IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

ROBERT B. BERGDAHL Sergeant, U.S. Army, *Appellant*, v. JEFFERY R. NANCE Colonel, JA Military Judge, and UNITED STATES, *Appellees*.	)	BRIEF OF FORMER FEDERAL JUDGES AS *AMICI CURIAE* IN SUPPORT OF THE WRIT-APPEAL PETITION Crim. App. Misc. Dkt. No. 20170114 USCA Dkt. No. 17-0307/AR

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

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae are five former federal civilian and military judges:

- Edward H. Bonekemper, III,
  Commander, U.S. Coast Guard Reserve (ret.);

- Nancy Gertner,
  U.S. District Judge (ret.);

- Joshua Kastenberg,
  Lieutenant Colonel, U.S. Air Force (ret.);

- Michael D. Mori,
  Lieutenant Colonel, U.S. Marine Corps (ret.); and

- Patricia M. Wald,
  U.S. Circuit Judge (ret.).

Although *amici* take no position on how this Court should resolve the issues presented in the writ-appeal petition, we come together in this case out of a shared sense of the importance of those issues—and of having them resolved at this stage of the litigation, and by this Court.

II

ISSUES PRESENTED

CAN PRESIDENTS COMMIT UCI?

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III

SUMMARY OF ARGUMENT

Unlawful command influence is an important piece of a far larger framework of common-law, statutory, and constitutional rules designed to mitigate—if not eliminate—the "probability of unfairness," *i.e.*, the specter of judicial proceedings that are the product of bias, caprice, passion, or prejudice. *See In re Murchison*, 349 U.S. 133, 136 (1955). To that end, colorable claims of actual or apparent command influence raise perhaps the gravest threat to the public's confidence in—and underlying legitimacy of—court-martial proceedings. *See United States* v. *Thomas*, 22 M.J. 388, 393 (C.M.A. 1986)

Especially where, as in this case, the claims of unlawful command influence are leveled against senior civilian leaders, the potential for prejudice, or the appearance thereof, is only that much greater—as is those leaders' interest in conclusively resolving the propriety of their allegedly unlawful influence. Coupled with this Court's structural independence from those same civilian leaders (unlike the courts below), it is in the interests of all concerned to have this Court reach and resolve

those claims at the first possible instance—including, as here, prior to trial. For these reasons, *amici* believe that the writ-appeal petition should receive this Court's plenary review, and that the issues presented therein should be resolved on the merits at the earliest opportunity.

IV

ARGUMENT

The *amici* are not all military lawyers or experts in military law. We therefore take no position on whether the President's materially false, disturbing, and ill-informed statements during the 2016 campaign in fact constitute actual or apparent "unlawful command influence" under Article 37 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 837, or whether, regardless of Article 37, their potential to influence the judge and the members of Appellant's court-martial violates Appellant's rights under the Due Process Clause of the Fifth Amendment. U.S. CONST. amend. V.

We file this brief instead to offer two more modest observations: First, we believe it is true, as this Court has previously insinuated, that colorable claims of actual or apparent command influence raise perhaps the gravest threat to the public confidence and underlying legitimacy of

court-martial proceedings. Second, especially where, as in this case, the claims of unlawful command influence are leveled against senior civilian leaders, this Court is uniquely situated to reach and resolve those claims—and it is in the interests of all concerned that it do so at the first possible instance—including, as here, prior to trial.

By way of context, just three weeks ago, the U.S. Supreme Court summarily reversed a Nevada Supreme Court decision that had held that the defendant failed to demonstrate "actual bias" in seeking the recusal of his trial judge. *See Rippo* v. *Baker*, 137 S. Ct. 905 (2017) (per curiam). As the Justices unanimously explained, the state court's "actual bias" requirement was obvious error, because the question the Constitution asks is whether "the *risk* of bias was too high to be constitutionally tolerable." *Id.* at 907 (emphasis added).

Although the Appellant in this case does not seek the recusal of his trial judge, his writ-appeal petition implicates exactly the same elementary constitutional principle—that "[a] fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has al-

ways endeavored to prevent even the *probability* of unfairness." *In re Murchison*, 349 U.S. 133, 136 (1955) (emphasis added).

To be sure, this case is fraught with unique political considerations, and has been since long before the problematic statements made by President Trump during the 2016 election. But that fact only increases, rather than mitigates, the probability of unfairness. As Justice Kennedy explained for the Supreme Court in 2009,

> It is true that extreme cases often test the bounds of established legal principles, and sometimes no administrable standard may be available to address the perceived wrong. But it is also true that *extreme cases are more likely to cross constitutional limits*, requiring this Court's intervention and formulation of objective standards. This is particularly true when due process is violated.

