IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Michael E. SULLIVAN Captain (O-6), United States Coast Guard, Appellant	BRIEF ON BEHALF OF APPELLANT USCA Dkt. No. 15-0186/CG Crim.App. No. 0001-69-13

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

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Index of Supplement

TABLE OF AUTHORITIES

Coast Guard Instructions and Orders

Issues Presented

I.

WHETHER THE GOVERNMENT CARRIED ITS BURDEN OF PROVING THAT THE CONVENING AUTHORITY'S CATEGORICAL EXCLUSION OF ALL FLAG OFFICERS WAS HARMLESS?

II.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING CHALLENGES FROM BOTH PARTIES TO HIS IMPARTIALITY BASED ON PRIOR PERSONAL RELATIONSHIPS WITH INDIVIDUAL MILITARY COUNSEL, THE ACCUSED, TRIAL COUNSEL, SEVERAL MEMBERS, SEVERAL WITNESSES, AND THE STAFF JUDGE ADVOCATE?

Statement of Statutory Jurisdiction

Because the Judge Advocate General of the Coast Guard referred Captain (CAPT) Michael E. Sullivan's general court-martial to the U.S. Coast Guard Court of Criminal Appeals (CGCCA), the CGCCA had jurisdiction under Article 69(d), Uniform Code of Military Justice (UCMJ). 10 U.S.C. § 869(d)(2012). CAPT Sullivan now invokes this Court's jurisdiction under Article 67, UCMJ. 10 U.S.C. § 867 (2012).

Statement of the Case

After a lengthy and hotly-contested trial and unusually protracted deliberations, the members convicted CAPT Sullivan, contrary to his pleas, of one specification of wrongful use of cocaine in violation of Article 112a, UCMJ, 10 U.S.C. § 912a (2012). (J.A at 273.) He was acquitted of one specification of

conduct unbecoming an officer and a gentleman in violation of Article 133, UCMJ, 10 U.S.C. § 933 (2012). The members, after further deliberations, sentenced him to a fine of $5,000 and a reprimand. (J.A. at 274.) The convening authority approved the sentence and ordered it executed. (General Court-Martial Order No. 1-10, Nov. 13, 2009.) The Judge Advocate General referred the case to the CGCCA on April 30, 2012.

On September 25, 2014, the CGCCA affirmed the findings and sentence as approved by the convening authority. United States v. Sullivan, No. 001-69-13 (C.G. Ct. Crim. App. Sept. 25, 2014). CAPT Sullivan petitioned this Court for review pursuant to Art. 67, UCMJ, on November 24, 2014. On March 3, 2015, this Court granted CAPT Sullivan's petition on two of the assigned errors.

Statement of Facts

CAPT Sullivan is a Coast Guard officer with over twenty-six years of service. In June 2008, his urine tested positive for cocaine at a level just over the military laboratory reporting cut-off. (J.A. at 267.) With his consent, the Coast Guard had his hair tested for cocaine. It also tested positive at low levels. (J.A. at 519.)

CAPT Sullivan denied that he had ever used cocaine and conducted an independent investigation to discover the source of the cocaine that had been detected in his hair and urine. As part of that investigation, he sought independent testing of his

family. (J.A. at 269-71.) His wife Allison's hair tested positive at a very high level; the hair one of his minor daughters also tested positive but at a low level. (J.A. 513-14.) Eventually, Mrs. Sullivan confessed that she had been using cocaine in the home and may have been the source of the contamination. (J.A. at 272.)

A. Member Selection.

The government preferred charges on August 15, 2008. (J.A. at 19.) On January 13, 2009, the convening authority signed Convening Order No. 1-09, appointing a panel consisting entirely of Captains. (J.A. at 418.)

Before signing the convening order, the convening authority told his staff judge advocate (SJA) and Deputy SJA that he intended to exclude all flag officers from the panel. (J.A. at 143, 146, 155.) In a stipulation of expected testimony, the parties agreed that the convening authority, if called to testify under oath, would say that he excluded flag officers because of their busy schedules. (J.A. at 512.) However, as found by the military judge, the convening authority made no effort to determine whether flag officers would be in fact available for the court-martial. (J.A. at 243.)

