IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT B. BERGDAHL, Plaintiff, v. UNITED STATES, Defendant.	)	Civil Action No. 1:21-CV-00418 (RBW)

DEFENDANT'S MOTION TO ALTER OR AMEND JUDGMENT

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On July 25, 2023, this Court held that the military judge presiding over the plaintiff's court-martial proceeding failed to disclose a disqualifying conflict arising from his application for an immigration judge position, *see* Mem. Op., ECF No. 25 at 61–62,[1] and vacated all orders and rulings issued by the military judge as of the date of his application. Order, ECF No. 26 at 1. In doing so, the Court relied on *In re Al-Nashiri*, 921 F.3d 224 (D.C. Cir. 2019). *See* Mem. Op. at 62. However, in *Al-Nashiri*, the finding of an appearance of partiality marked the beginning—not the end—of the remedy analysis. The Court of Appeals' assessment of whether to order vacatur "[was] guided by the three *Liljeberg* [*v. Health Servs. Acq. Corp.*, 486 U.S. 847 (1988)] factors: 'the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process.'" 921 F.3d at 239. The defendant respectfully submits that the same analysis applied here would yield dramatically different results, and its omission comprises clear error, the correction of which is within the Court's discretion on a request for relief under Rule 59(e). *See* Fed. R. Civ. P. 59(e).

A Rule 59(e) motion is not a vehicle to present arguments that could have been advanced earlier. *See Pfeiffer v. U.S. Dep't of Energy*, 2023 WL 4405158, at *2 (D.D.C. July 7, 2023) (quotation omitted). Here, the plaintiff requested that "his conviction and sentence be expunged," Am. Compl., ¶83(b)—but unlike Al-Nashiri, he never sought "the vacatur of all orders entered by [the military judge] whilst he was under a . . . conflict." *In re Al-Nashiri*, 921 F.3d at 233. The government thus had no occasion before this Court issued its judgment to address the appropriateness of such a date-based vacatur. This case presents "extraordinary

[1] The defendant respectfully disagrees with the Court's conclusion as to the plaintiff's Count II, and is considering whether to seek an appeal of that or any other facet of the Court's judgment.

circumstances" warranting relief, *Pfeiffer*, 2023 WL 4405158, at *2, because the judgment vacates the final, fully executed orders of an independent court system in a form not sought by the plaintiff, and, therefore, not briefed by the parties,[2] and vacatur is not warranted under the applicable framework.

Each consideration that supported vacatur in *Al-Nashiri*—the severity of the potential sentence; the early stage of the proceedings; the Court's broader concerns about the proceedings; and the potential cloud on the public perception of the military commissions, *see* 921 F.3d at 241—is absent from this case. Here, the plaintiff received a sentence largely consistent with what he requested following his own guilty plea; the underlying proceedings are final; there are no concomitant concerns regarding the court-martial system; and the Court has determined that an objective observer would not harbor significant doubts as to the fairness of the proceedings. For all these reasons, the defendant respectfully submits that the *Liljeberg* factors will not support vacatur in this case, and relief under Rule 59(e) is appropriate.

The defendant also asks that, even if the Court declines to amend its vacatur order, the Court clarify that this case is remanded for further proceedings. The defendant understands the Court's judgment to permit the defendant to continue proceedings against the plaintiff so long as such proceedings do not rely on the vacated orders, but an express statement in the Court's Order is warranted to prevent any future disputes regarding the scope of this Court's remedy.

Consistent with Local Civil Rule 7(m), undersigned counsel conferred with the plaintiff's counsel regarding the relief sought herein. The plaintiff's counsel indicated that plaintiff could not consent without having seen the motion, and that plaintiff intends to file a response.

[2] *See Sanford v. U.S.*, 586 F.3d 28 (D.C. Cir. 2009) (recognizing "the deference that should be accorded the judgments of the carefully designed military justice system established by Congress") (quoting *Schlesinger v. Councilman*, 420 U.S. 738, 753 (1975)).