Caperton v. *A.T. Massey Coal Co.*, 556 U.S. 868, 887 (2009) (emphasis added).

A. COLORABLE CLAIMS OF ACTUAL OR APPARENT UNLAWFUL COMMAND INFLUENCE RAISE GRAVE THREATS TO THE LEGITIMACY OF COURT-MARTIAL PROCEEDINGS

There are two separate—but closely related—constitutional purposes served by the panoply of common-law, statutory, and constitutional rules that help to mitigate "the probability of unfairness": First, they ensure public confidence in the outcome of the underlying judicial

proceedings, whatever the result, by absolving those proceedings of charges that the judgment could have been predicated on some inappropriate consideration, such as bias, caprice, passion, or prejudice. *See TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443, 475–76 (1993) (O'Connor, J., dissenting) ("[Such] influences . . . are antithetical to the rule of law. If there is a fixture of due process, it is that a verdict based on such influences cannot stand."). As Justice Marshall eloquently put it,

> There is good reason why public confidence in the integrity of the judiciary is diminished whenever invidious prejudice seeps into its processes. This diminution of confidence largely stems from a recognition that the institutions of criminal justice serve purposes independent of accurate factfinding. These institutions also serve to exemplify, by the manner in which they operate, our fundamental notions of fairness and our central faith in democratic norms. They reflect what we demand of ourselves as a Nation committed to fairness and equality in the enforcement of the law.

Hobby v. *United States*, 468 U.S. 339, 352 (1984) (Marshall, J., dissenting) (footnote omitted).

These considerations are perhaps even more pronounced in the context of courts-martial, thanks to the unique specter of command influence, which this court's predecessor described as "the mortal enemy of military justice." *United States* v. *Thomas*, 22 M.J. 388, 393 (C.M.A.

1986). However apt that specific metaphor remains today, *see United States* v. *Douglas*, 68 M.J. 349, 358 (C.A.A.F. 2010) (Baker, J., dissenting), "[t]his Court is concerned not only with eliminating actual unlawful influence, but also with 'eliminating even the appearance of unlawful command influence at courts-martial.'" *United States* v. *Salyer*, 72 M.J. 415, 424 (C.A.A.F. 2013) (quoting *United States* v. *Rosser*, 6 M.J. 267, 271 (C.M.A. 1979)); *see also United States* v. *Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006) ("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.'" (citation and internal quotation marks omitted)). After all, as then-Judge Baker put it in 2010, "[i]f allowed in practice, unlawful command influence will have a corroding effect that could prove deadly to the confidence members of the Armed Forces and the public have in the military justice system." *Douglas*, 68 M.J. at 358 (Baker, J., dissenting).

Thus, although unlawful command influence is expressly prohibited by Article 37 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 837, it also has constitutional ramifications, as this Court has

repeatedly recognized. *See, e.g.*, *Salyer*, 72 M.J. at 423 ("While statutory in form, the prohibition can also raise due process concerns, where for example unlawful influence undermines a defendant's right to a fair trial or the opportunity to put on a defense.").

Of course, public confidence in the integrity and impartiality of judicial proceedings is a compelling interest in its own right. But it also serves the equally (if not more) compelling purpose of promoting (and preserving) the legitimacy of judicial systems in which judges are appointed, rather than democratically elected. "The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship." *Mistretta* v. *United States*, 488 U.S. 361, 407 (1989); *see also Mickens* v. *Taylor*, 535 U.S. 162, 211 (2002) (Breyer, J., dissenting) (referring to the "public confidence in the criminal justice system upon which the successful functioning of that system continues to depend"); *Sherman* v. *United States*, 356 U.S. 369, 380 (1958) (Frankfurter, J., dissenting) ("Public confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake.").

All legal systems—regardless of their method of judicial selection—"can function only so long as the public, having confidence in the integrity of its judges, accepts and abides by judicial decisions." *Complaint Concerning Winton*, 350 N.W.2d 337, 340 (Minn. 1984); *cf. Baker* v. *Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) ("The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements."). Thus, there should be no question that minimizing the "probability of unfairness" in court-martial proceedings, including by providing remedies for "even the appearance of unlawful command influence at courts-martial," *Rosser*, 6 M.J. at 271, is a categorical imperative for the military justice system.

B. THE QUESTIONS PRESENTED IN THE WRIT-APPEAL PETITION WARRANT IMMEDIATE, PLENARY REVIEW

All of the above goes to why it is "incumbent on the military judge to act in the spirit of the Code by avoiding even the appearance of evil in his courtroom and by establishing the confidence of the general pub-

lic in the fairness of the court-martial proceedings." *Id*. Indeed, "[t]he failure of the military judge to meet such responsibilities may under particular facts and circumstances be found to constitute an abuse of his judicial discretion." *Id*. Thus, in the typical case, the court-martial itself can and should be expected properly to give consideration to a colorable claim of even apparent unlawful command influence.