The SJA had previously informed the convening authority that:

> Because there was an insufficient pool of qualified members, at your request and with the approval of the Coast Guard Chief of Staff and Atlantic Area Commander, I gathered all potential eligible members within the Coast Guard. Each respective Commander made available selected O-6, O-7, and O-8 personnel, whose names are included in an enclosed roster.

(J.A. at 423.) The "enclosed roster" contained the names of 37 eligible flag officers and 110 eligible Captains. (J.A. at 424-430.)

B. Motion to Recuse

The military judge, CAPT Gary Felicetti, was the Coast Guard's sole general court-martial judge at the time. Before trial, he disclosed his many personal and professional relationships with participants in CAPT Sullivan's case. (J.A. at 26-44.) The sheer number and variety of those relationships was such as to consume approximately eighteen pages in the record of trial. (Id.)

The Coast Guard officer corps, like the service as a whole, is very small. Even the military judge agreed the Coast Guard legal community is much smaller still, stating "[at] the senior levels ... amongst judge advocates it's not a stretch to say that everybody knows everybody to some extent." (J.A. at 49.)

The military judge had been stationed with CAPT Sullivan in Alameda, California, approximately 20 years earlier and was a part of the same social circle of junior officers as then-LT Sullivan. (J.A. at 32-34.) The military judge specifically re-

called one social gathering he attended at the Sullivans' home. (J.A. 33-34.) He indicated that he knew Appellant's wife from these social interactions. (J.A. at 36.)

Additionally, the military judge indicated that he had previously supervised CAPT Sullivan's Individual Military Counsel (IMC), CAPT (as he then was) Andersen, in the Operational Law Branch at Maintenance and Logistics Command Atlantic approximately seven years before this court-martial. (J.A. at 35.) During that period, the military judge served as the supervisor on CAPT Andersen's officer evaluation report. (Id.) He also socialized with CAPT and Mrs. Andersen. (J.A. 35-36, 46.) Further, he stated that (as the Coast Guard's Chief Trial Judge) he had recently received CAPT Andersen's request to be reinstated as a special court-martial military judge. (J.A. at 39.) Although the military judge would normally be involved in the application review and selection process, he indicated that he had refrained from further involvement with the review of CAPT Andersen's application while CAPT Sullivan's court-martial was pending. (J.A. at 39-40.)

The military judge had personal and professional relationships with a variety of other participants in the case. He knew CAPT (as he then was) Frederick J. Kenney, USCG, one of the defense's witnesses. (J.A. at 36.) In his prior billet as Chief of Legal Policy and Program Development at Coast Guard Headquarters

from 2006 to 2008, the military judge worked and spoke frequently with CAPT Kenney. (J.A. at 36-39.) Additionally, as Chief Trial Judge, the military judge had supervisory oversight over the SJA who was advising the convening authority in this case because the SJA also served as a collateral duty military judge. (J.A. 116.)

After voir dire, both parties challenged the military judge. (J.A. at 93; 115-18; 275-85.) The government first challenged him based on his professional and personal relationships with the accused, counsel, witnesses, and members of the court-martial. The military judge denied the government challenge. (J.A. at 114-15.) Thereafter, the defense challenged him, citing in addition to the concerns raised by the government, that the military judge and CAPT Sullivan were also in the same pool of Captains competing for promotion. The defense further noted that the government's concerns about the military judge's relationships were amplified because the military judge was directly supervised by The Judge Advocate General (TJAG), who was identified as a potential witness in the case. This rating chain relationship, with the Coast Guard's senior most judge advocate in this high visibility case that was briefed to senior leadership, created its own highly improper perception. (J.A. at 63-68; 116-17.) The military judge similarly denied the defense challenge, refusing to recuse himself. (J.A. at 118-119.)

