IN THE UNITED STATES
COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, Appellee	)	
v.	)	ANSWER ON BEHALF OF THE UNITED STATES
Michael E. SULLIVAN, Captain (O-6) United States Coast Guard, Appellant	)	USCAAF Dkt. No. 15-0186/CG CGCCA Dkt. No. 001-69-13

ANSWER ON BEHALF OF THE UNITED STATES

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

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 RELATIONSHIPS WITH INDIVIDUAL MILITARY COUNSEL, THE ACCUSED, TRIAL COUNSEL, SEVERAL MEMBERS, SEVERAL WITNESSES, AND THE STAFF JUDGE ADVOCATE.

STATEMENT OF STATUTORY JURISDICTION

The United States Coast Guard Court of Criminal Appeals reviewed this case under Article 69(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 869(d) (2012). This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

STATEMENT OF THE CASE

The Appellant was convicted, contrary to his plea, of wrongful use of cocaine in violation of Article 112a, UCMJ. He was acquitted of conduct unbecoming an officer and a gentleman under Article 133, UCMJ. He was sentenced to a fine and a letter of reprimand. The convening authority approved the sentence as adjudged and ordered it executed.

The Judge Advocate General of the Coast Guard referred this case to the United States Coast Guard Court of Criminal Appeals under Article 69(d), UCMJ.[1] On 25 September 2014, that court affirmed the finding and sentence. This Court granted the Appellant's petition for review on 03 March 2015.

STATEMENT OF FACTS

In June 2008, the Appellant's urine sample, provided during a random urinalysis inspection of his unit, tested positive for cocaine. JA at 267. Upon the advice of counsel, the Appellant sought an independent test of his hair at a laboratory of his choosing, which confirmed the presence of cocaine in his system. JA at 515. The government also procured a test of the Appellant's hair from yet a different laboratory, which confirmed for a third time that the Appellant had used cocaine. JA at 519. His defense at trial was that his wife was a frequent

[1] The Judge Advocate General at the time had recused himself from any role in the appellate case because he testified as a defense witness at the court-martial and briefly represented the Appellant during the investigation. The case was referred by the Deputy Judge Advocate General, who was the acting Judge Advocate General at the time.

cocaine user and that he had unknowingly absorbed cocaine into his system through contact with the supplies she used to cut and store the drug. An expert testified at trial that a person would have to ingest between two to three lines of cocaine on multiple occasions to test as high as the Appellant did. JA at 267-68.

A. Panel Selection

At the time of the court-martial, the Appellant was a captain (O-6) with twenty seven years of service. In order to impanel a court-martial composed of officers senior to him, the convening authority, VADM David Pekoske, considered officers in the grades of O-6, O-7, and O-8. JA at 423. He received permission from the Chief of Staff to expand the potential jury pool to include all eligible Coast Guard officers senior to the Appellant, rather than just those officers under VADM Pekoske's command. *Id*. He initially identified twenty candidates, including three flag officers, as possible members. JA at 432.[2] For various reasons, including scheduling conflicts and operational concerns, the convening authority removed and added several members to his original list. *See* JA 418-511. When the final iteration was complete, VADM Pekoske did not put any flag officers on the court-martial panel.

[2] Although the names listed on the exhibit do not include rank, it includes the names of VADM (ret.) John Currier, who was then a rear admiral (JA at 429), ADM Paul Zukunft, who was then a rear admiral (lower half) (JA at 430), and RADM (ret.) Timothy Sullivan, who was then a rear admiral (JA at 419).

In a stipulation of expected testimony, the parties agreed that the convening authority would have testified that he chose not to detail flag officers to the Appellant's court-martial because he "expected lots of availability issues, knowing how busy flag officers are." JA at 512. He would have further testified that he knew he could select flag officers and was aware of the selection criteria under Article 25, UCMJ. *Id.* The convening authority's staff judge advocate (SJA) and deputy SJA recalled that he also expressed concern over using flag officers because one of his upcoming duties was to serve as the detailing officer for all flag assignments. JA at 144-45, 148-49.

The Appellant raised the issue of improper rank exclusion during pretrial motions. The military judge found that the convening authority had not improperly excluded flag officers and that he knew, understood, and applied the Article 25 criteria when he selected the members. JA at 241-44. He also found:

> The convening authority's consideration of flag officer availability for court member duties was motivated by a desire to select members who would actually serve on the panel, as opposed to officers who would be detailed and then excused because they were not available. There is no evidence of a desire or attempt to stack the court.

JA at 242-43. Lastly, the military judge concluded that, even assuming that there was an improper exclusion of flag officers,

he was convinced beyond a reasonable doubt that such action did not prejudice the proceedings. JA at 244.

