

Docket No. 18-1279
(NOT SCHEDULED FOR ORAL ARGUMENT)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN RE: ABD AL-RAHIM HUSSEIN MUHAMMED AL-NASHIRI

ON PETITION FOR WRIT OF MANDAMUS TO THE
UNITED STATES COURT OF MILITARY COMMISSION REVIEW

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BRIEF OF THE ETHICS BUREAU AT YALE AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER'S PETITION FOR
A WRIT OF MANDAMUS AND PROHIBITION

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CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES
PURSUANT TO CIRCUIT RULE 28(a)(1)

A. Parties and Amici. Except for the Ethics Bureau at Yale, all parties, intervenors, and amici appearing before this court are listed in Petitioner's Petition.

B. Ruling Under Review. An accurate reference to the ruling at issue appears in the Petitioner's Petition.

C. Related Cases. An accurate statement regarding related cases appears in the Petitioner's Petition.

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STATUTES AND REGULATIONS

Amicus does not principally rely on statutes or regulations in this brief.

INTEREST OF AMICUS CURIAE AND STATEMENT OF AUTHORSHIP

The Ethics Bureau at Yale (“Ethics Bureau”) is a clinic composed of fourteen law students and supervised by Lawrence J. Fox, an experienced practicing lawyer, lecturer, and ethics teacher. The Ethics Bureau has submitted *amicus* briefs in matters involving lawyer and judicial conduct and ethics; has assisted with ineffective assistance of counsel claims implicating issues of professional responsibility; and has provided assistance, counsel, and guidance on a pro bono basis to not-for-profit legal service providers, courts, and law schools.

Amicus has no direct interest in the outcome of this litigation. Because the case implicates a military judge’s ethical obligations to uphold the integrity and fairness of a military commission, the Ethics Bureau believes it might assist the Court in resolving the important issues presented. In accordance with D.C. Circuit Rule 29, *amicus* affirms that all parties have granted their consent to allow the Ethics Bureau to participate in this matter. *Amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Judicial neutrality is a fundamental guarantee of our justice system, enshrined in both the Due Process Clause of the Fifth Amendment and codes of judicial ethics. Military judges are no exception: the duty of impartiality applies to them under the Rules for Military Commissions (R.M.C.). To preserve the commissions' fairness and integrity, the R.M.C. and other relevant standards require recusal when a military judge's impartiality might be questioned.

By not recusing himself from Petitioner's case, Colonel Vance Spath violated rules of judicial ethics and deprived Petitioner of due process of law. While entertaining arguments from Department of Justice (DOJ) lawyers in Petitioner's case, Colonel Spath secretly negotiated to obtain a position with the DOJ as an immigration judge. Colonel Spath's hiring hinged on the acquiescence of Attorney General (as he then was) Jeff Sessions, who had publicly advocated for Petitioner's conviction. Under these circumstances, the substantial conflict of interest posed by Colonel Spath's pursuit of employment could only have been remedied by his recusal.

The R.M.C. establish minimum ethical standards for military judges, mandating disqualification where a military judge holds "an interest, financial or otherwise, that could be substantially affected by the outcome of the proceeding." Manual for Military Comm'ns United States pt. 2, R.M.C. 902(b)(5)(B) (Dep't of

Def. rev. ed. 2016) [hereinafter R.M.C.]. Colonel Spath's pursuit of employment with the DOJ, and the DOJ's agenda in Petitioner's case, established an improper interest for the judge in obtaining a guilty verdict. This conflicted position also constituted grounds for disqualification under Rule 902(a), which provides that a military judge must recuse from "any proceeding in which their impartiality might reasonably be questioned." *Id.* 902(a).

Failure to recuse in the face of a clear conflict of interest violates the unqualified right to a fair trial embodied in the Fifth Amendment's Due Process Clause. The Supreme Court has observed that "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable" where judges hold a pecuniary interest in the proceedings. *Caperton v. A.T. Massey Coal Co. Inc.*, 556 U.S. 868, 868 (2009) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). Colonel Spath's pending employment application created the type of personal and financial dependency prohibited under this standard.