Having thus denied the parties' challenges, the military judge nonetheless offered to find a military judge from another armed force to hear the case instead of him. (J.A. at 119-20.) In doing so, he engaged in the following colloquy:

> MJ: [A]s a matter of helping apparently both sides find it easier to pick a court-martial panel, I can certainly explore with other chief trial judges if they have senior O-6's—it sounds like, because of the common promotion pool issue, certainly the Marine Corps would have some experience with that, since they're general officers…[A]ll I'm saying is I will [] call around. I'm not committing that you will have a new judge come June.
>
> ATC: From the government's perspective, your honor, we would prefer not to do that. We're not going to make that request. We've made the motion for recusal. You've ruled on the motion. I don't want to interject a certain degree of uncertainty [sic] about the progress of the trial by seeking the possibility of another service judge.
>
> MJ: Well, the way I could do that – and that's why I wouldn't make any promises—is it would be very specific. I could resolve whatever we're going to be able to get to today, and I can say—call up the Chief Trial Judge and say, "I need a judge who's available, senior O-6 available on these dates." They've got to be available on those dates and not as a matter of, "We'll hold an 802 to reschedule the court." You go to trial on the dates that have been agreed to. That's the only conditions under which I would look for—when I would solicit, I would make it very clear that those are the trial dates…I'm certainly not insensitive to the difficulties created by the small military community.
>
> IMC: If I may ask a question, sir. Maybe I just don't get it, but why would you do that?
>
> MJ: As a matter of convenience for the—essentially, I guess, the government, who has to produce a panel.
>
> IMC: Because of the concern that they would not be able to produce enough people based on some of

> the arguments that came up here today, because of relationship with you or perceived relationship with you?
>
> MJ: Whatever their concerns are—and you've articulated concerns too. Again, it would be a matter of convenience to say, you know what, we think, if we have this, then it makes our lives easier.

(J.A. at 119-121.) (It is not clear why the military judge thought a substitute judge would have to be a senior O-6. A military judge need not be senior to the accused. The military judge's error therefore unduly narrowed the class of potentially available substitutes. The basis for his insistence that any substitute judge would have to actually commence the trial, and not simply conduct an R.C.M. 802 conference, on a given date is also unclear, since a replacement judge would have plenary authority over the conduct of proceedings; a recused judge would not have power to constrain the replacement judge's exercise of discretion. The military judge's insistence on keeping to a precise trial date – for the convenience (as he freely admitted) of the government -- as a condition of his recusal presumably narrowed the field of potential substitutes.)

At a June 4, 2009 Article 39(a) session, the military judge indicated that he had in fact sought out alternative military judges from the other branches of service. (J.A. at 129-31.) He indicated that he was unsuccessful in finding a replacement, and therefore continued to preside over the case. (Id.)

Summary of Argument

As the convening authority erred by categorically excluding all flag officers from participation in CAPT Sullivan's court-martial and appointing a panel consisting entirely of Captains, the government had to prove harmlessness. It has not done so, and in fact, such a showing is impossible. Because CAPT Sullivan was a senior Captain, the pool of possible members was very small. When the convening authority excluded all flag officers, he eliminated the best-qualified candidates from that small pool and left only Captains who were in competition with CAPT Sullivan for promotion to flag rank.

The military judge abused his discretion in denying the defense and government motions for recusal. The sheer number of professional and personal relationships that the military judge disclosed would cause a reasonable observer to questioning his ability to be impartial.

Argument

I

THE GOVERNMENT FAILED TO CARRY ITS BURDEN OF PROVING THAT THE CONVENING AUTHORITY'S CATEGORICAL EXCLUSION OF ALL FLAG OFFICERS WAS HARMLESS.

Standard of Review

This Court reviews claims of error in the selection of members of courts-martial de novo as questions of law. United States v. Bartlett, 66 M.J. 426, 427 (C.A.A.F. 2008).

Discussion

The accused has a right to a fair and impartial panel. United States v. Roland, 50 M.J. 66, 68 (C.A.A.F. 1999). This right "is the cornerstone of the military justice system." United States v. Hilow, 32 M.J. 439, 442 (C.M.A. 1991). The selection of members is governed by Article 25(d)(2), UCMJ, which provides:

> When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. (Emphasis added.)

