

**IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS**

UNITED STATES,

Petitioner

v.

Colonel (O-6)

**JACQUELINE L. EMANUEL,**

Military Judge,

Respondent

and

Sergeant (E-5)

**CARMEN IRONHAWK,**

U.S. Army

Real Party in Interest

**GOVERNMENT PETITION  
FOR EXTRAORDINARY  
RELIEF IN THE NATURE OF  
A WRIT OF PROHIBITION**

Case No. ARMY Misc. 20240057

TO THE HONORABLE, THE JUDGES OF THE  
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

COMES NOW the United States, by and through undersigned appellate government counsel, and requests this court issue a writ of prohibition<sup>1</sup> and vacate respondent's order that the government produce certain communications for in camera review.

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<sup>1</sup> If this court determines a writ of mandamus is the more appropriate form, the government requests, in the alternative, this court issue such a writ. *See United States v. Pritchard*, 82 M.J. 686, 690 n.4 (Army Ct. Crim. App. 2022), *appeal denied*, 82 M.J. 446 (C.A.A.F. 2022) (“While either form of writ might ultimately achieve petitioner’s desired end, we believe a writ of prohibition is the correct form.”).

## Relevant Facts and History of the Case

The accused, the real party in interest, is charged with murder, in violation of Article 118, Uniform Code of Military Justice, 10 U.S.C. § 918 [UCMJ]. On 20 April 2023, respondent, the military judge in the accused’s court-martial, docketed trial for 24 October 2023–3 November 2023. On 6 October 2023, the accused filed a motion for continuance due to multiple motions that remained pending. The government did not oppose the continuance. The military judge granted the continuance on 11 October 2023, and trial is currently docketed for 9–19 April 2024.

On 17 October 2023, Colonel [COL] Kristy Radio, Staff Judge Advocate, 1st Armored Division and Fort Bliss, sent an email to COL Tyesha Smith, Chief Trial Judge, U.S. Army Trial Judiciary,<sup>2</sup> detailing the timeline of the case and the pending motions, expressing that “both the Command and the family [were] disappointed” by the delay, and explaining “the delay . . . presents a risk that either side loses access to a witness because of illness, injury, or death.” (App’x at 1–2). Judge Smith responded to COL Radio that day and carbon copied COL Kennebeck and COL Sean McGarry, Chief, U.S. Army Trial Defense Service on the response.

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<sup>2</sup> COL Christopher Kennebeck, Chief, Office of the Judge Advocate General, Criminal Law Division was carbon copied on the email.

(App'x at 1). Colonel McGarry forwarded the email through technical channels, eventually reaching the accused's trial defense counsel. (App'x at 3).

On 19 October 2023, the accused's trial defense counsel submitted a supplemental discovery request to the government, specifically requesting discovery of the following:

A. All emails related to the above listed case between the SJA, COL Kristy Radio, and the Chief Army Trial Judge, COL Smith.

B. A summary of any other communications between the SJA and Chief Trial Judge related to this case.

C. All emails, texts, or other communications between the prosecution team in this case and the SJA, DSJA, or [C]hief of Justice about the continuance in this case.

D. All emails, texts or other communications between members of the 1st Armored Division OSJA and members of the Trial Counsel Assistance Program (TCAP) or the Office of the Special Trial counsel (OSTC) related to communication with the Chief Judge about the trial judge in this case.

E. All emails, texts or other communications between members of the 1st Armored Division OSJA and the Office of the Judge Advocate General (OTJAG) about communicating with the Chief Trial Judge related to this case.

F. All emails, texts, or other communications between members of the prosecution team and the family of Hector Cervantes related to the continuance of the case.

(App'x at 6–8). The request also asked for responses to written interrogatories from COL Radio and Judge Smith. (App'x at 6–8). The government denied the discovery request, with the exception of “A” and “F” above. (App'x at 9–10). To

justify most of the denials, the government asserted that the requested materials contained attorney work-product and were not discoverable under Rule for Courts-Martial [R.C.M.] 701(f). (App’x at 9–10).

The accused’s trial defense counsel filed a motion to compel discovery, and the government filed a response in opposition. (App’x at 11–30). On 22 January 2024, the court held an Article 39(a) session on the motion to compel. (App’x at 31). The court did not receive evidence or argument on the motion, but the parties agreed to have COL Radio and Judge Smith available to testify at a later Article 39(a) session, mooting the written interrogatory issue. (App’x at 32). From the bench, the court granted the accused’s request to conduct an in camera review of some of the requested documents to “determine whether there is any information that needs to be disclosed to Defense.” (App’x at 32).

On 29 January 2024, the military judge provided her written findings of facts and conclusions of law via email to the parties. (App’x at 31–32). Three days later, the court issued a written order, directing the government to produce the following for in camera review by 1700 MST on 6 February 2024:

All emails, texts, or other communications between the prosecution team in this case and the SJA, DSJA, or [C]hief of Justice about the continuance in this case.

All emails, texts, or other communications between members of the 1st Armored Division OSJA and members of the Trial Counsel Assistance Program (TCAP) or the Office of the Special Trial counsel (OSTC)

related to communication with the Chief Judge about the trial judge in this case.

(App'x at 34).

On 6 February 2024, the government filed a motion requesting the military judge recuse herself under R.C.M. 902(a). (App'x at 37–48). In short, the government argues the email from COL Radio to Judge Smith should have remained confidential in accordance with R.C.M. 109 and that the disclosure of the email to the military judge “fundamentally altered [her] ability . . . to be impartial in the case.” (App'x at 45). When it filed its motion, the government requested the military judge stay the deadline for production of the materials for in camera review until she ruled on the recusal motion. (App'x at 35). The recusal motion remains pending; however, on 7 February 2024, the military judge extended the deadline for production of the materials for in camera review until 1700 MST on 8 February 2024. (App'x at 49).

On 8 February 2024, the government requested this court stay the proceedings at the trial court pending resolution of this writ petition. On the same day, this court issued a stay pending further order of the court and issued a briefing schedule on the government's writ petition. (App'x at 52–53).

## **Statement of the Issue**

WHETHER RESPONDENT ERRED WHEN SHE ORDERED THE GOVERNMENT TO PRODUCE COMMUNICATIONS BETWEEN GOVERNMENT COUNSEL FOR IN CAMERA REVIEW

## **Relief Requested**

The government requests this court issue a writ of prohibition to respondent preventing her from conducting an in camera review of the materials specified in her 1 February 2024 order. Additionally, the government requests this court vacate respondent's 1 February 2024 order directing the government to produce the requested documents for in camera review.

The court previously granted the government's request to stay the ongoing proceedings in this case. The government requests that this court continue to stay the proceedings until resolution of the present petition for extraordinary relief.

## **Reasons for Granting the Requested Relief**

### **A. This court has jurisdiction to issue the requested writ.**

The All Writs Act, 28 U.S.C. § 1651(a), grants military appellate courts authority to issue extraordinary writs necessary or appropriate in aid of their jurisdiction. *Loving v. United States*, 62 M.J. 235, 246 (C.A.A.F. 2005) (citing *Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999)). A writ for extraordinary relief is a “drastic instrument which should be invoked only in truly extraordinary situations.” *United States v. Howell*, 75 M.J. 386, 390 (C.A.A.F. 2016) (citing

*United States v. Labella*, 15 M.J. 228, 229 (C.M.A. 1983)). This court will only issue such a writ if a petitioner demonstrates: “1. There is no other adequate means of relief; 2. The right to issuance of the writ is clear and indisputable; and 3. Issuance of a writ is appropriate under the circumstances.” *Pritchard*, 82 M.J. at 690 (citing *Cheney v. United States Dist. Court*, 542 U.S. 367, 380–81 (2004)).

Whether a requested writ is “in aid of” an appellate court’s jurisdiction is determined by whether the writ implicates the court’s subject-matter jurisdiction. *United States v. Brown*, 81 M.J. 1, 3. “To establish subject-matter jurisdiction, the harm alleged must have had ‘the potential to directly affect the findings and sentence.’” *Id.* at 4 (citing *Howell*, 75 M.J. at 390)). The power to issue writs “extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected.” *FTC v. Dean Foods Co.*, 384 U.S. 597, 603 (1966). The Court of Appeals for the Armed Forces has explained that “the doctrine of potential jurisdiction allows appellate courts to issue opinions in matters that may reach the actual jurisdiction of the court.” *Brown*, 81 M.J. at 4 (quoting *Howell*, 75 M.J. at 390 n.4) (internal quotation marks omitted).

In the present case, the accused is charged with murder. If she is convicted, this court would have jurisdiction over her appeal. UCMJ art. 66(b). The particular issue implicated by this writ petition—whether the military judge views materials that may affect her ability to remain fair and impartial—has the potential

to directly affect the findings and sentence. *See Ctr. for Con'l Rights v. United States*, 72 M.J. 126, 129 (C.A.A.F. 2013) (citing *Hasan v. Gross*, 71 M.J. 416 (C.A.A.F. 2012)). Accordingly, the requested writ is “in aid of” this court’s jurisdiction. For the reasons discussed below, the writ is “necessary [and] appropriate.” 28 U.S.C. § 1651(a). Thus, this court has jurisdiction, and the writ should issue.

**B. The right to issuance of the writ is clear and indisputable.**

The military judge clearly abused her discretion in ordering production of the requested communications for in camera review. On its face, the requested materials—generally speaking, communications about the case between the attorneys prosecuting the case and either their supervisors or organizations designed to assist them in their prosecution—are likely to contain “notes, memoranda, or similar working papers prepared by counsel and counsel’s assistants and representatives,” and are therefore generally not discoverable. R.C.M. 701(f). To the extent the communications do not contain such privileged<sup>3</sup> materials, there is no reasonable probability that they are relevant and are therefore likewise not discoverable. R.C.M. 701(a)(2).

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<sup>3</sup> While sometimes referred to as the attorney work-product “doctrine,” military courts, including the Court of Appeals for the Armed Forces, more often refer to the protection as the work-product “privilege.” *United States v. Bowser*, 73 M.J. 889, 897, n.5 (A.F. Ct. Crim. App. 2014).



The military judge was correct to note that “[b]oth the [U.S.] Supreme Court and the Court of Appeals for the Armed Forces have approved of in camera review as a mechanism to resolve attorneys’ claims of privilege in criminal discovery matters.” (App’x at 32) (citing *United States v. Bowser*, 73 M.J. 889, 897 (A.F. Ct. Crim. App. 2014)) (second alteration in original). Indeed, as the Air Force Court of Criminal Appeals has explained, “Normally, in camera review is an appropriate mechanism to resolve competing claims of privilege and right to review information.” *United States v. Wright*, 75 M.J. 501, 510 (2015) (citing R.C.M. 703(f)(4)(C) and *United States v. Zolin*, 491 U.S. 554, 569 (1989)). In the same opinion, however, the court went on to explain that “in camera review is not automatically appropriate every time one party seeks information over which another claims privilege.” *Id.* In a case with an underlying issue somewhat similar to the instant case, the court announced a threshold test to determine when in camera review is appropriate: “[T]he military judge should determine whether a sufficient factual basis exists demonstrating a reasonable likelihood that the documents over which the Government claimed privilege contained information necessary to [the military judge’s] determination of the defense’s unlawful command influence motion.” *Id.*; see also *United States v. Klemick*, 65 M.J. 576, 580 (establishing a requirement to make a three-part threshold showing prior to in camera review of records subject to the protections of Mil. R. Evid. 513).

Ultimately, the Air Force court found that “the military judge ha[d] not adequately developed the record as to whether the defense provided sufficient facts demonstrating a reasonable likelihood that the records contain[ed] relevant, non-cumulative information, necessary for disposition of the defense’s unlawful command influence motion.” *Id.* This court should make a similar finding in the present case.

As a preliminary matter, the accused does not appear to contest that the requested materials are protected from disclosure under R.C.M. 701(f). Instead, she simply asserts, “If evidence falls under the protection afforded by R.C.M. 701(f) . . . then the material may be reviewed *in camera* as the rule contemplates prior to disclosure to the Defense.” (App’x at 20). While the accused is correct that, in general, the military judge has the authority to conduct an *in camera* review, she does not even suggest that some exception to the “protection afforded by R.C.M. 701(f)”—i.e., that it is not subject to disclosure—exists. (App’x at 20). For this reason alone, the military judge should have denied the accused’s motion outright.