Judicial neutrality safeguards both litigants' rights and the integrity of the justice system. The impermissible potential for bias in Petitioner's case produces a "corrosive impact on public confidence in the military justice system." *United States v. McIlwain*, 66 M.J. 312, 315 (C.A.A.F. 2008). Colonel Spath's failure to recuse in light of a clear conflict can only be remedied by vacating the proceedings below, so that Petitioner's case may be heard by a fair and impartial judge.

ARGUMENT

I. The Rules for Military Commissions Required Colonel Spath's Recusal.

The right to a neutral judge is a fundamental guarantee of our justice system. Article III and Article I courts alike depend on the principle that judges will act as a fair and impartial adjudicators of the matters before their courts. Accordingly, military judges must take an oath that they will perform their duties “faithfully and impartially.” R.M.C. 807(b)(2)(A) [hereinafter R.M.C.].

In order to preserve the standard of impartiality, Rule 902(a) of the R.M.C. provides that military judges shall disqualify themselves from “any proceeding in which that military judge’s impartiality might reasonably be questioned.” When a military judge is disqualified under 902(a), recusal must follow unless the judge obtains a waiver after a full disclosure on the record. *Id.* 902(d)(3), 902(e). In conformance with ethical standards for judges across jurisdictions,¹ the Rule 902(a) standard is objective: recusal is required where a reasonable observer could

¹ Parallel standards apply to federal judges, courts-martial judges, and Court of Military Commission Review judges. *See* 28 U.S.C. § 455 (2018); Manual for Courts-Martial United States pt. 2, R.C.M. 902(a) (Dep’t of Def. 2016); United States Court of Military Comm’n Review Rules of Practice r. 25 (Dep’t of Def. 2016); Model Code of Judicial Conduct r. 2.11 (Am. Bar Ass’n 2010); *see also* 17 C.F.R. § 12.305 (providing for disqualification of an administrative law judge on the grounds of personal bias, conflict of interest, or similar bases).

infer prejudice, regardless of whether a military judge believes himself to be actually biased.

Rule 902(b) further mandates disqualification based on specific enumerated grounds, including where they hold “an interest, financial or otherwise, that that could be substantially affected by the outcome of the proceeding.” *Id.*

902(b)(5)(B). Under such circumstances, the potential for bias is so great that even waiver by all parties cannot void the recusal requirement. *Id.* 902(e).²

Judge Spath failed to recuse himself from Petitioner’s case as required by both the general standard in Rule 902(a) and the specific grounds in Rule 902(b)(5)(B). Petitioner has submitted evidence—which Respondents do not appear to dispute—that while Petitioner was on trial for his life, Colonel Spath was pursuing new employment as an immigration judge with the Department of Justice (DOJ).³ *See* Pet. 23–25; Reply 4–5. In doing so, Colonel Spath occupied an

² Under the general standard in Rule 902(a), an apparent conflict can be waived by the parties only after a full disclosure on the record. R.M.C. 902(e). However, when the specific grounds for disqualification apply, disqualification cannot be avoided. *Id.* Because Colonel Spath never disclosed any information about his future employment, on or off the record, his conflict could not be waived under either standard.

³ While it is not yet clear precisely when Colonel Spath entered negotiations for the position, the appointment process for his class of immigration judges was “approximately 266 days.” Pet. 25. Thus, Petitioner reasonably contends that Colonel Spath could have been engaged in the appointment process for a year or more. Pet. 23. All the while, DOJ attorneys regularly appeared before him as part of the prosecution against Petitioner. Pet. 39–40.

impermissibly conflicted position. The hiring of immigration judges is conducted at the discretion of the Attorney General's office, and (then) Attorney General Sessions had taken a personal interest in securing a capital sentence against Petitioner, whom he believed to be responsible for the "most heinous attacks against the United States and our military personnel."⁴ Sessions advocated for carrying out the death penalty in military commission cases, leaving no question as to his desired outcome in Petitioner's case. Pet. 39 n.19. Colonel Spath's incentive to gain the favor of the Attorney General and other DOJ officials could not be reconciled with his responsibility to impartially oversee Petitioner's case.