The convening authority must apply these criteria when selecting members. To ensure that a convening authority makes an appropriate selection under Article 25, UCMJ, this Court has been clear: it is impermissible to exclude potential members categorically by rank. United States v. Kirkland, 53 M.J. 22, 24 (C.A.A.F. 2000).

The case law stemming from the ex ante exclusion of potential members based on rank typically involves the exclusion of members in the lower pay grades. E.g., Kirkland, supra; Roland,

supra; United States v. Upshaw, 49 M.J. 111 (C.A.A.F. 1998); United States v. McClain, 22 M.J. 124 (C.M.A. 1986); United States v. Daigle, 1 M.J. 139 (C.M.A. 1975). Here, in contrast, the convening authority excluded all flag officers from service as members in CAPT Sullivan's trial based solely on their rank. He did so without inquiring into whether any particular flag officers were actually available. (J.A. at 243.) This was error. United States v. Gooch, 69 M.J. 353, 358 (C.A.A.F. 2011). The CGCCA correctly so held. (J.A. at 4.)

Inexplicably, however, the CGCCA also held that the error was harmless because the excluded officers were higher-ranking, rather than lower-ranking. Id. It opined, consistent with this Court's precedent, that the exclusion of lower-ranking personnel raises the specter of court packing. Id. But the CGCCA went on to hold that because the exclusion of higher-ranking members does not necessarily generate an appearance of court packing, it is harmless. Id. That holding sanctions the exclusion of members by rank in any case, as long as those who are excluded are senior. Such reasoning flies in the face of the text of Article 25 and this Court's precedent.

The burden of demonstrating lack of harm rests on the government. United States v. Bartlett, 66 M.J. 426, 430 (C.A.A.F. 2008). In this case, it failed to show that the exclusion of all flag officers was harmless. The grab-bag of points cited by the

CGCCA do not cure this evidentiary void. The fact, for example, that the members deliberated for a long time, acquitted on one charge and specification, and awarded neither a dismissal nor confinement, (J.A. at 5), is of no moment. Citing Bartlett, 66 M.J. at 431, the CGCCA found "not improper" and "benign" three justifications for excluding all flag officers: (1) "the Convening Authority's future assignment responsibilities, [(2)] the possibility of a flag officer's undue influence on other members, and [(3)] expected availability issues." (J.A. at 5) (bracketed numbers added.) These considerations quite simply do not concern harmlessness; if anything, they concern whether error was committed (which the CGCCA found had occurred).

None of these three purported justifications withstand scrutiny. The convening authority was slated to become Vice Commandant of the Coast Guard. (J.A. at 440.) In that capacity he would in the future have to oversee the duty assignment of any flag officer who was put on the panel (assuming that officer did not in the meantime retire). This concern is strange because the same notion would preclude *any* convening authority from appointing any person who served (or could expect to serve) under his or her command – a situation that is entirely normal. In any event, this concern does not show that the no-flag-officers exclusion was harmless.

The second concern is equally unavailing. Carried to its logical conclusion, it would mean that all members would have to be in the same pay grade – something that certainly can happen but rarely does, especially with general courts-martial that are required to have at least five members. Art. 16(1)(A), UCMJ. Moreover, if the fear is that the special status of flag officers would give such members undue sway in deliberations, the Code and Manual afford (and have been praised for) a variety of protections against permitting rank to compromise the independence of the members. E.g., Arts. 37, 51(a), UCMJ. "Superiority in rank shall not be used in any manner in an attempt to control the independence of members in the exercise of their judgment." R.C.M. 921(a), 1006(a). Voting is by secret ballot. R.C.M. 921(c)(1), 1006(d)(2). In any event, this second concern does not show that the no-flag-officers exclusion was harmless.