Even more problematic, however, is the fact that the military judge’s findings of facts and conclusion of law are completely bereft of analysis justifying production of the requested communications for *in camera* review. While the military judge’s “Rationale” section of her findings includes generally correct

statements of the law, she does nothing to analyze the facts of the present case under those legal principles. For example, she does not discuss whether the accused made an initial showing that the requested documents were likely to contain discoverable materials (they did not). Furthermore, the military judge does not conduct any analysis regarding application of the privilege. In fact, her order directing production of the materials for in camera review appears to suggest that she would turn over privileged materials to the accused. (App’x at 34) (“The Court will not *turn over any privileged material to Defense* without first providing the Government the opportunity to seek appellate relief if it deems it necessary.” (emphasis added)).<sup>4</sup>

Given the dearth of analysis by the military judge and the lack of argument from the accused as to why the general protection from disclosure may not apply, the military judge clearly abused her discretion and the right to relief is clear and indisputable.

### **C. Issuance of the writ is appropriate under the circumstances.**

As discussed above, the Air Force court has stated, “*Normally*, in camera review is an appropriate mechanism to resolve competing claims of privilege and

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<sup>4</sup> It is not clear from the remainder of the military judge’s order or corresponding findings of facts and conclusions of law whether this is a typographical error or whether she would first make a finding that some exception to the general privilege applied.

right to review information.” *Wright*, 75 M.J. at 510 (emphasis added). This is not a “normal” case, however. From the record, it is evident that the only reason the accused submitted the additional discovery request that led to the present litigation is because she received an email containing communications with the chief trial judge that should have remained confidential and never disclosed to the accused in the first place.<sup>5</sup> This error in disclosure, which ultimately led to the government requesting the military judge recuse herself, placed the present case in an unusual procedural posture that affects—or should affect—the manner in which the motion to compel is analyzed.

In R.C.M. 109, the President prescribed processes and procedures governing professional supervision of military judges and counsel. The rules allow any person, including lawyers or parties in a particular case, to forward complaints about military judges to the service Judge Advocate General or “to a person designated by the Judge Advocate General to receive such complaints.” R.C.M. 109(c)(3). In Army Regulation 27-10, the Judge Advocate General of the Army designated the Chief Trial Judge of the U.S. Army Trial Judiciary to receive “[i]nformation on alleged judicial misconduct or unfitness . . . in the case of trial judges . . .” Army Reg. 27-10, Legal Services: Military Justice (20 Nov. 20),

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<sup>5</sup> To be clear, the government is not suggesting or implying any wrongdoing on the part of the accused in receiving the email.

para. 15-12. As the discussion to R.C.M. 109(a)(4) explains, “Complaints under this paragraph will be treated with confidentiality.” Thus, when Judge Smith received the email from COL Radio, she should not have forwarded it to the chief of the Trial Defense Service. Nor should she have notified the military judge that a representative of the command made a complaint in an ongoing court-martial before that judge.

Furthermore, despite the accused’s arguments to the contrary, the email from COL Radio to Judge Smith is not evidence of unlawful command influence that may justify disclosure of otherwise privileged communications. The email—which is the sole basis of the accused’s allegation<sup>6</sup> of unlawful command influence—was an appropriate notification about her concerns about a military judge to the person designated by The Judge Advocate General to receive complaints regarding potential issues of a military judge’s unfitness. The discussion to R.C.M. 109(a)(2) explains that “[t]he term ‘unfitness’ should be construed broadly . . . .” The discussion goes on to explain that “[e]rroneous decisions of a judge are not subject to investigation under this rule. Challenges to these decisions are more appropriately left to the appellate process.” The

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<sup>6</sup> Although the accused states that she is not “making [a] substantive claim of unlawful command influence,” the majority of her motion to compel discovery is dedicated to the topic. (App’x at 18). She even asserts “[t]here is an arguable basis for a claim of actual unlawful command influence, and an existing claim of apparent unlawful command influence here.” (App’x at 19).

substance of the email from COL Radio to Judge Smith makes clear that COL Radio was not suggesting the military judge's decision to grant a continuance—or any other decision—was erroneous. Rather, she was notifying The Judge Advocate General's representative of potential issues of the military judge's unfitness; indeed, the second sentence in the email makes clear that the purpose of notifying Judge Smith was “for [her] awareness.” (App'x at 1). Additionally, it was appropriate for COL Radio to anticipate that in an ongoing murder case the fact the victim's family was unhappy may lead to media attention or other inquiries to The Judge Advocate General. Making him aware—through his designated representative and the chief of his office's Criminal Law Division—was appropriate under the circumstances and far from an attempt to unlawfully influence the proceedings.

In this context, the military judge should never have ordered production of the requested communications for in camera review. Especially in a case where exposure to what should have been a confidential email from COL Radio to Judge Smith itself was raised as grounds for the military judge to recuse herself, conducting an in camera review of emails between government counsel that, on their face, will almost certainly contain non-discoverable attorney work product only further risks calling the military judge's impartiality into question. To

mitigate that risk, this court should grant the petition and vacate the military judge's pending disclosure order.

**D. There is no other adequate means of relief.**

As discussed above, the facts of this case are unique. In the ordinary case, the real harm may very well be disclosure to the defense of the government's protected work product. *See, e.g., Bowser*, 73 M.J. at 900 ("Any damage to the privilege would only occur if the military judge chose to order privileged information to be released to the defense."). Under the unique facts of this case, however, production and disclosure to the military judge is a harm in and of itself. The military judge has already reviewed an email regarding potential issues of her unfitness sent by a staff judge advocate in an ongoing court-martial convened by the command she represents. That error led the government to file a motion requesting the military judge to recuse herself because, *inter alia*, her exposure to that email would lead a member of the public to question her impartiality in the court-martial. (App'x at 48). Further exposing the military judge to emails by and between government counsel—that may themselves raise issues regarding the military judge's fitness—would only further call into question her ability to remain fair and impartial. Accordingly, nothing short of a writ issued by this court can prevent the harm caused by the military judge's error. Put differently, there is no other adequate means of relief.

WHEREFORE, the United States respectfully asks this Court grant the present petition and vacate the respondent's 1 February 2024 order.



TIMOTHY R. EMMONS  
MAJ, JA  
Branch Chief  
Government Appellate Division



CHRISTOPHER B. BURGESS  
COL, JA  
Chief  
Government Appellate Division



# **APPENDIX**

**From:** [Smith, Tyesha L COL USARMY HQDA OTJAG \(USA\)](#)  
**To:** [Radio, Kristy L COL USARMY 1 AD \(USA\)](#)  
**Cc:** [Kennebeck, Christopher A \(Chris\) COL USARMY HQDA OTJAG \(USA\)](#); [McGarry, Sean T COL USARMY HQDA OTJAG \(USA\)](#)  
**Subject:** RE: Ironhawk  
**Date:** Tuesday, October 17, 2023 1:41:05 PM

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Received, Kristy. Thank you.

Very Respectfully,

Tye

Tyesha Lowery Smith  
Colonel, U.S. Army  
Chief Trial Judge  
U.S. Army Trial Judiciary  
(o) [REDACTED]  
(c) [REDACTED]

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**From:** Radio, Kristy L COL USARMY 1 AD (USA) <kristy.l.radio.mil@army.mil>  
**Sent:** Tuesday, October 17, 2023 2:38 PM  
**To:** Smith, Tyesha L COL USARMY HQDA OTJAG (USA) <tyesha.l.smith5.mil@army.mil>  
**Cc:** Kennebeck, Christopher A (Chris) COL USARMY HQDA OTJAG (USA) <christopher.a.kennebeck.mil@army.mil>  
**Subject:** Ironhawk

Ty,

Good afternoon. I hope all is well in DC. I wanted to provide you a summary of our timeline and concerns in US. v. Ironhawk (murder trial at Fort Bliss) for your awareness.

The case was originally docketed by Judge Emanuel on 20 April 2023 for 24 October – 3 November. The Motions deadline was 28 July 2023 and the Government and Defense each filed 5 Motions:

Government:

- Motion to Exclude 911 Call
- Motion to Exclude Suicide Defense
- Motion to Exclude Mention of Dr. Downs and his Report
- Motion to Exclude Previous DV Instances
- Motion for Clarification on Date of Death

Defense:

- Motion to Compel Discovery
- Motion to Compel Production of Witnesses
- Motion to Suppress Video Interviews
- Motion for Unanimous Verdict
- Motion to Exclude MRE 404b Evidence

The Motions Hearing was on 11 August. The only Motion which generated argument and witnesses was the Motion to Suppress. Judge Emanuel only ruled on one Motion, the Unanimous Verdict, from the bench. The rest she planned to take under advisement and issue written rulings. Some of the Motions could drastically alter trial strategy for both Parties, especially the Government Motion to Exclude Suicide and the Defense Motion to Suppress Video Interviews.

Over the next 8 weeks, Defense asked for a status update a month out from trial and three weeks out, Judge Emanuel did not respond or provide a timeline for her rulings. She was however responsive over email to other requests by the Parties to add witnesses and sever Closing and Rebuttal Argument.

At two weeks out, Defense filed the Motion for a Continuance on Friday, 6 October at 1800. The Government waited until Tuesday, 10 October to respond to see if the Judge would rule on the Motions over the long weekend. However, she did not. The Government supported the continuance and Judge Emanuel approved it the next day.

The new trial date is 9-19 April 2024 - a six-month delay. Given the overwhelming gravity of this murder case, both the Command and the family are disappointed. In addition to disillusioning their faith in our system, the delay also presents a risk that either side loses access to a witness because of illness, injury, or death.

Attached is the original PTO for your reference.

Thank you.

v/r,  
Kristy

v/r,  
Kristy Radio  
COL, JA  
Staff Judge Advocate  
1st Armored Division & Fort Bliss  
Office: (██)  
Cell: (██)

**From:** [Swilley, Angela D LTC USARMY HQDA OTJAG \(USA\)](#)  
**To:** [Jensen, Mark L MAJ USARMY 1 AD \(USA\)](#); [Sherry](#)  
**Subject:** FW: Ironhawk  
**Date:** Tuesday, October 17, 2023 1:53:16 PM

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FYSA.

ANGELA D. SWILLEY  
LTC, JA  
Regional Defense Counsel (Southwest)

U.S. Army Trial Defense Service  
330 761st Tank Battalion Avenue  
Fort Cavazos, Texas 76544

O: [REDACTED]  
C: [REDACTED]  
E: [angela.d.swilley.mil@army.mil](mailto:angela.d.swilley.mil@army.mil)

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**From:** McGarry, Sean T COL USARMY HQDA OTJAG (USA) <[sean.t.mcgarry.mil@army.mil](mailto:sean.t.mcgarry.mil@army.mil)>  
**Sent:** Tuesday, October 17, 2023 2:51 PM  
**To:** Steele, Lawrence H LTC USARMY HQDA TJAGLCS (USA) <[lawrence.h.steele.mil@army.mil](mailto:lawrence.h.steele.mil@army.mil)>  
**Cc:** Grammel, Timothy CIV USARMY HQDA OTJAG (USA) <[timothy.grammel.civ@army.mil](mailto:timothy.grammel.civ@army.mil)>; O'Brien, Edward J CIV USARMY (USA) <[edward.j.obrien.civ@army.mil](mailto:edward.j.obrien.civ@army.mil)>; Swilley, Angela D LTC USARMY HQDA OTJAG (USA) <[angela.d.swilley.mil@army.mil](mailto:angela.d.swilley.mil@army.mil)>; Korte, Michael E LTC USARMY HQDA OTJAG (USA) <[michael.korte4.mil@army.mil](mailto:michael.korte4.mil@army.mil)>  
**Subject:** FW: Ironhawk

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**Sent:** Tuesday, October 17, 2023 3:41 PM  
**To:** Radio, Kristy L COL USARMY 1 AD (USA) <[kristy.l.radio.mil@army.mil](mailto:kristy.l.radio.mil@army.mil)>  
**Cc:** Kennebeck, Christopher A (Chris) COL USARMY HQDA OTJAG (USA) <[christopher.a.kennebeck.mil@army.mil](mailto:christopher.a.kennebeck.mil@army.mil)>; McGarry, Sean T COL USARMY HQDA OTJAG (USA) <[sean.t.mcgarry.mil@army.mil](mailto:sean.t.mcgarry.mil@army.mil)>  
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v/r,  
Kristy

v/r,  
Kristy Radio  
COL, JA  
Staff Judge Advocate  
1st Armored Division & Fort Bliss  
Office: [REDACTED]  
Cell: ([REDACTED])

v.