Colonel Spath's interest in future employment with the DOJ constituted the type of financial interest in the outcome of the case specifically prohibited by R.C.M. 902(b). Considering analogous circumstances, the Committee on Codes of Conduct of the Judicial Conference of the United States has observed that "[d]isqualification would be mandatory . . . when the outcome of the case could substantially affect the amount of the judge's pension or the judge's right to receive it." 2B Guide to Judiciary Policy, Comm. on Codes of Conduct Advisory

⁴ *Lessons Learned from the Attack on U.S.S. Cole, on the Report of the Crouch-Gehman Commission, and on the Navy's Judge Advocate General Manual Investigation Into the Attack, Including a Review of Appropriate Standards of Accountability for U.S. Military Services: Hearing Before the Comm. on Armed Services, 107th Cong. 5 (2001)* (prepared statement of Sens. Thurmond, Santorum and Sessions); Pet. 39 n.19.

Op. No. 75: Disqualification Based on Military or Other Governmental Pensions (2012). Colonel Spath doubtless understood that the outcome of Petitioner's case could directly impact whether he would be hired as an immigration judge, and thus whether he would receive future payment from the DOJ. He knew that his potential employer, the Attorney General, would be monitoring his decisions closely, and he knew that the Attorney General wanted to see the Petitioner executed. A ruling against the government in Petitioner's case could easily have cost Colonel Spath his prospective employment as an immigration judge. Conflicts rising to this level can only be mitigated by recusal. R.M.C. 902(b)(5), 902(e).

It is a military judge's responsibility to inform himself of a potential conflict of interest and to promptly disclose the conflict. The R.M.C. makes clear that a "military judge should inform himself or herself about his or her financial interests," *id.* 902(b)(5) cmt., and that "[p]ossible grounds for disqualification should be raised at the earliest opportunity," *id.* 902(d)(1) cmt. Colonel Spath bore a duty to disclose any possible conflict, and his concealment of any pending application to DOJ thus compounded his violation of the ethical standards for military commissions.

Colonel Spath's engagement with DOJ was also disqualifying under the general standard promulgated in R.M.C. 902(a). *See United States v. Vargas*, No. ACM 38991, 2018 WL 1637991, at *7-8 (A.F. Ct. Crim. App. Mar. 15, 2018)

(reversing when a “military judge abused his discretion by failing to recuse himself under R.C.M. 902(a)”). Because he was applying for a DOJ position while DOJ lawyers were regularly appearing before him, his impartiality could reasonably be questioned. *See* Pet. 39–40. His behavior was all the more questionable given the high-profile nature of the case, his failure to disclose the conflict, and his dramatic public statements about “fake news” and the “defense community,” Pet. 15–16, 23.

Colonel Spath should have recused himself under these circumstances, just as he would were he seeking employment with a law firm representing a party before him. The Committee on Codes of Conduct has reasoned that “[a]fter the initiation of any discussions with a law firm, no matter how preliminary or tentative the exploration may be, the judge must recuse . . . on any matter in which the firm appears.” 2B Guide to Judiciary Policy, Comm. on Codes of Conduct Advisory Op. No. 84: Pursuit of Post-Judicial Emp’t 124 (2016). The standards for disqualification promulgated by federal statute, the American Bar Association, and the Department of Defense are identical,⁵ and all consider a judge’s negotiation for future employment with a party to an ongoing case to constitute a situation where their “impartiality might reasonably be questioned.” *Id.*

⁵ Compare Model Code of Judicial Conduct r. 2.11 (Am. Bar Ass’n 2010), with R.C.M. 902(a) and 28 U.S.C. § 455 (2018).

In promulgating the R.M.C., the Department of Defense created minimum ethical standards that military judges are obligated to uphold. These standards “serve to maintain the integrity of the judiciary and the rule of law.” *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009). Colonel Spath blatantly ignored his ethical duty to recuse, thereby tainting the commission’s proceedings.