The same is true of the convening authority's expectation that there would be problems of availability for Coast Guard flag officers. Excluding them from consideration cannot be sustained in any event as an a priori matter; some checking must be done before a decision is made to exclude eligible personnel. What is more, a categorical exclusion based on anticipated unavailability, even if it were permissible in theory, would have to take into account the universe of statutorily eligible officers, including flag and general officers from the other armed

forces. "Retired members of any Regular component and members of Reserve components of the armed forces are eligible to serve as members if they are on active duty." R.C.M. 502(a)(1) (Discussion) (also noting eligibility of NOAA and U.S. Public Health Service officers "when assigned to and serving with an armed force"). The convening authority's a priori wholesale judgment about availability thus was predicated on far too narrow a focus.[1]

We encourage the Court to examine the decision below to see if there is any evidence -- substantial or otherwise – that demonstrates that the Article 25(d) violation was harmless, as opposed to generalized comments about what a fine trial this was.

In Bartlett, the Court found exclusion of qualified members by branch specialty was harmless because: (1) there was no evidence the regulation was issued with an improper motive; (2) there was no evidence the convening authority's motivation in detailing the members was not benign; (3) the convening authority was a person authorized to convene a general court-martial; (4) the convening authority personally choose the members from a pool of eligible officers; (5) the members met the criteria in

[1] The eligibility of flag officers from other services also undercuts the convening authority's first concern – unfounded and irrelevant as it is for the reason previously explained – that he would be the future supervisor of Coast Guard flag officers.

Article 25, UCMJ; and, (6) the panel was "well-balanced across gender, racial, staff, command, and branch lines." 66 M.J. at 431.

The Court has never held that the Bartlett "factors" are exclusive. Nor, with respect, are they particularly useful in policing compliance with the statute or determining whether a non-jury-stacking-type violation is harmless. Thus, the first two factors are applicable only to the subset of Article 25(d) cases that fall under the unlawful command influence rubric. This is not such a case. If the government carries its burden on the third factor, all it has done is refute a claim that the convening authority was an imposter or acting ultra vires. Again, this is not such a case. Carrying its burden on the fourth factor similarly does nothing to demonstrate harmlessness where the practice complained of is an improper delegation of the power to select members. A showing on the sixth factor would be relevant if the gravamen of the objection were gender, racial or other imbalance – an issue that is irrelevant here and arises from wellsprings other than the statutory text. That leaves only the fifth factor, which is relevant and not only was not carried by the government, but could not be carried by it, as we shall explain.

Article 25(d)(2) requires that a convening authority choose potential members who are best qualified based on their "age,

education, training, experience, length of service, and judicial temperament." 10 U.S.C. § 825(d)(2) (2012). Those few officers fortunate enough to be promoted to flag rank are by definition the best qualified in the service. See 14 U.S.C. § 259 (2012).[2] They will be among the oldest officers, with the longest service, and most experience. They are highly likely to possess graduate degrees. It is equally fair to presume that the judicial temperament of flag officers is of the highest caliber, since they will certainly have been commanding officers and convening authorities, called upon as such to thoughtfully exercise the quasi-judicial functions assigned to commanders by the Code. Yet it was precisely these officers – who best satisfied Article 25's criteria -- who were excluded from a members pool that was already quite limited due to CAPT Sullivan's comparatively high rank as a senior O-6. (J.A. at 423.)

This Court has previously acknowledged the significance of rank in the context of Article 25. In United States v. Yager, where a convening authority excused personnel in pay grades E-1

[2] See also Memorandum from Commandant of the Coast Guard to VADM C. Pearson, subject: Precept Convening a Selection Board to Recommend Officers of the Coast Guard on the Active Duty Promotion List for Promotion to the Grade of Rear Admiral (Lower Half) (27 June 2008). (J.A. at 521-22.); U.S. COAST GUARD, COMMANDANT INSTR. MANUAL 1000.6A, PERSONNEL MANUAL art. 14.A.3 (Jan. 8, 1988) (subsequently replaced by U.S. COAST GUARD, COMMANDANT INSTR. MANUAL 1000.3A, OFFICER ACCESSIONS, EVALUATIONS, AND PROMOTIONS art. 6.A.3 (Sep. 13, 2013)).

and E-2, the Court affirmed because there was a "demonstrable relationship between the excluded ranks and the criteria of Article 25(d)(2)." 7 M.J. 171, 173 (C.M.A.). Specifically, because "application of these criteria would exclude most, if not all, of the grades involved" it was permissible to categorically exclude those pay grades. *Id*.