**SGT CARMEN J. IRONHAWK**  
**C Company, 16th Brigade Engineer**  
**Battalion, 1st Armored Brigade Combat**  
**Team, 1st Armored Division,**  
**Fort Bliss, Texas 79918**

**19 October 2023**

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1. This serves as the 3rd request for production and discovery in the case of *United States v. SGT Carmen J. Ironhawk*.

2. **Purpose of Request.** In light of a recent disclosure that the 1st Armored Division Staff Judge Advocate (SJA) sent a complaint to the Chief Trial Judge, COL Tyesha Smith, about the sitting judge on this case, COL Jacqueline Emmanuel, the Defense requests production of the below items to assess whether the SJA’s communications constituted unlawful command influence (UCI).

3. **Defense requests disclosure of the following:**

- A. All emails related to the above listed case between the SJA, COL Kristy Radio, and the Chief Army Trial Judge, COL Smith.
- B. A summary of any other communications between the SJA and Chief Trial Judge related to this case.
- C. All emails, texts, or other communications between the prosecution team in this case and the SJA, DSJA, or chief of Justice about the continuance in this case.
- D. All emails, texts or other communications between members of the 1<sup>st</sup> Armored Division OSJA and members of the Trial Counsel Assistance Program (TCAP) or the Office of the Special Trial counsel (OSTC) related to communication with the Chief Judge about the trial judge in this case.
- E. All emails, texts or other communications between members of the 1<sup>st</sup> Armored Division OSJA and the Office of the Judge Advocate General (OTJAG) about communicating with the Chief Trial Judge related to this case.
- F. All emails, texts, or other communications between members of the prosecution team and the family of Hector Cervantes related to the continuance of the case.

4. Defense requests answers to the following interrogatories for COL Kristy Radio:

- A. Who from the prosecution team briefed you about the continuance, and what did they brief you?
  - B. Whose idea was it to contact the Chief Trial Judge about dissatisfaction with the military judge in a pending court-martial?
  - C. With whom did you seek advice about contacting COL Tyesha Smith before sending the 17 October 2023 email related to *US v. Ironhawk*?
  - D. Was 1AD Commander aware that you were sending an email to COL Smith related to this case?
  - E. Did the 1AD Commander direct or encourage you to send the 17 October 2023 email to COL Smith?
  - F. Is the 1AD Commander now aware of the email sent to the COL Smith?
  - G. What was your purpose in sending an email to COL Smith about this pending court-martial?
  - H. What was your goal in sending this email to COL Smith about this pending court-martial?
  - I. Why did you bring your “concern” to the attention of the Chief Trial Judge? What did you want or expect her to do with the information you sent her?
  - J. Why did you send the email to COL Smith without including a member of the defense team on the email?
  - K. Why did you include COL Kennebeck on the email? What did you expect him to do with the information you provided to him?
5. Defense requests answers to the following interrogatories for COL Tyesha Smith:
- A. Have you had any communication with COL Radio about this case other than the email she sent you on 17 Oct 23 and your reply on 17 Oct 23?
  - B. What do you understand COL Radio’s “concern” to be?
  - C. Has COL Radio asked you to do anything with the information about her “concern”? If so, what did the request(s) consist of?
  - D. What actions have you taken related to the information provided to you by COL Radio on 17 October 23?



E. Have you communicated with COL Emmanuel in any manner about the information or concern expressed by COL Radio in her 17 October 23 email?

F. Did you at any time inform COL Radio that it was improper to attempt to influence a trial judge directly or indirectly?

G. Why did you include COL Kennebeck on your response to COL Radio's 17 October 23 email?

H. Have you received similar communications from other SJAs expressing "concerns" about Judge Emmanuel?

I. Are SJAs attempting to have Judge Emmanuel removed from the bench?

J. Are you aware of any concerns about Judge Emmanuel expressed by the Fort Sill SJA?

6. This request is a continuing request. All information responsive to this request must be supplied upon discovery by the Government to include after the conclusion of a court-martial, if necessary.

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MARK L. JENSEN  
MAJ, JA  
Senior Defense Counsel

**IN A GENERAL COURT-MARTIAL OF THE UNITED STATES  
U.S. ARMY TRIAL JUDICIARY, FIFTH JUDICIAL CIRCUIT**

UNITED STATES OF AMERICA	)	
	)	
v.	)	GOVERNMENT RESPONSE TO
	)	<b>DEFENSE'S THIRD</b>
IRONHAWK, CARMEN J.	)	DISCOVERY REQUEST
Sergeant (SGT), U.S. Army	)	
Charlie Company,	)	
16th Brigade Engineer Battalion,	)	
1st Armored Brigade Combat Team,	)	27 October 2023
1st Armored Division,	)	
Fort Bliss, TX 79918	)	

The Government provides the following response to the **Third** Defense Production and Discovery Request dated **19 October 2022**. The Government will reply to each numbered paragraph and treat this as a continuing request, except where noted.

1. Defense requested disclosure of the following:

A. All emails related to the above listed case between the SJA, COL Kristy Radio, and the Chief Army Trial Judge, COL Smith.

**Government Response: Granted. The Government will provide two emails responsive to this request as Enclosure 1.**

B. A summary of any other communications between the SJA and Chief Trial Judge related to this case.

**Government Response: Denied. The Government is currently unaware of any such available discovery.**

C. All emails, texts, or other communications between the prosecution team in this case and the SJA, DSJA, or chief of Justice about the continuance in this case.

**Government Response: Denied. This request violates Rule of Court-Martial (R.C.M.) 701(f) which does not require the disclosure or production of notes, memoranda, or similar working papers prepared by counsel and counsel's assistants or representatives (essentially materials that comprise attorney work product).**

D. All emails, texts or other communications between members of the 1<sup>st</sup> Armored Division OSJA and members of the Trial Counsel Assistance Program (TCAP) or the Office of the Special Trial counsel (OSTC) related to communication with the Chief Judge about the trial judge in this case.

**Government Response: Denied. This request violates Rule of Court-Martial (R.C.M.) 701(f) which does not require the disclosure or production of notes, memoranda, or similar working papers prepared by counsel and counsel's assistants or representatives (essentially materials that comprise attorney work product).**

E. All emails, texts or other communications between members of the 1<sup>st</sup> Armored Division OSJA and the Office of the Judge Advocate General (OTJAG) about communicating with the Chief Trial Judge related to this case.

**Government Response: Denied. This request does not meet a disclosure obligation under R.C.M. 701(a) and is violative of R.C.M. 105.**

F. All emails, texts, or other communications between members of the prosecution team and the family of Hector Cervantes related to the continuance of the case.

**Government Response: Granted. The Government provides notice that one phone call occurred between the Special Trial Counsel and the family of SGT Hector Cervantes on 10 October 2023. There are no other emails, texts, or communications responsive to this request.**

2. Defense requested answers to interrogatories for COL Kirsty Radio.

**Government Response: Denied. This request does not meet a disclosure obligation or a method for which information may be disclosed under R.C.M. 701(a) or 702.**

3. Defense requested answers to interrogatories for COL Tyesha Smith.

**Government Response: Denied. This request does not meet a disclosure obligation or a method for which information may be disclosed under R.C.M. 701(a) or 702.**

4. The Government reserves the right to update or modify these responses at any time if presented with new or additional responsive information.

Encls.  
2 Responsive Emails

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MATTHEW W. WALLACE  
CPT, JA  
Circuit Special Trial Counsel

UNITED STATES OF AMERICA	)	
	)	
v.	)	DEFENSE MOTION TO COMPEL
	)	EVIDENCE
IRONHAWK, CARMEN J.	)	
SGT (E-5), U.S. Army	)	
C Company, 16th Brigade Engineer	)	22 December 2023
Battalion, 1st Armored Brigade Combat	)	
Team, 1st Armored Division,	)	
Fort Bliss, Texas 79918	)	
	)	

**RELIEF SOUGHT**

1. The Accused, Sergeant (SGT) Carmen Ironhawk, by and through Counsel, respectfully requests this Court order the production of those items of requested discovery the Government denied on 27 October 2023 because they are relevant to the preparation of the Defense to determine whether the government has engaged in unlawful command influence.

**HEARING**

2. If opposed, Defense requests a hearing to present oral argument and hear testimony from COL Kristy Radio.

**BURDEN OF PERSUASION AND BURDEN OF PROOF**

3. As the moving party, the Defense bears both the burden of proof and the burden of persuasion on any factual issue, the resolution of which is necessary to decide its motion, by a preponderance of the evidence. Rule for Court-Martial (R.C.M.) 905(c)(1)-(2).

**FACTS**

4. SGT Ironhawk is charged with Murder, in violation of Article 118, U.C.M.J.

5. Trial was originally docketed for 23 Oct – 3 Nov 2023. The Defense requested a continuance to allow more time for the Military Judge to issue rulings in the case and allow time for the Defense to adjust trial strategy and preparation based upon those rulings. (AE\_\_\_\_). The Government not only did not oppose the continuance, but filed a motion in support of the Defense's Motion (AE\_\_\_\_).
6. On 17 October 2023, COL Kristy Radio, the Fort Bliss Staff Judge Advocate (SJA) sent an e-mail to COL Tyesha Smith, Chief Trial Judge. AE \_\_-A. In the e-mail, COL Radio expressed the felt disappointment of both the command and the family of the Deceased at the continuance and new trial dates of 9-19 April 2024. AE \_\_-A. On the email, COL Radio carbon copied (CC'd) COL Christopher Kennebeck, the Chief of Criminal Law Division of the Office of The Judge Advocate General (OTJAG-CRIMLAW). COL Radio did not include any member of SGT Ironhawk's defense team on the email or any other member of the Defense Bar.
7. COL Smith responded to the e-mail acknowledging receipt, and, in doing so, carbon copied COL Sean McGarry, Chief, Trial Defense Service. AE\_\_-B.
8. COL McGarry in turn forwarded the e-mail to LTC Angela Swilley, Regional Defense Counsel, Southwest Region, who then forwarded the e-mail to the detailed Defense Counsel in this case. AE\_\_-C.
9. On 19 October 2023, the Defense submitted a request for the discovery and production of items as well as answers to specific interrogatories to explore the potential for unlawful command influence arising from the contents of the e-mail. AE\_\_-D.

10. On 27 October 2023, the Government responded to the above request, denying the discovery and production of:

A. A “summary of any other communications between the SJA and Chief Trial Judge related to this case,” because the “Government is currently unaware of any such available discovery”;

B. All emails, texts, or other communications between the prosecution team in this case and the SJA, Deputy SJA, or Chief of Justice about the continuance in this case due to a violation of Rule of Court-Martial (R.C.M.) 701(f), which “does not require the disclosure or production of notes, memoranda, or similar working papers prepared by counsel and counsel’s assistants or representatives (essentially materials that comprise attorney work product)”;

C. All emails, texts or other communications between members of the 1st Armored Division Office of the Staff Judge Advocate (OSJA) and members of the Trial Counsel Assistance Program (TCAP), or the Office of the Special Trial counsel (OSTC) related to communication with the Chief Judge about the trial judge in this case due to an asserted violation of R.C.M. 701(f);

D. Answers to interrogatories for COL Kristy Radio, because the Defense request “[did] not meet a disclosure obligation or a method for which information may be disclosed under R.C.M. 701(a) or 702,” and

E. Answers to interrogatories for COL Tyesha Smith, because the Defense request “[did] not meet a disclosure obligation or a method for which information may be disclosed under R.C.M. 701(a) or 702.”

