IN THE UNITED STATES COURT OF
APPEALS FOR THE ARMED FORCES

UNITED STATES, Appellee, v. Phillip K. LEE, 525 25 8958 Staff Sergeant (E-5) U.S. Air Force, Appellant.	)	BRIEF OF NATIONAL INSTITUTE OF MILITARY JUSTICE AS *AMICUS CURIAE* Crim. App. No. 32773 USCA Dkt. No. 99-0002/AF

Philip D. Cave
515 King St., Suite 420
Alexandria, VA 22314
(703) 549-6075

Eugene R. Fidell
2001 L Street, NW
Second Floor
Washington, D.C. 20036
(202) 466-8960

Kevin J. Barry
13406 Sand Rock Court
Chantilly, VA 20151-2472
(703) 968-7247

Stephen A. Saltzburg
720 20th Street, N.W.
Washington, D.C. 20052
(202) 994-7089

Dwight H. Sullivan
2219 St. Paul Street
Baltimore, MD 21218
(410) 889-8555

Counsel for Amicus Curiae

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Appellant.	)	

Introduction

The National Institute of Military Justice (NIMJ) respectfully submits this Brief as *amicus curiae*. A motion for leave is being submitted contemporaneously. NIMJ is a District of Columbia nonprofit corporation organized in 1991. Its overall purpose is to advance the administration of military justice in the Armed Forces of the United States. NIMJ takes no position with respect to any issue raised by appellant, or as to any other matter, except as stated below.

Issue Granted

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED IN [ITS] DUTY UNDER ARTICLE[S] 66(a) AND 66(c), UCMJ, TO PROPERLY REVIEW APPELLANT'S CASE WHEN ONLY TWO JUDGES PARTICIPATED IN THE DECISION

Statement of Case and Facts

At a general court-martial, appellant pled guilty to carnal knowledge, sodomy, and indecent acts with a female under 16 years of age. *United States v. Lee*, ACM 32773, 1998 CCA

LEXIS 345, at *1 (A.F. Ct. Crim. App. Aug. 7, 1998) [Appendix], *rev'd*, 50 M.J. 296 (1999). The military judge sentenced him to a dishonorable discharge, confinement for 15 years, forfeiture of all pay and allowances, and reduction to pay grade E-1. *Id.*

Appellant's case was originally reviewed by a three-judge panel of the Air Force Court of Criminal Appeals. *Id.* He raised several legal issues before the panel and argued that his sentence was inappropriately severe. *Id.* at *2. Other than holding that automatic forfeitures had been collected and his reduction in rank had been effected in violation of the Constitution's Ex Post Facto Clause, *see United States v. Gorski*, 47 M.J. 370 (1997), and clarifying the amount of pretrial confinement credit to which he is entitled, the panel affirmed the findings and sentence. *Id.* at *9.

This Court granted appellant's petition for review and concluded that the staff judge advocate's recommendation had improperly omitted the military judge's clemency recommendation. *United States v. Lee*, 50 M.J. 296 (1999). The Court therefore returned the record to the Judge Advocate General for submission to a general court-martial convening authority for a new recommendation and action. *Id.* at 298.

Following the remand, the case was assigned to a Court of Criminal Appeals panel consisting of Senior Judge Young and Judges Head and Roberts. *See United States v. Lee*, No. ACM 32773 (f rev) (Dec. 14, 1999) (per curiam). None of the three participated in the Air Force Court's original decision in appellant's case. The panel affirmed the findings and sentence. *Id.*, slip op. at 2. The panel's memorandum opinion stated, "Judge HEAD did not participate in the decision." *Id.* The opinion provided no explanation for Judge Head's nonparticipation.

Appellant sought en banc review to determine whether the panel erred by deciding his case with only two judges participating in the decision. *See United States v. Lee*, No. ACM 32773 (f rev) (Jan. 12, 2000) (order) (en banc). The full court refused to set aside the panel's decision for reconsideration by a panel with three participating judges. *Id.* Judge Head participated in the Air Force Court's en banc decision. *Id.* The full court's decision provided no explanation of why Judge Head did not participate in the panel's decision or why he did participate in the en banc decision.

The Court granted review, pursuant to appellant's petition, on May 23, 2000.

Summary of Argument

This case's outcome hinges on the standard of review. The Court has expressly held that Court of Criminal Appeals judges' failure to disqualify themselves will be reviewed under an abuse of discretion standard. This Court has also equated judges' obligation to disqualify themselves when reason exists to do so with judges' obligation *not* to disqualify themselves when no such reason exists. The same abuse of discretion standard that applies to challenges of an appellate military judge's participation in a case should also apply to challenges of an appellate military judge's nonparticipation. The record provides no information from which this Court can determine whether Judge Head abused his discretion by failing to participate in appellant's case. Accordingly, a remand is necessary.