Here, precisely the opposite is true. The convening authority excluded flag officers, the best qualified candidates from an already limited pool. CAPT Sullivan has no duty to show prejudice in order to prevail; the government must prove a lack of harm. But there is literally no way it can do so where the panel determining CAPT Sullivan's fate was unlawfully deprived of those who best fit the statutory criteria. While the convening authority may have had the purest of motives when he placed a higher premium on the time and convenience of flag officers than on the proper application of Article 25 and the selection of the best qualified members for CAPT Sullivan's panel, motives have nothing to do with this plain violation of the statute. Be it ever so broad, the convening authority's Article 25(d)(2) discretion does not permit the wholesale exclusion of the very cohort of eligible personnel who best fit the statutory criteria.

What is more, CAPT Sullivan's panel consisted entirely of officers with whom he would compete for promotion to O-7. Because of his seniority on the active duty promotion list, all of

the Captains detailed to his court-martial were in the same pool of officers against whom he would complete for promotion to flag rank. (J.A. at 107; 414.) When the convening authority excluded all flag officers from CAPT Sullivan's panel, he excluded the *only* eligible officers whose participation would not raise that concern.

The CGCCA noted that none of the officers on CAPT Sullivan's panel were, in the end, promoted to flag rank. (J.A. at 5.) This is true but utterly irrelevant as it in no way addresses whether the desire or competition for promotion was or gave the appearance of being an influence on the members at the time they sat in judgment.

The government failed to prove harmlessness. That is the end of the matter. Subjecting an accused to trial by a panel from which those who are best qualified have been systematically excluded on a wholesale basis violates the statutory test. Congress meant something when it used the phrase "best qualified." While it may not lend itself to empirical measurement (and for that reason suggests that violations are properly analyzed as structural error),[3] it takes no stretch of the imagination to

[3] Judge Erdmann observed in Bartlett that structural error had not been briefed or argued "and is not an issue that is necessary to the resolution of th[e] case." 66 M.J. at 431 (Erdmann, J., concurring). In our view, the fact that it would never be possible to test for specific prejudice from a no-flag-officers

view as valuable and important the several traits Congress wrote into Article 25(d)(2). There is, therefore, no need to rest on appearances. But if for some reason we cannot imagine the Court were disposed to find that the government had proven the convening authority's error was harmless, it would still have to confront the "unresolved appearance" of unfairness. Kirkland, 53 M.J. at 25. Reversal therefore would nonetheless be "appropriate to uphold the essential fairness and integrity of the military justice system." Id. (quoting McClain, 22 M.J. at 133).[4]

The decision below should be reversed and the findings and sentence set aside with leave to conduct a rehearing before a court-martial that complies with Article 25(d)(2).[5]

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violation of Article 25(d)(2), makes this a proper case for application of the structural-error approach. Such violations simply do not leave the fingerprints that might be found in, for example, classic stacking and hence defy meaningful analysis for harmlessness (as the CGCCA's transparent grasping at straws demonstrates). We therefore respectfully assert structural error as an additional string to our bow on Issue I. Because, however, CAPT Sullivan is entitled to relief on the ground that the government never carried its burden of showing harmlessness under a case-specific approach, there is no need to employ a structural-error analysis.

[4] In Kirkland, the convening authority merely selected members from a pool of candidates that had been improperly limited by a subordinate based on the candidates' rank. This is an a fortiori case because here the convening authority himself decided to ignore the requirements of Article 25 and categorically exclude flag officers.

[5] On March 17, 2015, the Court heard argument in United States v. Ward, No. 15-0059/NA, a case that involves both high-end and low-end categorical exclusions in violation of Article 25(d)(2).