## **WITNESSES AND EVIDENCE**

11. E-mail from COL Radio to COL Smith, dated 17 October 2023, AE \_\_-A.
12. E-mail from COL Smith in reply to COL Radio, dated 17 October 2023, AE \_\_-B.
13. E-mail from LTC Swilley to Defense Counsel, MAJ Mark Jensen and Ms. Sherry Bunn, dated 17 October 2023, AE \_\_-C.
14. Defense Discovery and Production Request, dated 19 October 2023, AE \_\_-D.
15. Government Response to Defense Discovery and Production Request, dated 27 October 2023, AE \_\_E
16. Defense requests production of the following witness at the Article 39a hearing:  
COL Kristy Radio.

## **LEGAL AUTHORITY AND ARGUMENT**

### *Legal Principles*

#### **17. Authority to Request Item(s) Relevant to Defense Preparation**

A. R.C.M. 701(e) states that “[e]ach party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence. See also Article 46, UCMJ (no party may unreasonably impede the access of another party to a witness or evidence). R.C.M. 701(a)(2)(A)(i) states the Government shall permit the Defense, upon request, and after service of charges, papers, documents, and data, if the item(s) is both within the possession, custody, and control of the Government and relevant to Defense preparation. Additionally, R.C.M. 703(f)(1) states,

“[t]hat each party is entitled to the production of evidence which is relevant and necessary.” The discussion of R.C.M. 703(f)(1) provides that “necessary” evidence is evidence that contributes to the party’s presentation of the case in a positive way on a matter in issues.

B. Relevant evidence is that which tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. M.R.E. 401. The Court of Appeals for the Armed Forces affirmed that trial counsel have a special responsibility to provide evidence to the defense, by seeking out, and turning over, evidence that may be unfavorable to the defense’s case at trial. *See United States v. Stellato*, 473 M.J. 374, 381 (C.A.A.F. 2015). In addition to the discovery rules, the courts have outlined the importance of discovery and stated that the military justice system contains much broader rights of discovery than are available under the Constitution or in most civilian jurisdictions. *United States v. Eshalomi*, 23 M.J. 12, 24 (C.M.A. 1986).

## **18. Actual Unlawful Command Influence**

A. The Courts have deemed unlawful command influence (UCI) the “mortal enemy” of military justice because of the recognition that members of the military, including convening authorities, panel members, witnesses, counsel, etc., through strict discipline and adherence to a military chain of command, are more susceptible to the influence of military superiors and policies than their civilian counterparts in a civilian judicial proceeding. *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986).

B. The Court of Appeals for the Armed Forces (CAAF) has provided the analytical framework to examine issues of unlawful command influence. *United States v.*



*Biagase*, 50 M.J. 143 (C.A.A.F. 1999). While the threshold for raising unlawful command influence is low, the Defense must offer something more than mere allegation or speculation. *Id.* at 150. The evidentiary standard to be initially met by the Defense to raise an unlawful command influence issue is “some evidence.” *United States v. Ayala*, 43 M.J. 296, 300 (C.A.A.F. 1995). “Some evidence” must demonstrate those facts which, “if true, constitute unlawful command influence, and that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings.” *Biagase*, 50 M.J. at 150.

C. Once properly raised, the burden of proof then shifts to the Government to show, beyond a reasonable doubt, one of the following:

- 1) The facts which the unlawful command influence allegation is made of do not exist;
- 2) The facts, if accurate, do not constitute unlawful command influence; or
- 3) Even if the facts are accurate, and they do constitute unlawful command influence, such influence will not affect the proceedings. *Thomas*, 22 M.J. at 394; *Biagase*, 50 M.J. at 151.

#### **19. Apparent Unlawful Command Influence**

A. If the government cannot succeed in showing beyond a reasonable doubt any of the three steps above, it must prove beyond a reasonable doubt that the unlawful command influence “did not place an intolerable strain upon the public’s perception of the military justice system and that an objective, disinterested observer, fully informed of all the facts and circumstances, would [not] harbor a significant doubt about the fairness

of the proceeding.” *United States v. Salyer*, 72 M.J. 415, 423 (quoting *Lewis*, 63 M.J. at 415).

B. In *United States v. Stoneman*, the Court ruled that, even if actual unlawful influence is not shown, relief is still warranted where there is an appearance of it. 57 M.J. at 42 (“disposition of an issue of unlawful command influence falls short if it fails to take into consideration the concern of Congress and this Court in eliminating even the appearance of unlawful command influence at courts-martial.”). The appearance of unlawful command influence is “as devastating to the military justice system as the actual manipulation of any given trial.” *Lewis*, 63 M.J. at 406; citing *United States v. Simpson*, 58 M.J. 368, 374 (C.A.A.F. 2003). Even an “improper manipulation of the criminal justice process’...effectuated unintentionally, will not be countenanced by this [c]ourt.” *United States v. Barry*, 78 M.J. 70, 78 (quoting *United States v. Boyce*, 76 M.J. 242, 247 (C.A.A.F. 2017)).

C. The mere appearance of unlawful command influence may place an “intolerable strain on public perception of the military justice system.” *United States v. Wiesen*, 5 M.J. 172, 175 (C.A.A.F. 2001). The significant factor determining whether the unlawful command influence caused the intolerable strain is based on whether the appellant, or in this case, the Accused, was not personally prejudiced by unlawful command influence or that the prejudice from the unlawful command influence was later cured. *United States v. Spykerman*, 81 M.J. 709, 728. Should the government fail to produce the required rebuttal evidence, the “military judge must find unlawful command influence exists and then take whatever measures are necessary to ensure [beyond a reasonable

doubt] that the findings and sentence” are not affected. *United States v. Jones*, 30 M.J. 849, 854 (N.M.C.M.R. 1990).

**20. Ability to Commit Unlawful Command Influence and Against Whom it May Be Committed**

A. Article 37(a), U.C.M.J. explicitly prohibits “any person subject to [the UCMJ] from attempting to...influence the action of a court-martial.” The intent to actually interfere with a case is not required.

B. Actions that cause witnesses to alter their testimony may constitute unlawful command influence. In *United States v. Harvey*, the court noted the effect of “superior rank or official position upon one subject to military law, [is such that] the mere asking of a question under [certain] circumstances is the equivalent of a command.” 37 M.J. 143 (C.M.A. 1993).

*Application of Legal Principles*

21. While this motion is for the purpose of compelling the production of the requested evidence, the basis for why the evidence is relevant and necessary for the Defense is that its provision would allow the Defense to determine the existence of actual unlawful command influence or the extent of apparent unlawful command influence, and to act accordingly. The Defense is not herein making substantive claim of unlawful command influence, however, “some evidence” of a potential to cause unfairness in the court-martial proceedings is arguably already present in the contents of the e-mail to the Chief Trial Judge by COL Radio following the grant of a continuance in the same proceedings.

22. In the provided enclosures, there is a potential for an unfair effect upon the court-martial because the Government has made its opinion of the posture of the case and a

desired result clear through the email from the Fort Bliss SJA to the Chief Trial Judge, and through the communication with a named witness in the case against the Accused.

23. In the e-mail to the Chief Trial Judge, the overwhelming message of the end of the e-mail is one of disappointment in the delay of the dates for trial. Furthermore, as noted in the same e-mail, the disappointment in the delay was also relayed by the family of the Deceased. The Government response to the Defense Discovery and Production request, paragraph 1F., states a phone call occurred between Special Trial Counsel and the family of SGT Hector Cervantes, relating to the continuance of the case. In that conversation, Special Trial Counsel could have asked, "How do you feel about the continuance?" due to the reported emotional experience of the family of the Deceased in the e-mail. The relaying of the disappointment from a conversation with the potential to have a skewed perspective, because of the position of the other participants as possible Government witnesses, to the Chief Trial Judge presents, at the very least, apparent unlawful command influence.

24. There is an arguable basis for a claim of actual unlawful command influence, and an existing claim of apparent unlawful command influence here. The basis for the claim of actual unlawful command influence is due to the potential the communications with the judiciary have to cause an unfair effect upon the court-martial of the Accused, and the existing apparent unlawful command influence exists because of the appearance of improper communications with the judiciary. Since apparent unlawful command influence exists, relief is warranted. How could an objective member of the public not have a loss of confidence in a system specifically regarding the prosecution of the Accused with the facts thus far presented? In *United States v. Villareal*, the court

decided that while the action (a telephone call) itself did not constitute unlawful command influence, it might give a member of the general public the perception that military justice yielded fixed results. 52 M.J. 27 (C.A.A.F. 1999). The facts outlined above, when perceived by the public, would lead to the perception military justice occurs at the whims of those who have the right connections and the superior rank to the Accused.

25. Moreover, since a “subordinate officer is in a tenuous position when it comes to evaluating the effects of unlawful command influence being exerted on him or her,” the Accused ought to be afforded both the access to and the production of the evidence requested by the Defense. *United States v. Gerlich*, 45 M.J. 309, 313 (1996). The production of evidence in response to the requests by the Defense dated 19 October 2023 would be of consequence to the determination of whether actual unlawful command influence exists more probable or less probable than it would be without the evidence.

26. If evidence falls under the protection afforded by R.C.M. 701(f), as discussed in the Government response dated 27 October 2023, in paragraphs 1C-D, then the material may be reviewed *in camera* as the rule contemplates prior to disclosure to the Defense. Contrary to the assertion in the Government response, dated 27 October 2023, Paragraphs 1E, 2, and 3, the evidence requested is relevant to Defense preparation due to the relationship of the materials to the claim of possible actual, and existing apparent, unlawful command influence. Furthermore, though the requested evidence is said to be violative of R.C.M. 105 in Paragraph 2, the Defense request does not pretend to prohibit communications allowed for in said rule. In Paragraph 1B of the same

response, the Government denies the Defense request on the basis the Government is currently unaware of any such available discovery. However, the nature of the Defense request is a continuing one, meaning the request is not only for evidence in the possession of the Government, but for evidence coming into possession at a later time, and after the exercise of due diligence in the attempt to obtain it. By denying the item outright, the Government puts the Defense in a position of accepting non-provision if the item were to become available at a later time, or of asking the Court to compel production of the item. As no other reason for denial was given, the latter is of Defense selection.

### **CONCLUSION**

27. Accordingly, for the purpose of Defense preparation in the protection of the right of the Accused to a fair trial, the Defense requests the production of the items denied by the Government in the 27 October 2023 response to the Defense Discovery and Production request.

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MARK L. JENSEN  
MAJ, JA  
Senior Defense Counsel

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**IN A GENERAL COURT-MARTIAL OF THE UNITED STATES  
U.S. ARMY TRIAL JUDICIARY, FIFTH JUDICIAL CIRCUIT**

UNITED STATES OF AMERICA )  
 )  
 v. )  
 )  
 IRONHAWK, CARMEN J. )  
 Sergeant (SGT), U.S. Army )  
 Charlie Company, )  
 16th Brigade Engineer Battalion, )  
 1st Armored Brigade Combat Team, )  
 1st Armored Division, )  
 Fort Bliss, TX 79918 )

GOVERNMENT RESPONSE TO:  
DEFENSE MOTION  
TO COMPEL EVIDENCE

20 January 2024

**RELIEF SOUGHT**

The Government respectfully requests this Court DENY the Defense Motion to Compel Evidence as the items requested do not constitute potential unlawful command influence.

**HEARING**

At the next docketed Article 39a session, the Government does request to be heard on this Motion and associated response.

**BURDEN OF PERSUASION AND BURDEN OF PROOF**

As the moving party, the Defense bears the burden of persuasion and must prove any factual issue necessary to decide its motion by a preponderance of the evidence pursuant to Rule of Court-Martial (R.C.M.) 905(c)(1) and 905(c)(2)(A). When determining preliminary questions concerning the admissibility of evidence, the court is not bound by the rules of evidence, except with respect to privileges. M.R.E. 104(a).

**FACTS**

The Government adopts facts 4-10 as drafted by the Defense in their initial Motion.

The Government seeks to add one additional fact which is, on 27 October 2023, in the Government's Response to the Defense's Third Production Request, dated 19 October 2023, the Government provided the one and only email between COL Kristy Radio and COL Tyesha Smith as Enclosure 1 in response to Request 1(A) of the Production Request.

### **WITNESS(ES)/EVIDENCE**

The Government also requests consideration of Enclosure A, a Memorandum for Record from MAJ Bradley N. Olsen regarding COL Kristy Radio's availability.

