IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellant*, v. JEFFREY R. MILLER Seaman (E-3) U. S. Coast Guard, *Appellee*.	)	BRIEF OF NATIONAL INSTITUTE OF MILITARY JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE Crim.App. Dkt. No.005-69-01 USCA Dkt. No. 06-5002/CG

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

I. Interest of Amicus

NIMJ is a District of Columbia nonprofit corporation organized in 1991 to advance the fair administration of military justice and to foster improved public understanding of the military justice system. NIMJ files this brief on only the third certified issue and in support of appellee under the Rules of Practice and Procedure, United States Court of Appeals for the Armed Forces Rule 26(a)(3). NIMJ's interest in this appeal stems from the potential impact of granting great deference to the government's interpretation of Article 61 of the UCMJ. Such an important and contested issue should not be decided in a case as clearly moot as this one. However, should the Court reach this issue, broad, *Chevron*-style deference must not govern judicial interpretations of the UCMJ. The military justice

system, a specialized criminal context for which this Court has primary responsibility, is not equivalent to an administrative agency, nor is its rulemaking process or statutory framework comparable with that of an executive agency. Requiring deference to executive interpretation of rules of criminal procedure would violate existing precedent regarding federal criminal procedure. It would place accused servicemembers at an unfair disadvantage and would effectively strip the Court of its assigned role as overseer of military justice.

II. Issue

> To the extent UCMJ Article 61 is ambiguous, and given that Congress has expressly granted the President rule-making authority in the field of military justice, must an Article I court defer to the president's reasonable interpretation of that article?

III. Argument

A. The Case Is Moot

This case does not present a live controversy. There is no dispute between the parties. Thus, the case is moot. As a result, the Court should decline to answer the question of whether judicial deference to the President's interpretation of Article 61 is required. Neither the government nor the appellee has suffered harm as a result of the lower court's interpretation of Article 61. Seaman Miller, in fact, has no discernible interest remaining; appellate defense counsel's brief takes no position on two of the three certified issues,

including the question of *Chevron* deference. Instead, it "takes no specific issue with the decision of the Coast Guard Court of Criminal Appeals" and re-asserts Seaman Miller's "long-stated objective . . . to end this case." *Brief for Appellee* 7. It is not this Court's practice to issue advisory opinions, even when issues are certified to the Court. *See United States v. Chisholm*, 59 M.J. 151, 153 (2003); *United States v. Stuart*, 50 M.J. 72, 73 n.2 (1999). In this case, the question of judicial deference to a presidential interpretation of Article 61 is entirely academic.

B. The Issue is Important and Complex

In addition to being moot, the *Chevron* issue raised here is important and complex. The degree of judicial deference owed to the government's interpretation of an ambiguous statute is a subtle question of law and fact. As Appellant's brief acknowledges, *Brief for Appellant* 20, the Supreme Court has not resolved whether *Chevron* deference applies to presidential interpretations of ambiguous statutes. Three different standards (*Chevron*, *Skidmore*, and the rule of lenity, see *Brief for Appellant* 20, 27 and *Brief for the Navy-Marine Corps Appellate Defense Division as Amicus Curiae* 2) that might govern are suggested in the briefs already filed in this case; at least one more, that of *de novo* review, is also in play. None are adopted by Appellee, and none would change Seaman Miller's legal

position. This is clearly not the case in which to establish a potentially far-reaching rule of statutory interpretation.

While this Court has on occasion exercised its supervisory role by issuing guidance for lower courts, *see United States v. Leak*, 61 M.J. 234, 252-53 (2005); *United States v. Russett*, 40 M.J. 184, 185 (1994), it has not resolved an issue of this complexity in an entirely uncontested case. This case is moot and should be dismissed.

C. Chevron Deference is Inappropriate

Should the Court elect to answer the third certified question, it should not apply the "*Chevron* deference" advocated by Appellant. The Court, not the executive, has responsibility for interpreting the UCMJ. Given the unusual rulemaking process through which the Rules for Courts-Martial are revised and the Supreme Court's decision not to apply *Chevron* deference in the realm of federal criminal procedure, the *Chevron* framework for administrative law should not be imposed on the military criminal justice system.