II

A MILITARY JUDGE WHOSE IMPARTIALITY MIGHT REASONABLY BE QUESTIONED MUST RECUSE HIMSELF. HERE, THE MILITARY JUDGE HAD PRIOR PERSONAL AND PROFESSIONAL RELATIONSHIPS WITH INDIVIDUAL MILITARY COUNSEL, THE ACCUSED, TRIAL COUNSEL, SEVERAL MEMBERS, SEVERAL WITNESSES, AND THE STAFF JUDGE ADVOCATE, AND BOTH PARTIES MOVED TO RECUSE. THE MILITARY JUDGE ABUSED HIS DISCRETION IN REFUSING TO RECUSE HIMSELF

Standard of Review

A military judge's decision on recusal is reviewed for abuse of discretion. McIlwain, 66 M.J. at 314 (citing United States v. Butcher, 56 M.J. 87, 90 (C.A.A.F. 2001)).

Discussion

"An accused has a constitutional right to an impartial judge." United States v. Martinez, 70 M.J. 154, 157 (C.A.A.F. 2011) (internal quotation marks and citations omitted). A military judge must disqualify himself or herself "in any proceeding in which that military judge's impartiality might reasonably be questioned." R.C.M. 902. It is settled law that "[w]hether the military judge should disqualify himself is viewed objectively, and is 'assessed not in the mind of the military judge, but rather in the mind of a reasonable man . . . who has knowledge of

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In the event the Court decides Ward after submission of our reply brief but before the instant case can be heard, we anticipate seeking leave to file a supplemental brief.

all the facts.'" McIlwain, 66 M.J. at 314 (quoting United States v. Wright, 52 M.J. 136, 141 (C.A.A.F. 1999)).

While "a former professional relationship is not *per se* disqualifying," id., a court must consider the facts and circumstances of the case to determine if the military judge's extensive relationships were improper. See United States v. Berman, 28 M.J. 615, 619 (A.F.C.M.R. 1989)("The facts of each situation will decide if the judge's relationship with counsel is improper.").

This military judge flagrantly abused his discretion. The Coast Guard officer community is small, particularly at the rank of Captain and above. As noted above, CAPT Sullivan was a senior O-6 and the judge in his case had prior relationships with nearly everyone involved in the case. These connections included the SJA, trial counsel, IMC, the Article 32 Investigating Officer, the members, as well as three defense witnesses. The military judge had previously been the IMC's rating chain supervisor and, at the time of trial, was responsible for reviewing the IMC's application for renewal as a special court-martial military judge. Additionally, CAPT Kenney, a critical defense witness, served as the military judge's program manager and had direct input into his future assignment decisions. Especially troubling is the fact that the military judge apparently found himself in

the same "pool" of O-6 Captains who were to be considered for promotion to flag officer as Appellant. (J.A. at 107; 125.)

It is as startling today as it was at trial that the military judge refused to recuse himself in light of motions from both the defense and the government. While the position of the parties in a case is not determinative, the concerns expressed by experienced counsel may "cast light on what a reasonable person might find questionable." National Union Fire Ins. Co. v. Continental Ill. Corp., 639 F. Supp. 1229 n.1 (N.D. Ill. 1986). Here the parties were not feigning combat: this was a totally hard-fought case in which neither side pulled its punches. It is scarcely an everyday experience in the Coast Guard (or any branch, for that matter) for a respected senior O-6 to stand before a general court-martial accused of drug abuse and obstruction of justice. Against this backdrop, the fact that the prosecution fired the first shot in urging recusal is tremendously significant. Worse yet, the defense, which agreed with the government about little else in this protracted trial, had reached the same conclusion. And bafflingly, even the judge must have thought there was a problem since he claimed to have taken steps to find a substitute (albeit one who – needlessly -- had to be senior to CAPT Sullivan and – improperly -- would leave Judge Felicetti's trial date intact).

Experienced, senior trial and defense counsel both had concerns that the tangled web of relationships between the judge and the parties created an appearance of bias. Although R.C.M. 902 establishes that it is for the military judge to resolve in the first instance whether grounds exist for disqualification, the objection of both parties is, to say the least, a rare event in the annals of military justice and strongly suggests that a reasonable observer would be puzzled by the judge's insistence on continuing with the case.