As to the Defense's request production of COL Kristy Radio, that request is DENIED. COL Radio is currently with the 1st Armored Division Headquarters at the National Training Center (NTC) and unavailable on the proposed date of the hearing in this matter. See Enclosure A. Defense also did not comply with the requirements of R.C.M. 703(c) which require, among other elements: "...a synopsis of the testimony the witness will give, and the reasons which the witness' personal appearance will be necessary under the standards set forth in R.C.M. 1001(f)." Defense failed to do so. For these reasons, the production request is DENIED. See *United States v. Rockwood*, 52 M.J. 105 (C.A.A.F. 1999) (a synopsis of expected testimony is not satisfied by merely listing subjects to be addressed; rather, it must set out what the witness is expected to say about those subjects).

### **LEGAL AUTHORITY AND ARGUMENT**

#### **A. The Government's Denial of the Items Requested in Defense's 19 October 2023 Discovery Request was Properly Within the Rules of Court-Martial.**

Rule of Court-Martial (R.C.M.) 701 guides the discovery obligations of both the Government and the Defense in the Court-Martial process. R.C.M. 701(a) states that:



*(a) Disclosure by trial counsel.* “Except as otherwise provided in subsection (f) and paragraph (g)(2) of this rule... trial counsel shall provide the following...

- (1) Papers accompanying charges; convening orders; statements...
- (2) Documents tangible objects, reports...
- (3) Witnesses...
- (4) Prior convictions of accused offered on the merits...
- (5) Information to be offered at sentencing...
- (6) Evidence favorable to the defense...”.

See R.C.M. 701(a) (emphasis added). Thus, the first and foremost consideration needs to be, what items are prohibited from disclosure under subsection (f). To that end, R.C.M. 701(f) specifically states:

*(f) Information not subject to disclosure.* Nothing in this rule shall be construed to require the disclosure of information protected from disclosure by the Military Rules of Evidence. Nothing in this rule shall require the disclosure of production of notes, memoranda, or similar working papers prepared by counsel and counsel’s assistants and representatives.

See R.C.M. 701(f) (emphasis added). Using these two Rules as a framework, the Government properly responded to the Defense’s 19 October 2023 Discovery Requests.

**1. The Government GRANTED Requests 1(A) and 1(F).**

Request 1(A) was for “all emails related to the above listed case between the SJA, COL Kristy Radio, and the Chief Army Trial Judge, COL [Tyasha] Smith.” See Defense’s Third Discovery Request, dated 19 October 2023. In response to this request, the Government turned over the one and only email, which Defense already had in their possession. Request 1(F) was for “all emails, texts, or other communications between members of the prosecution team and the family of [SGT] Hector Cervantes related to the continuance of the case. See Defense’s Third Discovery Request, dated 19 October 2023.

In response to this request, the Government noted that one call occurred on 10 October 2023. The phone call was a standard update to the family on the moving of the upcoming trial date and not an in-depth exploration of the family's feelings on the matter. This call was not recorded nor was a verbatim transcript developed. There were no further emails, text messages, or communications with the family related to this specific matter.

**2. The Government Properly DENIED Request 1(B) as it was Unaware of Any Such Available Discovery.**

Request 1(B) was for "a summary of any other communications between the SJA and [the] Chief Trial Judge related to this case." See Defense's Third Discovery Request, dated 19 October 2023. To the best of the Government's knowledge, no other communications existed at the time or exist now as part of the Government's noted continuing discovery obligation. Therefore, the Request was properly DENIED.

**3. The Government Properly DENIED Requests 1(C) and 1(D) as the Requests were Violative of R.C.M. 701(f).**

Request 1(C) was for "all emails, texts, or other communications between the prosecution team in this case and SJA, DSJA, or [C]hief of [J]ustice about the continuance in this case." See Defense's Third Discovery Request, dated 19 October 2023. Request 1(D) was for "all emails, texts, or other communications between members of the 1st Armored Division OSJA and members of the Trial Counsel Assistance Program (TCAP) or the Office of Special Trial [C]ounsel (OSTC) related to communication with the Chief Judge about the trial judge in this case." See Defense's Third Discovery Request.

As mentioned above, both of these requests are violative of R.C.M. 701(f). The Government is not required to disclose notes, memoranda, or working papers between

counsel, counsel's assistants, or counsel's representatives. The SJA, DSJA, the Chief of Justice, and the OSJA qualify as "counsel's representatives" to the Commanding General, OTJAG, the wider Army, etc. The OSJA, TCAP, and OSTC qualify as "counsel's assistants" as they assist in the prosecution of criminal cases. The Defense has not provided a compelling reason for which this Court should order that this protection under R.C.M. 701(f) should be pierced. Without any basis as to what conversations may have occurred between the OSJA, TCAP, and OSTC, the Defense request amounts to nothing more than a speculative fishing expedition. Therefore, the Requests were properly DENIED.

**4. The Government Properly DENIED Request 1(E) as the Request was Violative of R.C.M. 701(a) and R.C.M. 105(b).**

Request 1(E) was for "all emails, texts, or other communications between members of the 1st Armored Division OSJA and the Office of the Judge Advocate General (OTJAG) about communicating with the Chief Trial Judge related to this case." See Defense's Third Discovery Request, dated 19 October 2023. Nowhere in R.C.M. 701(a) is there a provision requiring disclosure of such information. Furthermore, R.C.M. 105(b) addresses this matter and states that:

**Direct communications: convening authorities and staff judge advocates; among Staff Judge Advocates**

*(b) Among the Staff Judge Advocates and with the Judge Advocate General. The staff judge advocate of any command is entitled to communication directly with the staff judge advocate of a superior or subordinate command, or with the Judge Advocate General.*

R.C.M. 105(b) (emphasis added). Since OTJAG is the "Office of the Judge Advocate General", which is the entity set-up to solicit and synthesize information for The Judge Advocate General, requiring the 1st Armored Division OSJA to disclose communications

that aren't even a requirement under R.C.M. 701(a) would be violative of both Rules.

Therefore, the Request was properly DENIED.

**5. The Government Properly DENIED Requests 2 and 3 as Interrogatories are not a Proper Disclosure Obligation under R.C.M. 701(a) nor was the Proper Written Deposition Process Followed under R.C.M. 702.**

Request 2 asked for answers to interrogatories by COL Kristy Radio. See Defense's Third Discovery Request, dated 19 October 2023. Request 3 asked for answers to interrogatories by COL Tyesha Smith. See Defense's Third Discovery Request, dated 19 October 2023. Nowhere in R.C.M. 701(a) do the Rules of Court-Martial authorize the use of interrogatories to acquire information. While there is a process for a "written deposition" in R.C.M. 702, it is only to be done under "exceptional circumstances" and "a request for a written deposition may not be approved without the consent of the opposing party." See R.C.M. 702(a). Defense did not posit any case law or precedent with which to use such a method to acquire information under R.C.M. 701(a) without making a formal deposition request. Thus, this is not an authorized manner of disclosure nor a requirement for disclosure; and, therefore, both Requests were properly DENIED by the Government.

**B. Despite this Being a Motion to Compel, the Defense Spent the Majority of their Motion on Unlawful Command Influence; Yet, In No Way Do These Matters Rise to the Level of Unlawful Command Influence**

As mentioned by Defense in their Motion, the Court in *Biagese* made clear that "while the threshold for raising unlawful command influence is low, the Defense must offer something more than mere allegation or speculation." *United States v. Biagese*, 50 M.J. 150 (C.A.A.F. 1999) (emphasis added). **In this case, all Defense has is mere allegation and speculation.**

**1. The Email Between the SJA and the Chief Trial Judge was Protected by the Rules of Court-Martial as Not Being Unlawful Command Influence**

R.C.M. 105(b), as mentioned above, states that “The staff judge advocate of any command is entitled to communication directly with the staff judge advocate of a superior or subordinate command, or with the Judge Advocate General.” See R.C.M. 105(b).

R.C.M. 109(c)(3) also contributes in saying that:

*(c) Investigation of judges.*

*(3) Complaints.* Complaints concerning an appellate military judge, military judge, or military magistrate will be forwarded to the Judge Advocate General of the service concerned or to a person designated by the Judge Advocate General concerned to receive such complaints.

R.C.M. 109(c)(3). R.C.M. 104(a)(3)(C) adds to this in saying that “[prohibitions against unlawful command influence] do not prohibit action by the Judge Advocate General under R.C.M. 109.” See R.C.M. 104. Based on these provisions, complaints against the trial judiciary are specifically protected from being unlawful command influence.

Additionally, COL Radio properly directed her email to the Chief Trial Judge as she is the Judge Advocate General’s representative for receiving complaints regarding the judiciary under R.C.M. 109. See R.C.M. 109; see also, AR 27-1, para. 11-4. She also properly did so without CC’ing Defense Counsel or the Chief, Trial Defense Service, as such complaints are supposed to be “treated with confidentiality.” See Discussion of R.C.M. 109(c)(4).

**2. There is No Actual Unlawful Command Influence Present.**

The basis of Actual UCI is through command relationships. In this case, the 1st Armored Division Staff Judge Advocate is not a commander nor a rater for the Chief Trial

Judge, the Judge Advocate General himself never got involved, and, to the best of the Government's knowledge, the Trial Judge was never made aware of this email until the filing of this Motion, nor should she have been (as discussed above). Defense Counsel has provided no context or connection in their Motion as to how this email has a "logical connection to the Court-Martial, in terms of its potential to cause unfairness in the proceedings." *Biagese*, 50 M.J. at 150.

Right now, the Defense's claims that the family's perception of the Court-Martial somehow effects the fairness of the proceedings is mere allegation and speculation. The Defense even goes to far as to allege and speculate as to what questions the family asked the Special Trial Counsel – which is the literal definition of what does NOT comprise UCI (mere allegation and speculation). There is no element of the email through the chain-of-command, nor through the family's involvement, that lends an iota of credence to an allegation of Actual Unlawful Command Influence.

### **3. There is No Apparent Unlawful Command Influence**

To contravene Apparent UCI, the Government must prove that the UCI, "did not place an intolerable strain upon the public's perception of the military justice system and that an objective, disinterested observer, fully informed of all the facts and circumstances, would not harbor a significant doubt about the fairness of the proceeding." *United States v. Salyer*, 72 M.J. 415, 423 (quoting *United States v. Lewis*, 63 M.J. 415). Again, as of this writing, Defense has nothing more than mere allegation and speculation as to what the family or public MIGHT think. No one from the family is on the witness list for this Motion, nor is anyone from the public at-large. Defense does not possess one shred of evidence

that a disinterested observer, one fully informed of the facts and circumstances in this case, would harbor a doubt about the fairness of the current proceedings.

Defense next calls out that “the significant factor in determining whether the unlawful command influence caused the intolerable strain is based on whether the appellant, or in this case, the Accused, was not personally prejudiced by unlawful command influence or that the prejudice from the unlawful command influence was later cured.” *United States v. Spykerman*, 81 M.J. 709, 728. The only way the Defense could argue that the Accused has been personally prejudiced by this email, is if the Trial Judge herself was so affected by the email, that it has impacted her ability to avoid any unlawful prejudice upon the Accused.

To prove this, the Defense would have to call the Trial Judge as a witness at this hearing and ask that very question. Therefore, if Defense wants to allege Apparent Unlawful Command Influence on this Court-Martial, then the Government calls on the Defense to ask for the Trial Judge as a witness instead of dancing around the idea with mere allegation and speculation – otherwise, that’s all they have in this Motion, and that simply will never be enough to warrant relief in this matter. The Defense could also ask the Military Judge to recuse herself, should they believe that is the only way to resolve this matter completely.

### CONCLUSION

For these reasons, the Government respectfully requests this Court DENY the Defense Motion to Compel Evidence as the items requested do not constitute potential unlawful command influence.



Digitally signed by  
WALLACE.MATTHEW.WILLIAM.  
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Date: 2024.01.20 15:46:07 -06'00'

MATTHEW W. WALLACE  
CPT, JA  
Circuit Special Trial Counsel

## **Emanuel, Jacqueline L COL USARMY HQDA OTJAG (USA)**

---

**From:** Emanuel, Jacqueline L COL USARMY HQDA OTJAG (USA)  
**Sent:** Monday, January 29, 2024 6:23 PM  
**To:** Wallace, Matthew W CPT USARMY HQDA OSTC (USA); Sherry; Hofbauer, Melanie R CPT USARMY 1 AD (USA); Levin, Michael I MAJ USARMY HQDA OSTC (USA); Jensen, Mark L MAJ USARMY 1 AD (USA)  
**Cc:** Hale, Deborah CIV USARMY (USA)  
**Subject:** RE: U.S. v. Ironhawk Article 39(a) session on 22 January

Counsel,

### **FACTS.**

1. The court adopts the facts contained in paragraphs 4-10 of the Defense Motion to Compel Evidence (AE XL), which were adopted by the Government in its Response (AE XLV).