Chevron deference is a rule of construction that requires an Article III court to defer to an administrative agency's reasonable interpretation of an ambiguous statute that is administered by that agency. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 843-44 (1984); *see generally* Cass R. Sunstein*, Law and Administration After*

Chevron, 90 Colum. L. Rev. 2071, 2085-91 (1990) (setting out the *Chevron* rationale). The Supreme Court has not applied *Chevron* deference in all cases in which an agency's interpretation of a statute is challenged, *see, e.g., United States v. Mead Corp.,* 553 U.S. 218, esp. 229-231 (2001), nor has it determined whether executive interpretations are to be granted such a high degree of deference, *see, e.g., Acree v. Republic of Iraq*, 370 F.3d 41, 63 n.2 (D.C. Cir. 2004) (Roberts, J., concurring) ("[t]he applicability of *Chevron* to presidential interpretations is apparently unsettled"). In *Mead* and other contested cases, the Supreme Court has applied a more flexible, variegated deference to the government's resolution of statutory ambiguity, see *Mead*, 553 U.S. 234; *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) ("The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.").

Even more important, *Chevron* deference has not been applied in criminal contexts. *See, e.g., Neal v. United States,* 516 U.S. 284 (1995) (rejecting the defendant's argument for *Chevron* deference to a Guidelines rule regarding how to calculate the weight of LSD); Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?,* 110 Harv. L. Rev. 469, 490 n.115 (1996) (citing

cases). Forcing a court to accept the government's interpretation of an ambiguous, contested statute in a criminal case serves neither the ends of justice or efficiency in criminal justice. Cases that turn on interpretations of the federal sentencing guidelines and federal Bureau of Prisons regulations have been decided through nuanced applications of both the common-law rule of lenity (which requires that ambiguities in penal statutes be construed in favor of the defendant) and the often contrary dictates of *Chevron* deference. *See, e.g., Mujahid v. Daniels*, 413 F.3d 991, 997-98 (9th Cir. 2005). Even such limited application of *Chevron* deference to federal criminal law, however, has been challenged as a violation of separation of powers and an unwise judicial practice. *See, e.g.*, Rachel E. Barkow*, A More Perfect System: Twenty-Five Years of Guidelines Sentencing Reform*, 58 Stan. L. Rev. 119, 124-28 (2005) (explaining why deference to federal sentencing guidelines is inappropriate).

Even if *Chevron* deference has limited application in the arena of federal criminal law, its use in military justice matters is not justified. Unlike the federal criminal justice system, military justice is overseen by an Article I court, a judicial body with core expertise in precisely the activity at issue here: interpreting the UCMJ. In this context, such deference has the potential to constrain a wide range of

judicial decision-making. Applying *Chevron* deference would effectively place this Court in a position of deferring not to the President, but to the Joint-Service Committee on Military Justice ("JSC"), a committee that operates very differently from the rules committees that propose amendments to the Judicial Conference of the United States and ultimately to the Supreme Court and Congress. The process for amending military justice rules lacks the pervasive openness and transparency associated with either the federal rulemaking process or agency rulemaking. *See generally* Kevin J. Barry*, Modernizing the Manual for Courts-Martial Rule-Making Process: A Work in Progress*, 165 Mil. L. Rev. 237, 271-74 (2000) (contrasting formal and public process of rulemaking used in civilian courts with JSC's closed, off-the-record process). The rules of construction that guide judicial deference to administrative agency law in Article III courts should not be permitted to undermine either the rights of accused servicemembers or the institutional authority of this Court.

Conclusion

For the foregoing reasons, the case should be dismissed as moot. If the third issue is reached, *Chevron* deference should be rejected as inapplicable to this Court's interpretation of the UCMJ.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and seven copies of the foregoing brief were delivered to the Court on January 18, 2006, and that a copy was deposited at the post office prepaid for first-class delivery to each of the counsel: counsel for the Appellant, Commander Jeffrey C. Good, United States Coast Guard, Commandant (G-LMJ), 2100 Second Street, SW, Washington, DC 20593, counsel for Appellee, Lieutenant Commander Nancy J. Truax, United States Coast Guard, U.S. Coast Guard, Senior Appellate Defense Counsel, 4200 Wilson Blvd., Suite 750, Arlington, VA 22203-1804, and counsel for the Amicus Curiae, Captain Pamela A. Holden, Judge Advocate General's Corps, United States Navy, Navy-Marine Corps Appellate Review Activity, 716 Sicard Street, S.E., Suite 1000, Washington Navy Yard, DC 20374, as well as a courtesy copy sent by e-mail to each of the above-named counsel.

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