But as Judge Wolfe pointed out in his concurring opinion below, there is a serious "issue of civil-military relations when a military appellate court is asked to review the conduct and speech of the civilian leaders of the military." *Bergdahl* v. *Nance*, No. 20170114, at 1 (Army Ct. Crim. App. Mar. 13, 2017) (Wolfe, J., concurring); *see also id*. (noting the "structural differences in the composition" of the Army CCA and this Court). Thus, there may be reasons why, especially when an unlawful command influence claim runs against senior civilian leaders of the military, the lower military courts may defer too heavily in favor of those leaders—or, at the very least, in favor of deferring resolution of the claim for as long as possible, as the Army Court of Criminal Appeals appears to have contemplated here. *See id*.

This Court, in contrast, is an Article I court of record, *see* 10 U.S.C. § 941, with independent judges, and with the specific authority to hold civilian leaders of the military accountable for their actions in appropriate cases. *See United States* v. *Hutchins*, 72 M.J. 294, 303 (C.A.A.F. 2013) (Ryan, J., concurring in the result). Indeed, "a 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 (citing *Hearings on H.R. 2498 Before a Subcomm. of the House Committee on the Armed Services*, 81st Cong., 1st Sess. 608 (1949)); *see also United States* v. *Harvey*, 64 M.J. 13, 17 (C.A.A.F. 2006) ("Our responsibility to protect the military justice system against unlawful command influence comes from our statutory mandate to provide oversight of the military justice system. . . . Fulfilling this responsibility is fundamental to fostering public confidence in the actual and apparent fairness of our system of justice.").

This Court's especial responsibility for providing oversight of the military justice system dovetails, in this case, with the gravity of the unlawful command influence allegations, which run against the sitting President—the "commander in chief of the Army and Navy of the Unit-

ed States." U.S. CONST. art. II, § 2, cl. 1. It cannot be gainsaid that it is in the interests of all concerned—the Appellant, the Appellees, and the entire military justice system—for the issues presented by the Appellant to be resolved forthwith. Indeed, the Supreme Court has repeatedly suggested that claims involving the personal responsibility of the President raise unique separation-of-powers concerns that militate in favor of immediate—including interlocutory—resolution. *See, e.g.*, *Clinton* v. *Jones*, 520 U.S. 681, 689–92 (1997); *United States* v. *Nixon*, 418 U.S. 683, 691–92 (1974); *see also Nixon* v. *Fitzgerald*, 457 U.S. 731, 743 & n.23 (1982) (noting the "special solicitude due to claims alleging a threatened breach of essential Presidential prerogatives under the separation of powers"). So too, here.

Whether a President can commit unlawful command influence—and whether, if so, statements *prior* to his inauguration can be used as proof thereof—are, for obvious reasons, questions of the utmost importance. If they are resolved against the Appellant, then that would presumably militate against claims of impropriety that might otherwise linger over the court-martial proceedings in Appellant's case as they unfolded. If, to the contrary, they are resolved in Appellant's favor, then he

may well be entitled to relief from the entire proceeding—a right that cannot be vindicated on the far side of a court-martial, even if he is ultimately acquitted. *See, e.g.*, *Abney* v. *United States*, 431 U.S. 651, 660–62 (1977); *see also Noyd* v. *Bond*, 395 U.S. 683, 696 n.8 (1969) ("[I]t appeared especially unfair to require exhaustion of military remedies when the complainants raised substantial arguments denying the right of the military to try them at all.").

Because of these considerations, because of the gravity of the questions presented, and because there is no question that the Army CCA (and this court) have subject-matter jurisdiction to issue the relief Appellant seeks, *see LRM* v. *Kastenberg*, 72 M.J. 364, 368 (C.A.A.F. 2013) ("To establish subject-matter jurisdiction, the harm alleged must have had 'the potential to directly affect the findings and sentence.'" (quoting *Ctr. for Constitutional Rights* v. *United States*, 72 M.J. 126, 129 (C.A.A.F. 2013)), this Court's plenary review is not just warranted, but imperative.

V

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the writ-appeal petition should be granted, and the issues presented set for plenary review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This brief complies with the type-volume limitation of Rule 24(d) because it contains 2503 words. It also complies with the typeface and type style requirements of Rule 37.

/s/ Stephen I. Vladeck

CERTIFICATE OF FILING AND SERVICE

I certify that I have, this 3rd day of April, 2017 filed and served the foregoing amicus brief by emailing copies to the Clerk of the Court, Counsel for the Petitioner, and the Government Appellate Division at the following email addresses:

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