I. Legal Standard

Rule 59(e) permits a court to alter or amend a judgment upon motion filed within 28 days after entry of judgment, *see* Fed. R. Civ. P. 59(e), *inter alia*, "to correct a clear error or prevent manifest injustice." *Pfeiffer*, 2023 WL 4405158, at *2 (quotation omitted). The Court has "considerable discretion" in ruling on such a motion. *Int'l Ctr. For Tech. Assessment v. Thompson*, 421 F. Supp. 2d 1, 6 (D.D.C. 2006).

II. The Court Should Amend its Order to Assess the *Liljeberg* Factors, and, in Light of that Analysis, Leave Intact the Orders of the Military Courts.

A. An Order of Vacatur in the Absence of the Requisite Analysis Comprises Clear Error Warranting Relief under Rule 59(e).

The standard for clear error is satisfied here because the Court imposed the remedy of vacatur upon finding an appearance of partiality, *see* Mem. Op. at 62, without applying the test that should have guided the Court's remedial discretion. In *Liljeberg*, the Supreme Court instructed that "[t]here need not be a draconian remedy for every violation" of a statute addressing judicial impartiality, 486 U.S. at 862, and instead "identified three factors relevant to the question whether vacatur is appropriate." *U.S. v. Microsoft Corp.*, 253 F.3d 34, 116 (D.C. Cir. 2001); *see also id.* at 116–17 (applying *Liljeberg* factors).[3] The *Al-Nashiri* Court reasoned that, because it was considering the vacatur of judicial decisions, its "discretion [was] guided by [those] factors." 921 F.3d at 239. To be sure, when assessing whether the petitioner had justified his request for relief, the Court made remarks supporting vacatur. *See, e.g. id.* at 238 ("If a judge 'should have been recused . . . then any work produced' by that judge 'must also be 'recused'—that is, suppressed.'") (quoting *In re Brooks*, 383 F.3d 1036, 1044 (D.C. Cir. 2004)).

[3] *See also*, *e.g.*, *Whitehead v. Paramount Picture Corp.*, 2001 WL 936260, at *1 (D.C. Cir. July 27, 2001) (per curiam) (finding "allegations that the district court judge should have been disqualified [were] without merit," and "would not justify vacatur of the district court's judgment in any event") (citing *Liljeberg*, 486 U.S. at 863–64).

But vacatur was far from a foregone conclusion; the Court carefully considered the *Liljeberg* factors in concluding it was warranted. *Id.* at 239–40. The same factors applied here would yield a very different result.

B. The *Liljeberg* Factors Weigh Heavily Against Vacatur in this Case.

1. The risk of injustice to the parties counsels against vacatur. For several reasons, while the D.C. Circuit concluded that the first *Liljeberg* factor—the risk of injustice to the parties—favored vacatur in *Al-Nashiri*, the opposite is true here. First, in assessing the risk of injustice in *Al-Nashiri*, the Court focused on the severity of the potential sentence, noting "the [Supreme] Court has been particularly sensitive to ensure that every safeguard is observed" in death penalty cases. *Id.* Neither the death penalty nor a sentence of confinement is involved here. *See* Mem. Op. at 42–43. Indeed, plaintiff *requested* his sentence of a dishonorable discharge. *See id.*[4] Thus, while *Al-Nashiri* held vacatur was appropriate in light of the potentially drastic consequences of any injustice in a death penalty case, there is no similar consideration here.

Second, the *Al-Nashiri* Court relied on the fact that "Al-Nashiri's case remain[ed] at the pre-trial stage," and, given that posture, the Court was "confident that the costs of [vacatur] [were] not intolerably high, especially when weighed against the hefty burdens that would be shouldered by both Al-Nashiri and the public were his military commission to proceed under a cloud of illegitimacy." 921 F.3d at 240. Here, by contrast, both considerations counsel against vacatur. As to the procedural posture: proceedings in the plaintiff's case had fully concluded prior to this Court's review. Indeed, the court that entered the plaintiff's conviction and sentence