Argument

WHEN ONLY TWO COURT OF CRIMINAL APPEALS JUDGES PARTICIPATE IN A DECISION, THE RECORD MUST INDICATE WHY THE THIRD ASSIGNED JUDGE DID NOT PARTICIPATE.

According to the adage, two heads are better than one.[1] For appellate courts, three heads are better than two. Justice Murphy was undoubtedly correct when he reasoned that a "decision reached by two Judges is not necessarily the one which might have been reached had they had the benefit of the views and conclusions of the third judge." *Ayrshire Collierries Corp. v. United States*, 331 U.S. 132, 139 (1947).

This Court's practice reflects the principle that a court operates best with its full complement of judges. Its judges have at times gone to considerable lengths to participate in decisions. *See, e.g., U.S. Navy-Marine Corps Court of Military Review v. Carlucci*, 26 M.J. 328 (1988) (judge reviewed audiotape of oral argument); *United States v. Rockwood*, 52 M.J. 98 (1999) (judge participated by two-way video-teleconference). Additionally, Senior Judges and Article III Judges routinely sit with this Court when one of its Judges is unavailable in a particular case. *See generally* EUGENE R. FIDELL, GUIDE TO THE RULES OF PRACTICE AND PROCEDURE FOR THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES 42-43 (9th ed. 2000) (collecting cases). Appellant unquestionably had a substantial interest in having his case

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1 *Cf. United States v. Cruz*, 20 M.J. 873, 889-90 (A.C.M.R. 1985) (noting that appellate review satisfies the public that justice was done by the trial court because "the fact that another body has reviewed the matter is a source of reassurance, on the principle that two heads are better than one"), *rev'd in part on other grounds*, 25 M.J. 326 (C.M.A. 1987).

considered by three military appellate judges, particularly when the lower court exercised its Article 66(c) function of deciding whether confinement for fifteen years was, as appellant argued, inappropriately severe.[2] *See Lee*, 1998 CCA LEXIS 345, at *9.

On several occasions, this Court has considered whether intermediate appellate military judges should have disqualified themselves in a particular case. *See, e.g., United States v. Morgan,* 47 M.J. 27 (1997); *United States v. Hamilton*, 41 M.J. 32 (C.M.A. 1994); *United States v. Mitchell*, 39 M.J. 121 (C.M.A.), *cert. denied*, 513 U.S. 874 (1994). The Court has held that the standard of review for an appellate military judge's "denial of a motion to disqualify is abuse of discretion." *Hamilton*, 41 M.J. at 39; *accord Mitchell*, 39 M.J. at 144 n.7.

Recusing and not recusing are two sides of the same coin. In a case concerning a Coast Guard Court of Military Review judge, this Court stated that "[a] . . . judge has as much obligation not to [disqualify] himself when there is no reason to do so as he does to [disqualify] himself when the converse is true." *United States v. Kincheloe*, 14 M.J. 40, 50 n.14 (C.M.A. 1982) (quoting *United States v. Bray*, 46 F.2d 851, 857 (10th Cir. 1976)) (brackets and ellipses in the original). Since an appellate military judge's obligation to participate where no cause for

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2 The Courts of Criminal Appeals exercise functions unique among criminal appellate tribunals, in that they exercise power to find facts, to affirm only findings and sentences found correct in fact as well as in law, and to review sentence appropriateness. See Uniform Code of Military Justice art. 66(c), 10 U.S.C.A. § 866 (1998). NIMJ believes that these statutory provisions require each judge on the panel to personally review the record and to reach both factual and legal conclusions consistent with any decision to affirm. These unique functions make more urgent the wisdom of Justice Murphy in *Ayrshire*, 331 U.S. at 139, concerning the importance of a third judge, and place a higher burden on these courts to sit with a full complement of judges, or to explain the reason why only two judges participated. Accordingly, only good and sufficient reason, displayed on the record, should justify the failure of a Court of Criminal Appeals to have at least three judges participating in a decision on a case on review.

disqualification exists is coextensive with the obligation not to participate where such cause does exist, the standard of review applying to the two situations should be the same. Thus, the Court should review Judge Head's nonparticipation for abuse of discretion.