II. Colonel Spath’s Failure to Recuse Deprived the Petitioner of Due Process of Law.

The right to an impartial judge is without qualification. *Tumey v. Ohio*, 273 U.S. 510, 535 (1927). “The truth pronounced by Justinian more than a thousand years ago that, ‘Impartiality is the life of justice,’ is just as valid today as it was then. Impartiality finds no room for bias or prejudice.” *United States v. Brown*, 539 F.2d 467, 469 (5th Cir. 1976) (per curiam).

The Due Process Clause of the Fifth Amendment requires disqualification when “the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.” *Caperton*, 556 U.S. at 872 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). This includes any circumstance where the conflict would pose “a possible temptation to the average man as a judge . . . which might lead him not to hold the balance nice, clear and true between the State and the accused.” *Tumey*, 273 U.S. at 532. Failure to recuse under these

circumstances “will always invalidate the conviction.” *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (citing *Tumey*, 273 U.S. 510).

On this basis, the Supreme Court has repeatedly reversed decisions where a judge had a financial stake in the outcome of the trial, without requiring a showing of prejudice or even actual bias on the part of the judge. Judgements have been overturned where the judge would be paid fees only for a conviction, *Tumey*, 273 U.S. 510; where the judge would generate revenue for his city by convicting, *Ward v. City of Monroeville*, 409 U.S. 57 (1972); where the judge would benefit the settlement prospects of his own case by favoring one party, *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986); and where the judge had received major campaign funds from a party before him, *Caperton*, 556 U.S. 868. This line of precedent reflects the fundamental principle that “no man is permitted to try cases where he has an interest in the outcome.” *In re Murchison*, 349 U.S. 133, 136 (1955). Each of these judges may have considered themselves to be fair and scrupulous, but all of them were required to recuse themselves when their own financial interests were at stake. Colonel Spath falls easily among their ranks.

Colonel Spath’s interest in gaining favor with the Department of Justice to secure long-term employment as an immigration judge was substantial and pecuniary. Similar to the justice in *Caperton*, whose job was secured with the help of campaign donations from a party to the case, *see* 556 U.S. at 882, Colonel

Spath's immigration judgeship depended on the beneficence of the Attorney General. The Supreme Court has observed that such a "debt of gratitude" can create a "constitutionally intolerable probability of actual bias." *Id.*

Colonel Spath's conflict was therefore sufficient to require recusal under the Due Process Clause, regardless of whether or not he was actually biased.⁶ As the Court has stated, a defendant needs only to show a "serious, objective risk of actual bias." *Id.* at 886. Colonel Spath's participation in Petitioner's case introduced a substantial opportunity for prejudice, in violation of Petitioner's constitutional right to due process of law.

III. Principles of Fairness and Judicial Legitimacy Demand that the Proceedings Below Be Vacated.

Judicial impartiality not only safeguards litigants' rights to due process of law, but also protects public confidence in the justice system as a whole. The Supreme Court recognizes that "[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship." *Mistretta v. United States*, 488 U.S. 361, 407 (1989). As such, "[n]ot only must judges be independent, fair, competent, and honorable, but these qualities must be apparent to the public."

⁶ This contrasts with the rule for attorney conflicts, where a defendant can obtain a reversal for judicial partiality without showing that the conflict had an adverse effect on the proceedings. See *Mickens v. Taylor*, 535 U.S. 162, 171 (2002).

Joe G. Riley, *Ethical Obligations of Judges*, 23 Mem. St. U. L. Rev. 507, 509 (1993); *see also* Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 Yale L.J. 455, 483 (1986) (“Few situations more severely threaten trust in the judicial process than the perception that a litigant never had a chance because the decisionmaker may have owed the other side special favors.”). Judges must therefore adhere to the highest of ethical standards.

To maintain the integrity of the courts, even scrupulous and fair-minded judges must recuse when faced with conflicts of interest. “The Due Process Clause ‘may sometimes bar trial by judges who have no actual bias and who would do their best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, ‘justice must satisfy the appearance of justice.’” *Aetna*, 475 U.S. at 825 (quoting *Murchison*, 349 U.S. at 136); *see also Caperton*, 556 U.S. at 886. Similarly, where a trial has been tainted by bias, or the appearance thereof, reversal may be required even where prejudice cannot be established. *See Tumey*, 273 U.S. at 535 (“No matter what the evidence was against him, he had the right to have an impartial judge.”).