[4] As this Court observed, while the military judge also imposed forfeitures that the plaintiff did not request, "given the aggravating factors in [the plaintiff's] case . . . an objective, disinterested observer . . . would not harbor a significant doubt about the fairness of the military judge's imposition" of that sentence. Mem. Op. at 43 (internal quotations, citations, and alterations omitted). The plaintiff's reduction to E-1 resulted from his punitive discharge by operation of law. *See also* 10 U.S.C. § 858a; Army Reg. 27-10, ¶ 5-38.

does not currently exist. *See U.S. v. Denedo*, 556 U.S. 904, 925 (2009) (Roberts, C.J., concurring in part) ("[A] court-martial is not a standing court . . . . When the object of its creation has been accomplished it is dissolved."). Court-martial jurisdiction arises from the "need for a prompt, ready-at-hand means of compelling obedience and order . . . [b]ut meeting that need requires expending significant military resources, and to the extent that those responsible for performance of [the military's] primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served." *Id.* at 925-26. "Accordingly, courts-martial, composed of active duty military personnel, have always been called into existence for a limited purpose and duration." *Id.* By vacating the military judge's decisions as of October 16, 2017, the Court's Order reflects the assumption that court-martial proceedings could resume, just like the military commission proceedings in *Al-Nashiri*. But such a resumption would "require[] expending significant military resources." *Id.*

Moreover, while in *Al-Nashiri*, the Court reasoned that the burdens of vacatur were outweighed by "the hefty burdens that would be shouldered by both Al-Nashiri and the public were his military commission to proceed under a cloud of illegitimacy," 921 F.3d at 240, there is no such countervailing consideration here because the Court has already examined whether "an objective, disinterested observer, fully informed of all the facts and circumstances, would . . . harbor a significant doubt about the fairness of the proceeding," Mem. Op. at 35, including as to the facets of the proceeding vacated by the Court's Order:

- As to the plea, "the Court conclude[d] that an objective observer would not harbor a significant doubt about [its] fairness," noting that plaintiff conceded that "there was a factual basis for his guilty plea" and that it "was voluntary." *Id*. at 40.

- As to the sentence, the Court noted the "significant" "discrepancy between the sentence the plaintiff received," and the sentence "called for by . . . former President Trump," and found the "the sentence the plaintiff received overall indicates a lack of prejudice to the

plaintiff." *Id.* at 41. Indeed, the Court found that "rather than being swayed by outside forces, the military judge [appeared] notably impervious to them." *Id.* at 42 (quoting *U.S. v. Bergdahl*, 80 M.J. 230, 244 (C.A.A.F. 2020)).

- As to appellate proceedings, the Court found that "given the aggravating factors in this case," "'there would be no basis for an impartial observer to believe that the decision by the [ACCA] to affirm the findings and sentence in this case was in any way unfair.'" *Id.* (quoting *Bergdahl*, 80 M.J. at 244).

Given these findings, and especially the Court's conclusion that the military judge "appeared notably impervious" to outside influence, *id.*—including to statements by the former President, which underlie the Court's concern about the military judge's employment application, *see id.* at 58–61—there is no risk that the court-martial proceedings would remain "under a cloud of illegitimacy" in the absence of vacatur. *Al-Nashiri*, 921 F.3d at 240.

Thus, the balance of the factors that the *Al-Nashiri* Court weighed is reversed in this case: while the burden of vacatur is inestimably greater—both as to the practical steps involved, and as to the impairment to the finality of judgments of a coordinate court—the Court's finding that an impartial observer would not harbor significant doubts about the fairness of the proceedings has removed the countervailing considerations.

2. The second *Liljeberg* factor, the "risk that the denial of relief will produce injustice in other cases," *In re Al-Nashiri,* 921 F.3d at 239 (citing *Liljeberg*, 486 U.S. at 864), also weighs against vacatur. Although restrictions against an appearance of partiality may generally prevent injustice in other cases, this case's unique posture makes the possibility of injustice elsewhere remote.

