

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES**

UNITED STATES,  
Appellee

MOTION FOR APPROPRIATE  
RELIEF

v.

Crim. App. Dkt. No. 20180611

Sergeant (E-5)  
**GARY A. HEMMINGSEN,**  
United States Army,  
Appellant

USCA Dkt. No. 20-0284/AR

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

The undersigned appellate defense counsel, pursuant to Rule 30 of this Honorable Court's Rules of Practice and Procedure, move for the Chief Judge to appoint an eligible Senior Judge or request that the Chief Justice of the United States appoint a judge from either a United States Court of Appeals or a United States District Court so that there are five judges to perform the functions of the Court, which includes voting on appellant's Petition for Grant of Review, filed with this Court on August 10, 2020. Alternatively, should the Chief Judge elect not to appoint a Senior Judge or an Article III judge, appellant respectfully requests that this Court take no action on appellant's Petition for Grant of Review until a judge is confirmed by the United States Senate.

## **STATEMENT OF THE FACTS**

On May 6, 2020, the President nominated Liam Hardy to serve as a judge on this Court. <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-judicial-nominees-12/>.<sup>1</sup>

Judge Margaret Ryan's term of service with this Court expired on July 31, 2020. <https://www.armfor.uscourts.gov/newcaaf/judges.htm>.<sup>2</sup> This Court is now composed of four judges. *Id.*

The Senate Committee on Armed Services held a hearing on Mr. Hardy's nomination on August 4, 2020. <https://www.congress.gov/nomination/116th-congress/1913>.<sup>3</sup> The Senate has not voted on Mr. Hardy's nomination. *Id.*

## **LAW**

Article 142 of the Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 942, prescribes that this Court consists of five judges, each appointed from civilian life by the President, by and with the advice and consent of the Senate, for a term of fifteen years.

Article 142(g) permits the remaining judges of this Court to exercise the powers of the Court during a vacancy. However, section (e)(1)(A)(ii) provides that

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<sup>1</sup> Included as Appendix A

<sup>2</sup> Included as Appendix B

<sup>3</sup> Included as Appendix C

the Chief Judge of the Court may call upon an individual who is a senior judge of the Court, with that senior judge's consent, to perform judicial duties with the Court, during a period in which a position of the court is vacant. Section (e)(1)(B) permits the Chief Judge to call upon the judge whose term has expired to continue to perform judicial duties with the Court until the vacancy is filled.

Article 142(f) permits the Chief Judge to request from the Chief Justice of the United States the appointment of a judge from a United States Court of Appeals or a United States District Court during a period when there is a vacancy on the Court and in the opinion of the Chief Judge that such a designation is necessary for the proper dispatch of the business of the Court. Such a request of the Chief Justice of the United States is not proper unless the Chief Judge of this Court has determined that no person is available to perform judicial duties with this Court as a senior judge.

### **ARGUMENT**

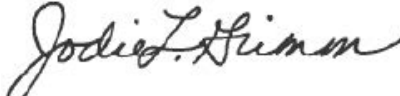
When this Court is composed of four judges instead of five, appellant is at a mathematical disadvantage for the decision regarding a grant of review. If this Court denies a petition for grant of review, a petitioner cannot seek a writ of certiorari from the Supreme Court and is relegated to petitioning for a writ of habeas corpus or other relief from an Article III court. *See* Article 67a(a), UCMJ, 10 U.S.C. § 867a(a). When this Court is composed of five judges, it follows a

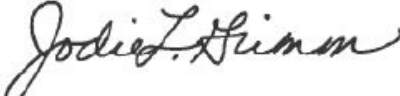
minority-grant rule: only two votes out of five, or 40%, are needed to grant review. Eugene R. Fidell and Dwight Sullivan, *Guide to the Rules of Practice and Procedure for the United States Court of Appeals for the Armed Forces*, § 6.03[3] at 67-68 (19th ed. 2020). When this Court is composed of four judges, a petitioner needs two votes out of four, or 50% of the court's composition, to grant review.

*Id.* The possibility of a grant has therefore been reduced, as has appellant's opportunity to seek a writ of certiorari from the Supreme Court.

**PRAYER FOR RELIEF**

WHEREFORE, appellant respectfully requests that the Chief Judge appoint an eligible Senior Judge or request that the Chief Justice of the United States appoint an Article III judge. Alternatively, appellant respectfully requests that this Court take no action until a nominee for this Court is confirmed by the Senate.

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## **APPENDIX A**



## NOMINATIONS & APPOINTMENTS

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# President Donald J. Trump Announces Judicial Nominees

Issued on: May 6, 2020



Today, President Donald J. Trump announced his intent to nominate:

**Roderick C. Young, of Virginia, to serve as Judge on the United States District Court for the Eastern District of Virginia.**

Roderick Young currently serves as a United States Magistrate Judge on the United States District Court for the Eastern District of Virginia. Before taking the bench in 2014, Judge Young served as an Assistant United States Attorney for the Eastern District of Virginia, where he was the Deputy Criminal Supervisor. Judge Young previously served as a Special Assistant United States Attorney for the District of Columbia, a Senior Assistant Commonwealth's Attorney for the Richmond Commonwealth's Attorney's Office, and an Assistant Public Defender for the Portsmouth Public Defender's Office. Judge Young is also an Adjunct Professor at William & Mary Law School. Judge Young earned his B.A. and M.A. from George Mason University, and his J.D. from the West Virginia University College of Law.