Additionally, although some of the judge's relationships were with perons aligned with the defense and some were with persons aligned with the Government, conflicting bias is not necessarily counteracting bias. If anything, these overlapping potential sources of bias make it nearly impossible to tease out a net effect. The judge should plainly have granted the combined motions for recusal.

Further, the military judge's actions -- half-hearted, unduly constrained, and undocumented as they were -- in seeking a replacement military judge demonstrated his own belief that his participation created an appearance problem and therefore, disqualified him from further participation. It is unfortunate that his abuse of discretion may require the parties to go through this case a second time (if that is not directed for the reasons set forth in Point I), but the parties – both parties – did

their level best to prevent this from happening by seeking recusal at the appropriate early point in the proceedings.

The Court addressed the disqualifying effect of a military judge's own statements about his or her capacity to continue to serve as arbiter in McIlwain. There the Court found that a military judge erred in failing to recuse herself, not because she actually appeared biased, but because she made statements that indicated she believed that she would appear biased. 66 M.J. at 314. Given McIlwain, this one is easy.

Applying the rationale in McIlwain, it is clear that the military judge should have disqualified himself. After receiving challenges from both parties, he took affirmative steps to find alternative judges to try CAPT Sullivan's case. Once he took actions that demonstrated his own recognition that he was biased, he was disqualified.[6] His failure to recuse himself in light of his comments and actions in this instance constitutes error.

[6] Judge Felicetti was vague as to just what steps he took. He revealed no documents or emails to document his efforts. According to statements on the record, he may have made some informal inquiries with colleagues from other armed forces while he was attending a meeting at The Judge Advocate General of the Army's Legal Center and School in Charlottesville. (J.A. at 129-31.) Since he was the only trial participant who was privy to those efforts, it was incumbent on him to make them a matter of record. His failure to do so frustrates appellate review and warrants an inference that they were half-hearted and desultory. The record does not reveal, for example, whether there were judges from other services who would have made themselves or others available but for his insistence that any replacement

The CGCCA dismissed the similarity between this case and McIlwain, focusing on the military judge's explanation that he sought a new judge as "a matter of convenience." While he did so describe his efforts, he also acknowledged the concerns of both parties and the potential that his prior relationships would complicate the trial. Therefore, his comments and actions raise the same concerns as were present in McIlwain.

The military judge abused his discretion. His tangled web of personal and professional relationships to the people involved in the case casts a cloud over his ability to remain impartial. The Court should reverse the decision below and set aside the findings and sentence with leave to conduct a rehear-

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judge (1) be an O-6 (something neither the Code nor the Manual require) and (2) commit to the trial date he had previously set. The unauthorized pay-grade limitation aside, no judge could responsibly accept assignment to a case under circumstances where his or her discretion in the "exercise [of] reasonable control over the proceedings," R.C.M. 801(a)(3), had been thus circumscribed. No judge -- including (indeed, especially) one who is recused -- may tie the hands of a successor. Art. 51(b), UCMJ; R.C.M. 801(e)(1)(B) ("[t]he military judge may change a ruling by that or another military judge in the case except a previously granted motion for a finding of not guilty, at any time during the trial"). The conditions Judge Felicetti attached to his search for a substitute were improper and would certainly have deterred eligible judges from agreeing to try the case. He thus sabotaged his own search, such as it was.

ing with a different judge or a judge from a different branch of the service.[7]

Conclusion

The decision of the Court of Criminal Appeals should be reversed.

/s/

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Certificate of Filing and Service

I certify that the foregoing was electronically filed with the Court and served on Appellate Government Counsel on 02 April 2015.

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[7] Judge Felicetti has been recalled from retirement and is once again serving as a general court-martial judge. The Coast Guard has added a second general court-martial judge position.

Certificate of Compliance

This supplement complies with the page limitations of Rule 24(b) because it contains less than 14,000 words. Using Microsoft Word version 2010 with 12-point-Courier-New font, this supplement contains 6,687 words.

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