2. On 27 October 2023, the Government responded to the Defense witness production request, in part, as follows:

C. All emails, texts, or other communications between the prosecution team in this case and the SJA, DSJA, or chief of Justice about the continuance in this case.

**Government Response: Denied. This request violates Rule of Court-Martial (R.C.M.) 701(f) which does not require the disclosure or production of notes, memoranda, or similar working papers prepared by counsel and counsel's assistants or representatives (essentially materials that comprise attorney work product).**

D. All emails, texts, or other communications between members of the 1<sup>st</sup> Armored Division OSJA and members of the Trial Counsel Assistance Program (TCAP) or the Office of the Special Trial counsel (OSTC) related to communication with the Chief Judge about the trial judge in this case.

**Government Response: Denied. This request violates Rule of Court-Martial (R.C.M.) 701(f) which does not require the disclosure or production of notes, memoranda, or similar working papers prepared by counsel and counsel's assistants or representatives (essentially materials that comprise attorney work product).**

3. At the 22 January 2024 Article 39(a) hearing on the Defense's Motion to Compel Evidence (AE XL), I concluded that the 1st Armored Division & Fort Bliss Staff Judge Advocate, COL Kristy Radio, was unavailable to testify due to her duties at the National Training Center. I informed counsel that I would reschedule the hearing. I also confirmed with Defense Counsel that if COL Radio testified at the Article 39(a) hearing, then the Defense request for the court to compel her to answer interrogatories would be moot.

4. Because R.C.M. 702 requires exceptional circumstances for the ordering of written depositions, I stated that my inclination was to have both COL Radio and the Chief Trial Judge, COL Tyesha Smith, testify at the hearing rather than compel them to answer interrogatories from Defense. I informed the Government that I understand that Defense hadn't provided a synopsis of what testimony they believe COLs Radio and Smith would provide IAW R.C.M. 703(c) because this is not an instance where there has been an investigation and the file contains witness statements. Trial counsel stated they believed having COLs Radio and Smith testify at the Article 39(a) hearing would be an amicable resolution.



5. Defense counsel then asked the court to require the Government to produce the documents requested by Defense that the Government asserts violates R.C.M. 701(f) for *in camera* review, “to determine whether there actually is privilege, because those documents may inform the questions that we want to ask COL Radio and COL Smith.”

6. The court issued a verbal order directing the Government <sup>JLE 1 Feb 24</sup> to you to produce the requested documents for the court to conduct an *in camera* review and determine whether there is any information that needs to be disclosed to Defense.

#### RATIONALE.

Article 46, UCMJ states: “In a case referred for trial by court-martial, the trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe.”

R.C.M. 701(a)(2) states: “After service of charges, upon request of the defense, the Government shall permit the defense to inspect any [ ] papers, documents, data, ... if the item is within the possession, custody, or control of military authorities and—(i) the item is relevant to defense preparation.”

R.C.M. 701(f)(<sup>JLE 1 Feb 24</sup>2) states: “Nothing in this rule shall require the disclosure or production of notes, memoranda, or similar working papers prepared by counsel and counsel’s assistants and representatives.”

Papers, documents, and data that relate to whether there has been unlawful command influence in a particular case are items relevant to defense preparation.

“Both the [U.S.] Supreme Court and the Court of Appeals for the Armed Forces have approved of *in camera* review as a mechanism to resolve attorneys' claims of privilege in criminal discovery matters.” United States v. Bowser, 73 M.J. 889, 897 (A.F. Ct. Crim. App. 2014) citing United States v. Zolin, 491 U.S. 554, 568 (1989) (“holding that a complete prohibition against an opponent's use of *in camera* review to establish the applicability of the crime-fraud exception to the attorney-client privilege is ‘inconsistent with the policies underlying the privilege’”); United States v. Romano, 46 M.J. 269, 275 (C.A.A.F. 1997) (“holding that appellant was prejudiced by the Government’s failure to provide discovery of exculpatory statements, and ‘[i]f a rehearing is ordered, we would expect the military judge to examine *in camera* any documents for which the work-product privilege is claimed’”).

COL Jacqueline L. Emanuel  
Circuit Judge  
Fourth Circuit, US Army Trial Judiciary  
1633 Mekong Street, Bldg. 6221  
Fort Carson, CO 80913  
[REDACTED] (Office)  
[REDACTED] (Mobile)

---

**From:** Wallace, Matthew W CPT USARMY HQDA OSTC (USA) <matthew.w.wallace2.mil@army.mil>  
**Sent:** Friday, January 26, 2024 10:36 AM  
**To:** Emanuel, Jacqueline L COL USARMY HQDA OTJAG (USA) <jacqueline.l.emanuel.mil@army.mil>  
**Cc:** Hale, Deborah CIV USARMY (USA) <deborah.hale4.civ@army.mil>; Sherry <sbunn@fbknlaw.com>; Hofbauer, Melanie R CPT USARMY 1 AD (USA) <melanie.r.hofbauer.mil@army.mil>; Levin, Michael I MAJ USARMY HQDA OSTC (USA) <michael.i.levin.mil@army.mil>; Jensen, Mark L MAJ USARMY 1 AD (USA) <mark.l.jensen.mil@army.mil>; Wallace, Matthew W CPT USARMY HQDA OSTC (USA) <matthew.w.wallace2.mil@army.mil>  
**Subject:** RE: U.S. v. Ironhawk Article 39(a) session on 22 January

Good Morning Your Honor,

Ma'am, the Government has reviewed Defenses' Requests from the original Motion to Compel.

Having done so, the Government requests a written ruling explaining the Court's Order to produce information for in-camera review. Given the sensitive nature of the communications requested, and resultant request for the Government to pierce the Attorney-Work Product privilege, the Government needs to understand the basis and rationale of the Order and have it preserved in the record. The Government may also need to consult their respective Bar counsel about the request; and, if necessary, seek appropriate interlocutory relief.

Please let me know if you have any questions, ma'am. Thank you.

Very Respectfully,

Matthew W. Wallace  
CPT, JA  
Circuit Special Trial Counsel

Office Line | [REDACTED]  
Government Cell | [REDACTED]  
Email | [matthew.w.wallace2.mil@army.mil](mailto:matthew.w.wallace2.mil@army.mil)

Third Circuit | Office of Special Trial Counsel

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**IN THE FIFTH JUDICIAL CIRCUIT, U.S. ARMY TRIAL JUDICIARY  
FORT BLISS, TEXAS**

---

<b>UNITED STATES</b>	)	
	)	<b>COURT ORDER</b>
<b>v.</b>	)	
	)	<b>PRODUCTION OF DOCUMENTS</b>
<b>IRONHAWK, Carmen</b>	)	<b>FOR IN CAMERA REVIEW</b>
<b>SGT, U.S. Army</b>	)	
<b>C Company,</b>	)	
<b>16th Brigade Engineer Battalion,</b>	)	<b>1 February 2024</b>
<b>1st Armored Brigade Combat Team,</b>	)	
<b>1st Armored Division,</b>	)	<b>S: 6 February 2024</b>
<b>Fort Bliss, Texas 79918</b>	)	

---

1. The Court orders Government Counsel to produce the following documents to the court, via DoD SAFE, not later than 1700 MST on 6 February 2024 for the Court to conduct *in camera* review:

- All emails, texts, or other communications between the prosecution team in this case and the SJA, DSJA, or chief of Justice about the continuance in this case.
- All emails, texts, or other communications between members of the 1st Armored Division OSJA and members of the Trial Counsel Assistance Program (TCAP) or the Office of the Special Trial counsel (OSTC) related to communication with the Chief Judge about the trial judge in this case.


2. The written explanation for the order (AE XLVIII) is attached. The Court will not turn over any privileged material to Defense without first providing the Government the opportunity to seek appellate relief if it deems it necessary.

SO ORDERED THIS 1ST DAY OF FEBRUARY 2024.

EMANUEL.JACQUELIN  
E.LUCIA.1026566106

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Date: 2024.02.01 08:43:16 -07'00'

JACQUELINE L. EMANUEL  
COL, JA  
Military Judge

**From:** Jensen, Mark L MAJ USARMY 1 AD (USA) mark.l.jensen.mil@army.mil   
**Subject:** FW: IRONHAWK - GOV - Motion to Request Recusal  
**Date:** February 6, 2024 at 3:14 PM  
**To:** [REDACTED]



/r  
MARK L. JENSEN  
MAJ, JA  
Senior Defense Counsel  
Fort Bliss Field Office  
[REDACTED]

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[REDACTED]

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**From:** Wallace, Matthew W CPT USARMY HQDA OSTC (USA)  
<matthew.w.wallace2.mil@army.mil>  
**Sent:** Tuesday, February 6, 2024 2:04 PM  
**To:** Emanuel, Jacqueline L COL USARMY HQDA OTJAG (USA)  
<jacqueline.l.emanuel.mil@army.mil>  
**Cc:** Levin, Michael I MAJ USARMY HQDA OSTC (USA) <michael.i.levin.mil@army.mil>; Wallace, Matthew W CPT USARMY HQDA OSTC (USA) <matthew.w.wallace2.mil@army.mil>; Jensen, Mark L MAJ USARMY 1 AD (USA) <mark.l.jensen.mil@army.mil>; Sherry Bunn <sbunn@fbknlaw.com>; Hofbauer, Melanie R CPT USARMY 1 AD (USA) <melanie.r.hofbauer.mil@army.mil>; Hale, Deborah CIV USARMY (USA) <deborah.hale4.civ@army.mil>  
**Subject:** IRONHAWK - GOV - Motion to Request Recusal

Good Afternoon Your Honor,

Ma'am, please see the attached Motion to Request Recusal of the Military Judge. The Government requests a stay of the current deadline to submit documents for in-camera review until the Motion to Request Recusal of the Military Judge is acted upon. Enclosures A and B will come via DoDSafe shortly due to their size.

Please let me know if you have any questions or concerns, ma'am. Thank you.

Very Respectfully,

Matthew W. Wallace  
CPT, JA

Circuit Special Trial Counsel

Office of Special Trial Counsel

Third Circuit I Fort Campbell, Kentucky

Office Line: [REDACTED]

Government Cell: [REDACTED]

[matthew.w.wallace2.mil@army.mil](mailto:matthew.w.wallace2.mil@army.mil)

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**GOV - Ironhawk - Motion to  
Recuse the MJ - Final - Signed...**  
165 KB



**IN A GENERAL COURT-MARTIAL OF THE UNITED STATES  
U.S. ARMY TRIAL JUDICIARY, FIFTH JUDICIAL CIRCUIT**

UNITED STATES OF AMERICA )  
 )  
 v. )  
 )  
 IRONHAWK, CARMEN J. )  
 Sergeant (SGT), U.S. Army )  
 Charlie Company, )  
 16th Brigade Engineer Battalion, )  
 1st Armored Brigade Combat Team, )  
 1st Armored Division, )  
 Fort Bliss, TX 79918 )

GOVERNMENT MOTION  
TO REQUEST THE RECUSAL OF  
THE MILITARY JUDGE

6 February 2024

**RELIEF SOUGHT**

The Government respectfully requests the Military Judge recuse herself from the case of *United States v. Ironhawk* under Rule of Courts-Martial (R.C.M.) 902(a).

**HEARING**

Unless opposed by the Defense, the Government does not request to be heard on this Motion or any associated response.

**BURDEN OF PERSUASION AND BURDEN OF PROOF**

As the moving party, the Government bears the burden of persuasion and must prove any factual issue necessary to decide its motion by a preponderance of the evidence pursuant to Rule of Court-Martial (R.C.M.) 905(c)(1) and 905(c)(2)(A). When determining preliminary questions concerning the admissibility of evidence, the court is not bound by the rules of evidence, except with respect to privileges. M.R.E. 104(a).