In *United States v. Morgan*, 47 M.J. 27 (1997), the Court considered whether Air Force Court of Criminal Appeals judges abused their discretion by failing to disqualify themselves when they considered an ineffective assistance of counsel claim brought against a trial defense counsel who had since become one of the court's clerks. The Court found that "this record is not adequate for us to determine that question as a matter of law." *Id.* at 29. The Court explained, "[W]e believe it is incumbent upon a court, when challenged, to answer the questions directly in order to dispel even the appearance of impropriety. We leave to the discretion of the court below the means with which to resolve the questions raised." *Id.* at 30. Significantly, the Court added that it did not intend "to invade the deliberative process of the court below. All we require is a simple statement whether, or to what extent, counsel participated in any part of the appellate process in this case and whether her credibility played any part in any decision." *Id.*

On occasion, the reason for a judge's nonparticipation in a case may be readily apparent even if not specifically set out in the court's opinion. For example, when the District of Columbia Circuit recently noted that Judge Patricia Wald "was a member of the panel at the time of oral argument, but did not participate in this decision," *DeBerry v. First Gov't Mortgage & Investors Corp.*, No. 97-7211, 2000 U.S. App. LEXIS 18294, at *1 (D.C. Cir. Aug. 1, 2000) (per curiam) [Appendix], the opinion hardly needed to inform the reader that she had left the court to accept appointment to the International Criminal Tribunal for the Former Yugoslavia. *See U.S.*

Appellate Judge Joins War Crimes Panel, WASH. POST, Nov. 14, 1999, at C1.[3]

In contrast to *DeBerry*, the reason for Judge Head's failure to participate below is unknown. Because Judge Head took part in the en banc review, he was apparently not statutorily disqualified under Article 66(h). *Cf. United States v. Norfleet*, __ M.J. ___, No. 98-1131 (Aug. 16, 2000) (discussing, *inter alia*, Article 26(d)'s and R.C.M. 902's provisions regarding disqualification of military judges). His participation in the en banc review also suggests that he did not recuse himself from the case. *But see* FIDELL, *supra*, at 44 (noting uncertainty over whether judges may recuse themselves from only part of a case).

What, then, explains his failure to participate in the panel's decision? Was he on routine leave when the case was decided? Was he performing temporary additional duty? Was he on sick leave? Was he simply out of the office when the other two judges signed the decision? The record does not say. This precludes the Court from resolving the granted issue as a matter of law.

As in *Morgan*, the Court can return the record to the lower court for additional information without invading that court's deliberative process. *See* 47 M.J. at 30. The remand order can require the lower court either to explain the reason for Judge Head's failure to

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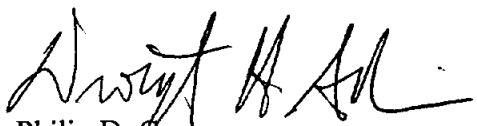
3 Moreover, her absence could not have been prejudicial since the panel had previously determined that the case turned on an issue of local law, had certified the question to the local court of appeals, and had received a dispositive answer. *See DeBerry v. First Gov't Mortgage & Investors Corp.*, 170 F.3d 1105, 1110 (D.C. Cir. 1999) (certifying question); *DeBerry v. First Gov't Mortgage & Investors Corp.*, 743 A.2d 699 (D.C. 1999); *accord Keefe Co. v. Americable Int'l, Inc.*, No. 98-7093, 2000 U.S. App. LEXIS 19966 (D.C. Cir. 2000) [Appendix]. All that remained for the panel after the local court of appeals' views were obtained was a virtually ministerial act.

participate in the panel decision or, in the lower court's discretion, to submit the case to a panel for review by three participating judges. If the lower court takes the former route, this Court will at least have the information it needs to resolve the granted issue. If the lower court takes the latter route, then the granted issue will have been mooted. In either event, the remand itself will correct the impression that the lower court acted cavalierly by providing only two judges to review appellant's general court-martial and fifteen year sentence. Doing so will serve the interest of fostering public confidence in the fair administration of military justice.

Respectfully submitted,



Philip D. Cave
515 King St., Suite 420
Alexandria, VA 22314
(703) 549-6075

Eugene R. Fidell
2001 L Street, NW
Second Floor
Washington, D.C. 20036
(202) 466-8960

Kevin J. Barry
13406 Sand Rock Court
Chantilly, VA 20151-2472
(703) 968-7247

Stephen A. Saltzburg
720 20th Street, N.W.
Washington, D.C. 20052
(202) 994-7089

Dwight H. Sullivan
2219 St. Paul Street
Baltimore, MD 21218
(410) 889-8555

Counsel for Amicus Curiae

August 25, 2000

CERTIFICATE OF FILING AND SERVICE

I certify that an original and seven copies of the foregoing Brief of National Institute of Military Justice as *Amicus Curiae* were mailed via first-class mail, postage prepaid, to the Court on August 25, 2000, and that a copy of the foregoing Brief of National Institute of Military Justice as Amicus Curiae was mailed via first-class mail, postage prepaid, to Captain Patience Schermer, USAF, AFLSA/JAJA, 112 Luke Avenue, Suite 343, Bolling Air Force Base, Washington, DC 20332-8000, counsel for Appellant, and Captain Suzanne Sumner, USAF, AFLSA/JAJG, 112 Luke Avenue, Suite 206, Bolling Air Force Base, Washington, DC 20332, counsel for Appellee, on August 25, 2000.

Dwight H. Sullivan
2219 St. Paul Street
Baltimore, MD 21218
(410) 889-8555