**Liam P. Hardy, of Virginia, to serve as Judge on the United States Court of Appeals for the Armed Forces.**

Liam Hardy currently serves as a Deputy Assistant Attorney General for the Office of Legal Counsel at the United States Department of Justice. Previously, Mr. Hardy was a litigation partner in the Washington, D.C. office of Kirkland & Ellis, LLP. Mr. Hardy also serves as a Lecturer on Law at Harvard Law School, and as an Adjunct Professor at Notre Dame Law School. Upon graduation from law school, Mr. Hardy served as a law clerk to Judge Margaret Ryan on the United States Court of Appeals for the Armed Forces. He later served as a law clerk to Chief Judge David B. Sentelle on the United States Court of Appeals for the District of Columbia, and to Associate Justice Clarence Thomas on the Supreme Court of the United States. Mr. Hardy earned his B.S.E., *magna cum laude*, from Princeton University, his M.S. from Stanford University, and his J.D., *cum laude*, from Georgetown University Law Center, where he served as the Senior Administrative Editor on the *Georgetown Law Journal*.



## **APPENDIX B**



# United States Court of Appeals for the Armed Forces

## Judges

The judges of the Court sit as a single panel on all cases. Typically, all five judges participate in each case, but the Court's rules provide that a quorum is established by participation of a majority of the active judges. The Chief Judge also has discretion to call upon a former judge of the Court who is in senior judge status to sit as a senior judge if an active judge is unable to participate. If a senior judge is not available, the Chief Judge may request that the Chief Justice of the United States designate a judge of a United States Court of Appeals or United States District Court to serve with the Court.

Article 142 of the UCMJ provides that each judge "shall be appointed from civilian life." To underscore the civilian nature of the Court, the statute provides that a person may not be appointed as a judge of the Court within seven years after retirement from active duty as a commissioned officer of a regular component of an armed force.

The judges are linked to the judges of the Article III courts of appeals for purposes of compensation.

The position of Chief Judge is rotated among the judges to the most senior judge who has not previously served as Chief Judge. The Chief Judge serves in that position for five years unless his or her term as a judge expires sooner. Prior to 1992, the Chief Judge was designated by the President from among the sitting judges.

Current Judges	Judicial Oath Taken	Expiration of Term
Scott W. Stucky (Chief Judge)	Dec. 20, 2006	July 31, 2021
Kevin A. Ohlson	Nov. 1, 2013	July 31, 2028
John E. Sparks	Apr. 19, 2016	July 31, 2031
Gregory E. Maggs	Feb. 2, 2018	July 31, 2033

Prior Judges	Active Service
Robert E. Quinn	June 20, 1951 - April 25, 1975
George W. Latimer	June 20, 1951 - May 1, 1961
Paul W. Brosman	June 20, 1951 - Dec. 21, 1955
Homer Ferguson	April 9, 1956 - May 21, 1976
Paul J. Kilday	Sept. 25, 1961 - Oct. 12, 1968
William H. Darden	Nov. 13, 1968 - Dec. 29, 1973
Robert M. Duncan	Nov. 29, 1971 - July 11, 1974
William H. Cook	Aug. 21, 1974 - June 30, 1984
Albert B. Fletcher, Jr.	April 30, 1975 - Sept. 11, 1985
Matthew J. Perry	Feb. 18, 1976 - Sept. 22, 1979

Robinson O. Everett	April 16, 1980 - Jan. 1, 1992
Walter T. Cox III	Sept. 6, 1984 - Sept. 18, 2000
Eugene R. Sullivan	May 27, 1986 - Sept. 30, 2002
Susan J. Crawford	Nov. 19, 1991 - Sept. 30, 2006
H.F. "Sparky" Gierke	Nov. 20, 1991 - Sept. 30, 2006
Robert E. Wiss	Jan. 2, 1992 - Oct. 23, 1995
Andrew S. Efron	Aug. 1, 1996 - Sept. 30, 2011
James E. Baker	Sept. 19, 2000 - July 31, 2015
Charles E. "Chip" Erdmann	Oct. 15, 2002 - July 31, 2017
Margaret A. Ryan	Dec. 20, 2006 - July 31, 2020

<b>Chief Judges</b>	<b>Active Service</b>
Robert E. Quinn	1951-1971
William H. Darden	1971-1973
Robert M. Duncan	1973-1974
Albert B. Fletcher, Jr.	1975-1980
Robinson O. Everett	1980-1990
Eugene R. Sullivan	1990-1995
Walter T. Cox III	1995-1999
Susan J. Crawford	1999-2004
H.F. "Sparky" Gierke	2004-2006
Andrew S. Efron	2006-2011
James E. Baker	2011-2015
Charles E. "Chip" Erdmann	2015-2017
Scott W. Stucky	2017-present

<b>Current Senior Judges</b> <b>See Article 142(e), UCMJ, 10 U.S.C. § 942(e)</b>
Walter T. Cox III
Eugene R. Sullivan
Susan J. Crawford
Andrew S. Efron
James E. Baker
Charles E. "Chip" Erdmann
Margaret A. Ryan

## **APPENDIX C**

## PN1913 — Liam P. Hardy — The Judiciary

116th Congress (2019-2020) | [Get alerts](#)

### Description

Liam P. Hardy, of Virginia, to be a Judge of the United States Court of Appeals for the Armed Forces for the term of fifteen years to expire on the date prescribed by law, vice Margaret A. Ryan, retiring.

### Organization

The Judiciary

### Latest Action

08/04/2020 - Committee on Armed Services. Hearings held.

### Date Received from President

05/21/2020

### Committee

Senate Armed Services

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Sort by

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Date	Senate Actions
08/04/2020	Committee on Armed Services. Hearings held.
05/21/2020	Received in the Senate and referred to the Committee on Armed Services.

## **CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the forgoing in the case of United States v. Hemmingsen, Crim. App. Dkt. No. 20180611, USCA Dkt. No. 20-0284/AR, was electronically filed with the Court and Government Appellate Division on August 14, 2020.

A handwritten signature in cursive script that reads "Melinda J. Johnson".

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