**FACTS**

1. SGT Carmen Ironhawk is charged with one violation of Article 118 (Murder) for the death of her husband, SGT Hector Cervantes, on 22 December 2019.

*United States v. SGT Carmen J. Ironhawk*  
Government Motion to Request the Recusal of the Military Judge

2. Pursuant to the original Pre-Trial Order (PTO) in this case, pre-trial motions were due from both Parties on 28 July 2023.
3. At the time of filing, the Government and Defense both submitted five motions each:
  - a. Government:
    - i. Motion to Exclude the 911 Call (AE VIII)
    - ii. Motion to Exclude Instances of Previous Domestic Violence (AE IX)
    - iii. Motion to Exclude a Suicide Defense (AE X)
    - iv. Motion to Exclude Mention of Dr. Jamie Downs and His Report (AE XI)
    - v. Motion for Clarification on a Date of Death Instruction (AE XII)
  - b. Defense:
    - i. Motion to Compel Discovery (AE XIV)
    - ii. Motion to Compel Production of Witnesses (AE XV)
    - iii. Motion to Suppress the Accused's Video Interviews (AE XX)
    - iv. Motion for a Unanimous Verdict (AE XVI)
    - v. Motion to Exclude M.R.E. 404(b) Evidence (AE XIII and AE XVIII)
4. Pursuant to the PTO, responses to the opposing party's pre-trial motions were due on 4 August 2023.
5. An Article 39(a) session to discuss the filed motions occurred on 11 August 2023 at Fort Bliss, Texas.
6. The original trial date in this case was 24 October 2023 – 3 November 2023.
7. The Defense asked for an update on the status of rulings on the motions one month out, three weeks out, and in the days leading up to the 24 October 2023 trial date. The

*United States v. SGT Carmen J. Ironhawk*  
Government Motion to Request the Recusal of the Military Judge

Military Judge did not respond to these requests for an update but did rule on other requests by the Parties to add witnesses and sever closing/rebuttal argument.

8. On 5 October 2023, two weeks before trial, the Defense filed a Motion to Continue which the Government concurred with shortly thereafter.
9. On 9 October 2023, the Military Judge granted the Motion to Continue and asked the Parties to submit a new Electronic Docket Request (EDR).
10. On 12 October 2023, the Parties submitted the EDR and the Military Judge reset the trial for 9-19 April 2024.
11. On 17 October 2023, the 1st Armored Division (1AD) Staff Judge Advocate, COL Kristy Radio, sent a complaint, via email, to the Chief Trial Judge for the United States Army Trial Judiciary, COL Tyesha Smith, pursuant to R.C.M. 109, expressing her concerns about the impetus of the continuance. The email did not request COL Smith take any action regarding the case and was merely for situational awareness.
12. Unbeknownst to the Government at the time, in her response, COL Smith replied to COL Radio, "Received, Kristy. Thank you" and CC'd COL Sean McGarry, the Chief of the United States Army Trial Defense Service. That email was eventually forwarded down the Trial Defense Services supervisory chain to the *Ironhawk* Defense Counsel.
13. On 19 October 2023, the Defense filed a Third Request for Production and Discovery requesting all communication between COL Radio, COL Smith, the Deputy Staff Judge Advocate (LTC Jason Young), the 1AD Chief of Justice (MAJ Bradley Olsen), the assigned Trial Counsel, the Trial Counsel Assistance Program (TCAP), the Office of Special Trial Counsel (OSTC), the 1AD Office of the Staff Judge Advocate (OSJA), and the Office of the Judge Advocate General (OTJAG).



*United States v. SGT Carmen J. Ironhawk*  
Government Motion to Request the Recusal of the Military Judge

14. On 27 October 2023, the Government Responded to Defense's Third Request for Production and Discovery and included two relevant emails as enclosures.
15. On 12 December 2023, Government Counsel asked the Military Judge when she expected to rule on the motions, the Military Judge replied that she hoped to do so before 23 December 2023.
16. On 22 December 2023, the Defense Filed a Motion to Compel related to the communications denied by the Government in the Defense's Third Request for Production and Discovery.
17. On 22 December 2023, the Military Judge provided an update that she intended to rule on all ten motions, on a rolling basis, between 23 and 29 December 2023.
18. On 10 January 2024, the Military Judge ruled on the first motion, the Government Motion to Exclude the 911 Call.
19. On 12 January 2024, the Military Judge ruled on the next two motions, the Government Motion to Exclude Dr. Jamie Downs and His Report and the Motion to Exclude a Suicide Defense.
20. On 18 January 2024, the Government filed a Response to the Defense Motion to Compel. In this response, the Government denied the production of COL Radio who was requested by the Defense for the upcoming Article 39(a) hearing.
21. On 19 January 2023, the Military Judge subsequently Ordered that COL Radio be available for the hearing, but since COL Radio was inside "the Box" at the National Training Center (NTC), the Government was unable to produce her, even telephonically, for the forthcoming Article 39(a) session.

*United States v. SGT Carmen J. Ironhawk*  
Government Motion to Request the Recusal of the Military Judge

22. On 22 January 2024, the Parties held an Article 39(a) session to discuss the Motion to Compel. During the first ten minutes of the Article 39(a), the Military Judge apologized for the tardiness of the motion responses and stated that she hoped to have them all completed by the Friday, 26 January 2024.
23. The Military Judge then went on to discuss two conversations she had with COL Smith on 8 and 12 January 2024. In these conversations, the Military Judge related that COL Smith offered to take over the case and the Military Judge refused.
24. After the motion colloquy, the Military Judge offered both Parties the opportunity to voir dire her on the matter. After a short recess, both sides conducted voir dire.
25. At the conclusion of the voir dire, the Military Judge asked if either party intended to ask for the Military Judge to recuse herself. At the time, the Government stated no. The Defense asked the Military Judge to Order the production of the items requested in the Motion to Compel so that the Defense could determine if there was a basis to request recusal of the Military Judge as a result of unlawful command influence (UCI). The Government renewed its stated objection in its response to the Motion to Compel, believing that the requested communications were protected by Attorney Work-Product under M.R.E. 701(f) and as communications between Staff Judge Advocates under M.R.E. 105(b).
26. Despite these objections, the Military Judge Ordered the Government to produce these communications for in-camera review so the Military Judge could determine herself if the communications were protected by M.R.E. 701(f) and M.R.E. 105(b).

*United States v. SGT Carmen J. Ironhawk*  
Government Motion to Request the Recusal of the Military Judge

27. On 26 January 2024, the Government requested the Military Judge reduce this Order to writing so that the Government could preserve it in the record, respond accordingly, and consult appropriate bar counsel if necessary.
28. On 29 January 2024, the Military Judge issued an Order via email directing the Government to produce the communications requested in the Motion to Compel for in-camera review at the soonest available opportunity.
29. On 31 January 2024, the Military Judge ruled on the fourth, fifth, and sixth motions: the Government Motion for Clarification on the Date of Death, the Government Motion to Exclude Previous Domestic Violence Incidents, and the Defense Motion to Compel Discovery.
30. On 1 February 2024, the Military Judge reduced her Order for the Government to produce the aforementioned communications to writing and sent it to the Parties with a deadline of 6 February 2024 for the items to be turned over to the Military Judge.
31. On 2 February 2024, the Military Judge ruled on the Defense Motion to Compel Production of Witnesses and stated she intended rule on the remaining motions by the end of the upcoming weekend (4 February 2024).
32. As of this writing, the rulings did not occur by 4 February 2024, and three motions remain outstanding: the Defense Motion to Suppress the Accused's Video Statements, the Defense Motion to Exclude 404(b) Evidence, and the Motion for a Unanimous Verdict (which was denied orally but has not been reduced to writing as of yet).
33. Several of these motions, but most notably, the Defense Motion to Suppress the Accused's Video Statements, are critical to the preparation efforts of both Parties.

**WITNESS(ES)/EVIDENCE**

Enclosure A:

1. Original PTO, dated 20 April 2023.
2. Defense Motion to Continue, dated 5 October 2023, and Government Response to Defense Motion for Continuance, dated 9 October 2023.
3. Email granting Defense Motion to Continue, dated 9 October 2023.
4. Email providing new EDR, dated 12 October 2023.
5. Email providing new trial date of 9-19 April 2024, dated 12 October 2023.
6. Emails between COL Radio and COL Smith, dated 17 October 2023.
7. Defense Third Request for Production and Discovery, dated 19 October 2023.
8. Government Response to Defense's Third Discovery Request, dated 27 October 2023; and disclosed email between COL Radio and COL Kennebeck, dated 16 October 2023.
9. Defense Motion to Compel Evidence, dated 22 December 2023.
10. Email to Parties re: Expected Motions Rulings by Military Judge, dated 22 December 2023.
11. Ruling on Government Motion to Exclude 911 Call, dated 9 January 2024.
12. Ruling on Government Motion to Exclude Mention of Dr. Jamie Downs and His Report; and, Motion to Exclude Mention of Suicide, dated 11 January 2024.
13. Government Response to Defense Motion to Compel, dated 18 January 2024.
14. Email to Parties re: Ordering the Production of COL Radio, dated
15. Ruling on Defense Motion to Compel Evidence, via email, dated 29 January 2024.

16. Ruling on Government Motion for Preliminary Ruling on Date of Death Instruction;  
and, Defense Motion to Compel Discovery, dated 31 January 2024.
17. The Order to Produce Documentation for In-Camera Review, dated 1 February 2024  
and associated reasoning.
18. Ruling on Defense Motion to Compel the Production of Witnesses, dated 2 February  
2024.
19. Email to Parties re: Intent to Rule on Remaining Motions by 4 February 2024.

Enclosure B:

1. Audio from the 22 January 2024 Article 39(a) Session.

#### **LEGAL AUTHORITY AND ARGUMENT**

##### **A. The Chief Trial Judge, COL Smith, Should Have Kept the Government's Concerns Confidential in Accordance with R.C.M. 109(c)(4) and Not CC'd the Chief, Trial Defense Services, in Her Responsive Correspondence**

On 17 October 2023, concerned by the recently granted continuance in *United States v. Ironhawk* due to the Military Judges failure to timely rule on the ten pre-trial Motions filed by the Parties, COL Kristy Radio, the 1AD Staff Judge Advocate, sent a complaint, via email to COL Tyesha Smith, the Army's Chief Trial Judge. See Enclosure A, page 20-23.

This email was sent in accordance with R.C.M. 109(c)(3), which states that:

*(c) Investigation of judges.*

*(3) Complaints.* Complaints concerning an appellate military judge, military judge, or military magistrate will be forwarded to the Judge Advocate General of the service concerned or to a person designated by the Judge Advocate General concerned to receive such complaints.

R.C.M. 109(c)(3) (emphasis added). COL Radio properly directed her concerns under R.C.M. 109(c)(3) to the Chief Trial Judge as COL Smith is the Judge Advocate General's representative for receiving complaints regarding the judiciary under R.C.M. 109. See R.C.M. 109; see also, AR 27-1, para. 11-4. COL Radio also properly did so without CC'ing Defense Counsel or the Chief, Trial Defense Service, as such complaints are supposed to be "treated with confidentiality." See Discussion of R.C.M. 109(c)(4).

Unfortunately, as stated by the Military Judge during the 22 January 2024 Article 39(a) session, on 8 December 2023, COL Smith called the Military Judge to directly address the concerns brought up by COL Radio. See Enclosure B. This should not have occurred. As stated above, such complaints are supposed to be "treated with confidentiality." See Discussion of R.C.M. 109(c)(4). This requirement for confidentiality exists because Congress does not want members of the trial judiciary to alter their perspective on a case because they know that one party or another has expressed concerns about their judicial fitness to the leadership of the trial judiciary. Unfortunately, COL Smith was unaware of this and chose to disclose the existence of the complaint to the Military Judge by way of a phone call on 8 December 2023, which fundamentally altered the ability of the Military Judge to be impartial in this case. See Enclosure B.