This Court has already recognized that this case is *sui generis*, as the appearance of partiality arose only from the "unique" circumstance that the then-President, "the ultimate authority over the agency that would determine the military judge's appointment as an

immigration judge, expressed during his candidacy and subsequently ratified after his election explicit condemnations of the plaintiff, reflecting his 'discernible interest in the outcome' of the plaintiff's case." Mem. Op. at 59 (citation omitted). Absent the former President's public comments regarding the case, no conflict would have arisen because, unlike in the military commission setting at issue in *Al-Nashiri*, the Attorney General typically is not a party in court-martial proceedings. That is why this Court distinguished military appellate decisions holding that court-martial proceedings presided over by the same judge at issue in *Al-Nashiri* were not infected by an appearance of impropriety, as neither case involved statements about a pending case by "the head of the executive branch" with "supervisory authority over a hiring official." Mem. Op. at 59 n.17 (discussing *U.S. v. Wilson*, 2021 WL 2390367 (A.F. Ct. Crim. App. June 10, 2021), and *U.S. v. Snyder*, 2020 WL 1896341 (A.F. Ct. Crim. App. Apr. 15, 2020)).

The unique circumstances here undermine any suggestion that systematic considerations warrant vacatur. This case thus differs markedly from *Al-Nashiri*. *See* 921 F.3d at 240 (citing concerns regarding other instances in the military commission system). Although the defendant respectfully disagrees with the *Al-Nashiri* Court's conclusions in this regard, such concerns clearly informed Court's reasoning. *See id.* In this case, the Court has not expressed concerns of the same degree regarding any facet of the court-martial system.

3. Finally, as to the third *Liljeberg* factor, in contrast to *Al-Nashiri*, there is no "risk of undermining the public's confidence in the judicial process," 921 F.3d at 239 (citing *Liljeberg*, 486 U.S. at 864), absent vacatur. To be sure, the Court found that the military judge's actions—including his statements concerning his retirement and his writing sample, *see* Mem. Op. at 61—"creat[ed] the appearance of impropriety," *id.* (quoting *Liljeberg*, 486 U.S. at 858). But nothing in *Liljeberg* or its progeny suggests that the remedial analysis should stop there. To the contrary,

that the *Al-Nashiri* Court found an appearance of impropriety but nonetheless continued to the three *Liljeberg* factors—even considering issues that had arisen in another military commission case, *see supra* 7—demonstrates that the analysis of whether public confidence would be undermined properly encompasses a review of all the facts that would inform the public perception. Here, once the broader facts and circumstances are considered, there is no reason to think that the public confidence in the military justice system would be undermined.

In sum, even assuming the military judge's application created a situation in which his "impartiality might reasonably be questioned," Mem. Op. at 61 (quoting R.C.M. 902), the indicia of fairness at each step of the proceeding would supply ready and conclusive answers to any such questions. A number of those circumstances are discussed in the Court's Memorandum Opinion, including the military judge's criticism of the former President's comments as, *inter alia*, "disturbing and disappointing," *id.* at 7, and the military judge's announcement that he would "consider the [former] President's comments as mitigation evidence" during sentencing, *id.* at 10. Indeed, even the plaintiff's counsel acknowledged that, being aware of the decision from the court-martial that the military judge had appended to his employment application, "the White House . . . was long aware of the dim view the [military judge] took of President Trump's pre-inauguration statements about Sergeant Bergdahl." Verbatim Record of Trial, ECF No. 16-9, at 233 (Tr. 1732:15–19).

Moreover, any appearance that the "military judge might be inclined to appeal to the President's expressed interest in the plaintiff's conviction and punishment when applying for the immigration judge position," Mem. Op. at 61,[5] would be outweighed here by the finding that

[5] While the Court determined that the military judge had contributed to the appearance of impropriety by including in his employment application a decision ruling against the plaintiff on a claim of unlawful command

"rather than being swayed by outside forces, the military judge [appeared] notably impervious to them." Mem. Op. at 42 (quoting *Bergdahl*, 80 M.J. at 244). So, too, with the outcome of the proceedings, as to which the Court concluded "'there would be no basis for an impartial observer to believe that the decision by the [ACCA] to affirm the findings and sentence in this case was in any way unfair.'" *Id.* (quoting *Bergdahl*, 80 M.J. at 244).