B. Motions to Recuse the Military Judge

During the first pre-trial Article 39(a) session, the military judge explained in detail the relationships he had with the individuals involved in the case and then gave the parties an opportunity to conduct *voir dire*. JA at 26-45. He acknowledged being part of a loose network of professional and social peers that included the Appellant and his wife twenty one years prior, but that there had been no contact since. JA at 32-35. He also stated that he had supervised the individual military counsel seven years prior and had twice socialized with him during that time. JA at 35-36, 47-48. He also acknowledged working professionally with almost every Coast Guard judge advocate, including a defense witness and the staff judge advocate, during his many years of service. JA at 29-30, 36-41. The most recent social interaction that he disclosed was a dinner with the individual military counsel seven years prior, with the exception of an office holiday luncheon that both he and the assistant trial counsel attended in 2007 along with one hundred other people. JA at 47. He further stated that "none of these associations will influence any of my decisions in this case." JA at 41.

The military judge also discussed the fact that he and the accused were eligible for consideration for promotion to rear admiral, that it was very unlikely that he as a judge advocate would be selected, and that it would not influence his decisions. JA at 42.

Both parties moved for recusal of the military judge. JA at 275-85. After allowing for full argument by both sides and additional *voir dire*, the military judge denied both parties' motions to recuse.

After finding no actual or implied bias in his service on the case, the military judge offered to ask other services' military judges if someone would be available to serve as the military judge in this case as a matter of convenience for the government.[3] JA at 120. He stated that he would explore that possibility "as a matter of helping apparently both sides find it easier to pick a court-martial panel." *Id*. The military judge never stated that he was making the offer out of a concern about bias or the appearance of bias. Ultimately, the military judge was unable to find another judge to serve. JA at 130.

[3] At the time of the court-martial, the military judge was the only Coast Guard judge authorized to preside over a general court-martial, so seeking another Coast Guard judge was not an option.

SUMMARY OF THE ARGUMENT

The convening authority did not select flag officers to serve on the court-martial panel because he anticipated that their schedules and operational workloads would preclude them from serving. His motive was not improper and was done to serve the interest of justice, rather than detract from it. The senior captains who did serve on the panel were personally selected by the convening authority, were fully qualified under Article 25, UCMJ, and fulfilled their duties with integrity and impartiality. There was no harm to a substantial right of the Appellant by being tried by a panel of captains senior to him, rather than flag officers.

With respect to the military judge, he did not abuse his discretion by declining to recuse himself based on bias or the appearance of it. He had a few dated social interactions with individuals involved in the case. All of the social contacts had taken place before he took the bench and, in the case of his contacts with the Appellant, had taken place over two decades earlier. He had professional contacts with many of the counsel due to his and their long service as judge advocates in a small judge advocate corps. However, he fully disclosed his associations on the record, allowed both parties extensive *voir dire* to explore every possible bias, and affirmatively stated that any connections would not in any way affect the way he

would conduct the trial. The record of trial, spanning over 5500 pages, attests to the fact that he remained impartial and evenhanded throughout. His decision to preside over the case was not an abuse of his discretion.

I. THE EXCLUSION OF FLAG OFFICERS FROM THE APPELLANT'S PANEL WAS HARMLESS.

Standard of Review

This Court reviews issues in the selection of panel members under a *de novo* standard. *United States v. Kirkland*, 53 M.J. 22, 24 (C.A.A.F. 2000). The military judge's findings of fact are entitled to deference unless they are clearly erroneous. *United States v. Gooch*, 69 M.J. 353, 358 (C.A.A.F. 2011).

Argument

The convening authority personally selected eight captains senior to the Appellant with a combined 224 years of experience to serve on the court-martial panel. He excluded flag officers not in an attempt to stack the panel but because he perceived that their significant time and operational commitments would hinder their duties to the court. The members he selected were fair and impartial and met the Article 25 criteria. They were subjected to a rigorous and diligent *voir dire* process before being seated. Because the Appellant suffered no prejudice as a result of the omission of flag officers from the court-martial panel, he is not entitled to relief.

The convening authority chose not to include flag officers on the panel because he expected that they would have availability issues based on their demanding schedules and operational workload. JA at 512. The United States Coast Guard Court of Criminal Appeals (CCA) determined that was error. However, in a case where the government has intentionally excluded a class of eligible members but in which unlawful command influence is not implicated, an appellant is only entitled to relief if the government fails to carry its burden to show the error was harmless and did not materially prejudice a substantial right of the accused. *United States v. Dowty*, 60 M.J. 163, 173 (C.A.A.F. 2004). As both the trial judge and the CCA concluded, the United States has met its burden to show a lack of harm.

When considering material prejudice in a case involving an error in panel selection, this Court has taken various approaches and considered numerous factors. For example, in *United States v. Bartlett*, 66 M.J. 426, 431 (C.A.A.F. 2008), this Court considered six issues, including whether the convening authority had an improper motive, whether the motive was benign, whether the convening authority had personally selected the members, and whether the members met the criteria of Article 25, UMCJ.

In *Dowty*, the significant considerations were whether there was an improper motive and whether the convening authority personally selected the members. 60 M.J. at 173-75. In *Kirkland*, this Court set aside a sentence after finding it necessary "to uphold the essential fairness and integrity of the military justice system." 53 M.J. at 25. In *Gooch*, this Court considered whether the convening authority had applied the Article 25 criteria to the members and whether the panel was fair and impartial. 69 M.J. at 361. *Gooch* is particularly enlightening because it post-dates the other cases by several years. When analyzing this case under any and all of these factors, it is clear that there was no material prejudice to the Appellant's substantial rights.