**B. The Phone Call from COL Smith to the Military Judge Reasonably Calls into Question the Military Judge's Impartiality**

As discussed above, on 8 December 2023, COL Smith called the Military Judge to directly address the concern's brought up by COL Radio. As noted by the Military Judge in her colloquy, at the time, COL Smith even offered to take over the case should the Military Judge no longer believe she is capable of handling a case as burdensome as *United*

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*States v. Ironhawk. Id.* The Military Judge asked for the weekend to think on the issue and called COL Smith back on 12 December 2023. *Id.* During the second phone call, the Military Judge related that she felt she could handle the case and asked to stay on. *Id.* COL Smith agreed and allowed her to do so. *Id.* However, outside of this discussion about remaining on the case, the Military Judge admitted, on the record, that she has had issues with ruling on motions in a timely manner in the past – which COL Smith has supposedly addressed with her before. *Id.*

At the time of the 8 December 2023 phone call, the Military Judge was not shown a copy of COL Radio's email. *Id.* It was only after the Defense filed their Motion to Compel Evidence, did the Military Judge see the email sent by COL Radio to COL Smith. *Id.* This email itself, expresses disappointment on behalf of the Command and the Victim's family due to the Military Judge's failure to rule on the Motions which caused the continuance. See Enclosure A, page 20-23. The Military Judge read this email as part of the Defense Motion to Compel after she was phoned by COL Smith on the matter, roughly ten days earlier. See Enclosure B. Regardless of whether the Military Judge took the email or the phone call from COL Smith to heart, the Military Judge cannot unsee the email or forget the two separate conversations she had with COL Smith. That bell cannot be "un-rung." It is now well known to her that the Trial Counsel, the 1AD Command, and the family of the Victim were disappointed by the continuance resulting from her failure to rule on the ten pre-trial motions, which calls into question whether the Military Judge can now remain impartial in this case. R.C.M. 902(A) addresses this matter in stating that:

(a) *In general.* Except as provided in subsection (e) of this rule, a military judge shall disqualify himself or herself in any proceeding

in which the military judge's impartiality might reasonably be questioned.

See R.C.M. 902(a) (emphasis added). The fact that the Military Judge now knows that the 1AD Staff Judge Advocate sent a complaint to the Military Judge's rater, COL Smith, reasonably calls into question whether the Military Judge can be unbiased in the administration of justice in *United States v. Ironhawk* or whether her judgement will be clouded by the subconscious knowledge of knowing the 1AD Staff Judge Advocate has already expressed her concerns to COL Smith once before.

Even if the Military Judge says that she would be free of bias or prejudice against the Government, the test is objective not subjective. "[T]he issue of disqualification under R.C.M. 902(a) is considered under an objective standard: '[a]ny conduct that would lead a reasonable [person] knowing all the circumstances to the conclusion that the judge's impartiality might reasonable [sic] be questioned is a basis for the judge's disqualification.'" *United States v. Norfleet*, 53 M.J. 262, 270 (C.A.A.F. 2000) (quoting *United States v. Kincheloe*, 14 M.J. 40, 50 (CMA 1982) (internal quotation marks omitted)). As such, the real question is whether a reasonable person might see the Military Judge's impartiality as being in question. The answer to that is yes.

It is natural for one to assume that, once receiving a complaint, the object of the complaint is going to alter their behavior to avoid similar complaints in the future – that is human nature. It would be unreasonable to expect someone not to change their behavior after being lectured by their supervisor and reading about their failures on paper from another individual. This prejudice could be felt by both the Government and the Defense.




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Simply put, there is now no way to ensure the fair and equitable administration of justice by this Military Judge with this shadow hanging over the trial. No voir dire nor assurance from the Military Judge can truly ensure that the Military Judge's impartiality has not been impacted by the 17 October 2023 email in the eyes of the public; as evidenced by the Military Judge's subsequent Order to submit to her, for in-camera review, the Government's attorney work product related to the performance and fitness of the Military Judge herself. Therefore, the only reasonable remedy is for the Military Judge to recuse herself in accordance with R.C.M. 902(A) and allow the trial to proceed without the specter of impartiality present in this case.

**CONCLUSION**

For these reasons, the Government respectfully requests the Military Judge recuse herself from the case of *United States v. Ironhawk* under R.C.M. 902(a).

 Digitally signed by  
WALLACE, MATTHEW.WILLIAM.  
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Date: 2024.02.06 12:51:01 -06'00'

MATTHEW W. WALLACE  
CPT, JA  
Circuit Special Trial Counsel

[REDACTED]

[REDACTED]

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**From:** Emanuel, Jacqueline L COL USARMY HQDA OTJAG (USA) <[jacqueline.l.emanuel.mil@army.mil](mailto:jacqueline.l.emanuel.mil@army.mil)>  
**Sent:** Tuesday, February 6, 2024 7:11 PM  
**To:** Wallace, Matthew W CPT USARMY HQDA OSTC (USA) <[matthew.w.wallace2.mil@army.mil](mailto:matthew.w.wallace2.mil@army.mil)>; Levin, Michael I MAJ USARMY HQDA OSTC (USA) <[michael.i.levin.mil@army.mil](mailto:michael.i.levin.mil@army.mil)>; Levin, Michael I MAJ USARMY HQDA OSTC (USA) <[michael.i.levin.mil@army.mil](mailto:michael.i.levin.mil@army.mil)>; Jensen, Mark L MAJ USARMY 1 AD (USA) <[mark.l.jensen.mil@army.mil](mailto:mark.l.jensen.mil@army.mil)>; Sherry Bunn <[sbunn@fbknlaw.com](mailto:sbunn@fbknlaw.com)>; Hofbauer, Melanie R CPT USARMY 1 AD (USA) <[melanie.r.hofbauer.mil@army.mil](mailto:melanie.r.hofbauer.mil@army.mil)>  
**Cc:** Hale, Deborah CIV USARMY (USA) <[deborah.hale4.civ@army.mil](mailto:deborah.hale4.civ@army.mil)>  
**Subject:** U.S. v. Ironhawk

Counsel,

1. Defense, please submit a response to the Government Request for Recusal NLT 1700 MST on 8 February.
2. Government, please produce the documents specified in the Court's 1 Feb 2024 order for *in camera* review NLT 1700 MST on 8 February.
3. Government, please submit a response to the Government Motion to Dismiss NLT 1700 MST on 8 February.
4. Government and Defense, please confer and propose a date for an Article 39(a) hearing sometime between 26-29 February 2024 to address the motions to recuse and dismiss.

COL Jacqueline L. Emanuel  
Circuit Judge  
Fourth Circuit, US Army Trial Judiciary  
1633 Mekong Street, Bldg. 6221  
Fort Carson, CO 80913  
[REDACTED] (Office)  
[REDACTED] (Mobile)

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**From:** Wallace, Matthew W CPT USARMY HQDA OSTC (USA) <[matthew.w.wallace2.mil@army.mil](mailto:matthew.w.wallace2.mil@army.mil)>  
**Sent:** Tuesday, February 6, 2024 2:04 PM  
**To:** Emanuel, Jacqueline L COL USARMY HQDA OTJAG (USA) <[jacqueline.l.emanuel.mil@army.mil](mailto:jacqueline.l.emanuel.mil@army.mil)>  
**Cc:** Levin, Michael I MAJ USARMY HQDA OSTC (USA) <[michael.i.levin.mil@army.mil](mailto:michael.i.levin.mil@army.mil)>; Wallace, Matthew W CPT USARMY HQDA OSTC (USA) <[matthew.w.wallace2.mil@army.mil](mailto:matthew.w.wallace2.mil@army.mil)>; Jensen, Mark L MAJ USARMY 1 AD (USA) <[mark.l.jensen.mil@army.mil](mailto:mark.l.jensen.mil@army.mil)>; Sherry Bunn <[sbunn@fbknlaw.com](mailto:sbunn@fbknlaw.com)>; Hofbauer, Melanie R CPT USARMY 1 AD (USA) <[melanie.r.hofbauer.mil@army.mil](mailto:melanie.r.hofbauer.mil@army.mil)>; Hale, Deborah CIV USARMY (USA) <[deborah.hale4.civ@army.mil](mailto:deborah.hale4.civ@army.mil)>  
**Subject:** IRONHAWK - GOV - Motion to Request Recusal

Good Afternoon Your Honor,

Ma'am, please see the attached Motion to Request Recusal of the Military Judge. The Government requests a stay of the current deadline to submit documents for in-camera review until the Motion to Request Recusal of the Military Judge is acted upon. Enclosures A and B will come via DoDSafe shortly due to their size.

Please let me know if you have any questions or concerns, ma'am. Thank you.

Very Respectfully,

Matthew W. Wallace

CPT, JA

Circuit Special Trial Counsel

Office of Special Trial Counsel

Third Circuit | Fort Campbell, Kentucky

Office Line: [REDACTED]

Government Cell: [REDACTED]

[matthew.w.wallace2.mil@army.mil](mailto:matthew.w.wallace2.mil@army.mil)

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# UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before  
PENLAND, HAYES, and MORRIS  
Appellate Military Judges

**UNITED STATES,  
Petitioner**

v.

**JACQUELINE L. EMANUEL, Military Judge,  
United States Army,  
Respondent**

and

**Sergeant CARMEN IRONHAWK,  
United States Army,  
Real Party in Interest**

ARMY MISC 20240057

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ORDER  
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WHEREAS:

The Real Party in Interest stands accused of murder before a general court-martial set to convene in the Fifth Judicial Circuit, Fort Bliss, TX on 9-19 April 2024. Trial Defense Counsel in this case filed a motion with the trial court to compel discovery of various forms of communication:

All emails, texts, or other communications between the prosecution team in this case and the SJA, DSJA, or Chief of Justice about the continuance in this case.

All emails, texts, or other communications between members of the 1st Armored Division OSJA and members of the Trial Counsel Assistance Program (TCAP) or the Office of the Special Trial Counsel (OSTC) related to communication with the Chief Judge about the trial judge in the case.

On 22 January 2024, the military judge, from the bench, granted the accused's request to conduct an in camera review of some of the requested discovery. On 29 January 2024, the military judge issued her findings of fact and conclusions of law to the parties, and on 1 February 2024 issued a written order directing the government to produce some of the requested discovery by 1700 MST on 6 February 2024. On 6 February 2024, the government filed a motion requesting the military

judge recuse herself. On 7 February 2024, the military judge extended the deadline for production of the materials for in camera review until 1700 MST on 8 February 2024 but did not rule on the motion for recusal.

On 8 February 2024, the government filed a “Request for a Stay of Proceedings” with this court, seeking to stay the court-martial in this case pending a decision on the “Government’s forthcoming petition for extraordinary relief.” The government cites “Rule 19(b)(F)” of the Joint Rules of Appellate Procedure for the Courts of Criminal Appeals [JRAP] as authority for granting this stay. The request for a stay, however, does not itself constitute a petition for an extraordinary writ that minimally contains all of the elements required for such a petition as set forth in JRAP R. 19(b)(2). JRAP R. 19(b)(2)(F) is but one of the elements of such a petition. However, given the immediacy of the court-martial proceedings, the court finds it is in the interest of justice under JRAP R. 32 to sua sponte suspend the requirement of Rule 19(b)(2) to file a stay request contemporaneously with the government’s petition for extraordinary relief.

NOW, THEREFORE, IT IS ORDERED:

1. The Petitioner’s request for a stay is granted and shall remain in effect until it is vacated by this court.

2. The Petitioner must file the government’s petition for extraordinary relief on or before 12 February 2024. The Real Party in Interest may, within 20 days of receipt of the government’s petition, file an answer with this court. The Petitioner will then have 7 days from receipt of any answer from the Real Party in Interest to submit a reply brief.

DATE: 8 February 2024

FOR THE COURT:



STEVEN P. HAIGHT  
Acting Clerk of Court

CF: JALS-DA	JALS-CCR
JALS-GA	Respondent
JALS-CR3	Real Party in Interest
JALS-CCZ	

**CERTIFICATE OF SERVICE, U.S. v. IRONHAWK, Real Party in  
Interest, (Misc 20240057)**

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at *usarmy.pentagon.hqda-otjag.mbx.dad-accaservice@army.mil* on the 12th day of February, 2024.



DANIEL L. MANN  
Senior Paralegal Specialist  
Government Appellate Division  
9275 Gunston Road  
Fort Belvoir, VA 22060-5546  
(703) 693-0822  
*daniel.l.mann.civ@army.mil*