual assault nurse exam questionnaire she filled out only hours after the alleged event shows she did not "douche," but counsel representing Petitioner failed to impeach the alleged victim and the prosecution did not correct this false but material statement. Clearly, there is "reasonable doubt" no crime occurred at all. The utter lack of evidence was known to the panel members and the convening authority who approved the findings of guilt, but because of the President and the SECDEF's prejudicial statements, no military officer involved in Petitioner's court-martial was going to risk their career by disobeying the commander-in-chief, so in that regard the President who appointed these panel members and the court-martial convening authority was virtually brought into the deliberation room.

Apparent UCI occurs when reasonable members of the public believe command influence prejudiced the accused. The military courts have ruled, within the cases cited in this petition President Obama's words constituted apparent UCI and accordingly case law mandates Petitioner's case be set aside for retrial, or remanded for review on the merits by the federal courts because military appellate courts abused their discretion by not applying appropriate law to this case, and the district

court simply refuse to review this case on its merits, despite of binding case law that justifies review of the matter for UCI and its prejudice upon the findings and sentence of this case. The words of the President and SECDEF resonating in the ears of military officers sitting in judgment of Petitioner's sexual assault case was an impossible hurdle to overcome, and there were no steps before, during, or after *voir dire* to cure the Unlawful Command Influence created by the President in the minds of the court-martial panel members.

So I beg this Court to recognize and hold President Obama and the SECDEF to a strict liability standard that applied to certain UCI due to their comments on sexual assault prosecutions, when they said it, and said it to a specific audience that infected Petitioner's court-martial and its panel members by directing, only three weeks before Petitioner's court-martial trial, military officers should exercise prejudice for sexual assault prosecutions at courts-martial. The prejudicial effect of the President and the SECDEF's words upon courts-martial was recognized in the military courts that merits relief in Petitioner's case. This precedent should have been applied in the Article 66(d) UCMJ review of Petitioner's case by the military appellate courts, but was not, and the federal courts refuse to even crack open this case to review on its merits, because of a court-created rule in the 10th Circuit, the four "*Dodson*" factors. The bias created by the President in the minds of the panel members moved the fulcrum-point of the scales for a close case that was not proven beyond a reasonable doubt because of the paucity of evidence used to convict Petitioner was solely based on vague, unreliable, and uncorroborated testimony that

is incredible because there is absolutely no DNA evidence from Petitioner to connect him to the alleged crime or the description of the crime.

Petitioner beg for this petition to be granted just as other Service courts recognized the President and SECDEF words created Unlawful Command Influence which is a nearly impossible hurdle to overcome at trial. The law concerning UCI was not applied in this case and tested for bias by weighing the totality of facts and circumstances, against the paucity of evidence used to convict Petitioner.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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Dated: April 10,2024