In *Al-Nashiri*, neither such independent determinations regarding the fairness of the proceedings, nor, indeed, the underlying facts supporting those conclusions, were present to allay potential concerns of the public. In the instant case, there are ample grounds on which to conclude that the public confidence in the military justice system would remain unshaken if the military courts' orders remained in place.

III. If the Court Determines that Vacatur is Warranted Here, the Court Should Clarify its Order to Remand this Case for Further Proceedings.

The defendant also respectfully asks that, if the Court retains its Order of vacatur, the Court amend that Order to clarify its intention to remand the case for further proceedings.[6] As the Court adopted the remedy ordered in *Al-Nashiri*, Mem. Op., ECF No. 25 at 62 (quoting 921 F.3d at 241)—a case at the pretrial stage, which could and did resume thereafter—the defendant understands this Court's Order to permit a like result here. However, as the court-martial that entered the plaintiff's conviction and sentence was dissolved once the plaintiff's conviction became final, *see supra* 5, further proceedings consistent with the Court's opinion would have to be instigated by an appropriate authority.

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influence by the former President, Mem. Op. at 61, the Court clarified the Court "[did] not mean to opine that there was actual bias in this case or that the military judge's 'orders were [not] the product of his considered and unbiased judgment, unmotivated by any improper considerations.'" *Id.* at 62 (quoting *Al-Nashiri*, 921 F.3d at 237).

[6] *See*, *e.g.*, *Microsoft*, 253 F.3d at 119 (after finding *Liljeberg* factors support limited vacatur, "remand[ing] the case . . . for reassignment to a different trial judge for further proceedings consistent with this opinion").

While the defendant construes this Court's Order to permit the resumption of proceedings consistent with that Order, relief clarifying as much is nonetheless warranted. Not only would such a clarification preclude future disputes regarding the scope of relief the Court intended, it would prevent the manifest injustice that would result if the Court's Order were given a contrary construction. *See Leidos, Inc. v. Hellenic Republic*, 881 F.3d 213, 217 (D.C. Cir. 2018) ("manifest injustice" requires "a clear and certain prejudice to the moving party" that is "fundamentally unfair in light of governing law"). Here, any construction of the Court's Order that does not permit a resumption of proceedings within the military justice system would significantly prejudice the Army's and the public's interest in the administration of justice, especially "given the government's strong evidence in support of the plaintiff's charges, . . . ; the seriousness of the charges . . . ; and the extensive casualties that resulted from the plaintiff's actions." Mem. Op. at 43. And the same factors would render such a construction "fundamentally unfair in light of governing law," *Leidos, Inc.*, 881 F.3d at 217, especially because the plaintiff "concedes that there was a factual basis for his guilty plea." Mem. Op. at 40. Against that backdrop, this case should be remanded for further proceedings consistent with the Court's decision, to potentially include eventual retrial and re-sentencing, if appropriate.

For all these reasons, the defendant respectfully requests that, if the Court determines that vacatur is appropriate in this case, the Court clarify its Order to direct that the plaintiff's case be remanded for further or continued proceedings, as appropriate, consistent with its Order.

Dated: August 22, 2023

Respectfully submitted,

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[PROPOSED] ORDER

The Court having considered Defendant's Motion to Alter or Amend Judgment, and the submissions of the parties in support thereof and in opposition thereto, hereby ORDERS that the motion is GRANTED. Based on the Court's assessment of the factors set forth by the Supreme Court in *Liljeberg v. Health Servs. Acq. Corp.*, 486 U.S. 847 (1988), the Court's July 25, 2023 Order, ECF No. 26, is hereby AMENDED to leave intact the rulings and orders of the military judge, and the appellate decisions reviewing such rulings and orders, that had been vacated by the Court's July 25, 2023 Order.

[In the event that the rulings and orders of the military judge, and the appellate decisions reviewing such rulings and orders, remain vacated,] The Court hereby ORDERS that this case be remanded for further or continued proceedings, as appropriate, consistent with this Court's Orders.

Dated: _____, 2023

_____
REGGIE B. WALTON
United States District Judge