These principles apply equally to military commissions. Like other judicial codes of conduct, the R.M.C. operate to uphold both impartiality and the appearance of impartiality. Under the R.M.C., it is the responsibility of a military

judge to ensure “that military commission proceedings are conducted in a fair and orderly manner” and that “the dignity and decorum of the proceedings are maintained.” R.M.C. 801(a) cmt., 801(a)(2). To properly fill this role, a military judge must be impartial. *See id.* 801(c) cmt., 807(b)(2)(A), 902(e)(7) cmt. However, military judges must also “avoid . . . the appearance of partiality.” *Id.* 801(a)(3) cmt.; *see also id.* 502(a)(2) cmt. (requiring commission members to avoid the appearance of partiality). By prohibiting even the semblance of partiality, the R.M.C. recognize that the perception of bias can shatter public confidence in a military court. Judicial bias within military tribunals produces a “corrosive impact on public confidence in the military justice system.” *McIlwain*, 66 M.J. at 315.

The stakes for both the defendant and the courts’ integrity are heightened in this case, because Petitioner is subject to the death penalty. “[T]he imposition of death by public authority is . . . profoundly different from all other penalties.” *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion). Public fear and discomfort surrounding wrongful convictions have triggered a “crisis of confidence” in capital punishment. Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attractions and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. Crim. L. & Criminology 587, 587 (2005). These concerns are closely tied to judicial

impartiality: ultimately, “any criminal justice system is inevitably as fallible as the humans who implement it.” *Id.* at 623–24.

Where the proceedings have been deeply infected with the likelihood of bias, “there is a greater risk of unfairness in upholding the judgment in favor of [a biased judge] than there is in allowing a new judge to take a fresh look at the issues.” *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 868 (1988). “[T]o allow the findings in this case to stand—when the military judge should have recused himself—runs the risk of undermining the public's confidence in the military justice process.” *Vargas*, 2018 WL 1637991, at *7–8 (finding that a “military judge abused his discretion by failing to recuse himself under R.C.M. 902(a)” and remanding for a new trial “to avoid undermining the public’s confidence in the military judicial process”). Vacating the proceedings below is therefore an appropriate and necessary remedy.

Colonel Spath’s pursuit of employment rendered him “so ‘personally embroiled’ with a lawyer in the trial as to make [him] unfit to sit in judgment” as the “image of ‘the impersonal authority of law.’” *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971) (internal citation omitted). This conflict establishes an impermissible “potential for bias,” for which recusal is the only acceptable remedy. *Id.* at 466; *see also McIlwain*, 66 M.J. at 315. In this case, the requirement of recusal can be satisfied only by vacating the proceedings below so that a non-

conflicted judge can adjudicate Petitioner's case from the outset. *See Mayberry*, 400 U.S. at 465. Petitioner's life is on the line, and in our system of justice he is entitled to be tried by a fair and impartial judge.

CONCLUSION

Colonel Spath's failure to recuse himself despite his conflict of interest violated his ethical duties and deprived Petitioner of due process of law. The proceedings below should be vacated.

Respectfully submitted,

Dated: November 9, 2018

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the word limit of Fed R. App. P. 29(a)(5) and D.C. Cir. Rule 29(a)(5) because this document contains 4372 words.
2. This brief complies with the typeface requirements of Fed R. App. P. 32(a)(5) and the type style requirements of Fed R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 point font size and Times New Roman type style.

Respectfully submitted,

Dated: November 9, 2018

/s/ Eugene R. Fidell
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

U.S. Court of Appeals Docket Number 18-1279.

I hereby certify that on November 9, 2018, copies of the foregoing brief were served on all relevant parties in the above captioned action by electronically filing on the Court's ECF software.

Dated: November 9, 2018

/s/ Eugene R. Fidell
Counsel for Amicus Curiae