A. Whether there was an Improper Motive

The convening authority's decision to exclude flag officers was not an attempt to stack the panel or to obtain a certain outcome, but to avoid scheduling conflicts. He was seeking to seat a panel where the members would actually be able to serve and would not be distracted by the daunting demands of their positions. This motive was proper and reasonable.

As the smallest of the armed forces, the Coast Guard at the time had only thirty five rear admirals (comprising the ranks of O-7 and O-8) and four vice admirals (O-9). JA at 419. As a three-star himself and a nominee to become the Vice Commandant,

the convening authority was intimately familiar with the flag officer duties and opined that "the more responsible the job . . . the more difficult availability becomes." JA at 512. By not selecting flag officers, he was seeking to avoid the strong possibility that many or all of them would have to be excused due to scheduling conflicts. His motives had nothing to do with the case itself, but with his desire to ensure that the operational needs of the Coast Guard were met and that the panel members were able to devote proper time and attention to their duties.

In the past, this Court has been concerned with the exclusion of members based on rank when the excluded members are lower ranking. *See, e.g., United States v. McClain,* 22 M.J. 124, 132 (C.M.A. 1986) (where this Court found an improper motive when the convening authority excluded lower ranks in order to obtain a court membership less disposed to lenient sentences). Excluding a certain rank in an attempt to drive the outcome of the court-martial or sentence is clearly improper and would constitute unlawful command influence. *Id.* at 131. But there is no evidence here, nor does the Appellant appear to argue, that the convening authority was trying to achieve a certain outcome by excluding flag officers.

After extensive litigation on this issue, the military judge concluded that the flag officer exclusion was based on

their anticipated availability and that it was "motivated by a desire to select members who would actually serve on the panel, as opposed to officer who would be detailed and then excused because they were not available." JA at 242. The judge's finding is entitled to substantial deference.

This Court held in *Gooch* that the *possibility* of a conflict should not lead to a blanket exclusion of a group of potential members.[4] 69 M.J. at 360. Rather than assume there was a conflict, the convening authority could have inquired into the availability of the flag officers that he felt were best qualified. While he probably would have had to exclude them anyway because their schedules would not have permitted them to serve, based on *Gooch* he at least had to ask. However, the error does not undermine the motive, which was to select officers who were going to be able to fully devote themselves to the awesome responsibility that is court-martial service. It is the convening authority's motive that must be scrutinized, and here his motive was above reproach.

The convening authority also stated to his staff that he was apprehensive about using flag officers because, if the President's nomination of him for Vice Commandant was approved, he was going to be in charge of detailing them to their next

[4] The opinion in *Gooch* was issued on 09 February 2011, over eighteen months after the Appellant's court-martial. The convening authority did not have this case as precedent at the time he decided to exclude the flag officers based on the possibility of scheduling conflicts.

billet. JA at 144-45, 148-49. It appears, based on the stipulation of testimony, that the concerns over detailing the officers were not the driving force behind selecting only captains. However, to the extent that this played some role in the decision, his reasoning was sound. Certain flag officer assignments are more highly sought-after than others, as they are more likely to produce officers who will be promoted to the highest ranks of the Coast Guard. VADM Pekoske wanted to avoid a scenario where someone might question whether a flag officer who sat on the Appellant's court-martial panel was later selected by the convening authority for a favored assignment only because of his work on the panel. To the extent that the convening authority's concerns over the appearance of bias played a role in his decision-making, his concerns were reasonable, proper, and not motivated by a desire to influence the panel against the Appellant.

B. Whether the Convening Authority Personally Picked the Panel

Another consideration of prejudice is whether the convening authority personally selected the panel members. It is clear from the record that he did so. If called, the convening authority would have testified that he applied the Article 25 criteria in selecting the members and he knew he could pick anyone senior to the Appellant, including admirals. JA at 512. The documents that the convening authority used in selecting the

members contained his signature or were written on his letterhead. JA at 423, 432, 447, and 449. His SJA and deputy SJA testified about the selection process and the convening authority's direct role in it. JA at 145-53. The convening authority had access to and considered the member questionnaires provided by prospective members. JA at 175-80. He used that information to personally select the members. Based on this information, the CCA found that the convening authority personally picked the members, a finding that is entitled to substantial deference. JA at 5.

C. Whether the Panel Members Fit the Article 25 Criteria

The members that the convening authority personally selected were qualified to serve under the Article 25 criteria, which is another factor previously considered by this Court when determining whether rank exclusion was harmless. The seated members were senior to the Appellant and had an immense sum of operational experience, education, and training. They also displayed the judicial temperament necessary to sit in judgment.

The Appellant argues that because only those officers who are considered the "best qualified" to serve as Coast Guard flag officers are promoted to O-7, they must necessarily also be the best qualified to serve on a court-martial, and thus the Appellant's court-martial panel was not composed of the best

qualified members. Appellant Brief at 16. This argument is flawed for two reasons.

First, the Appellant conflates the qualifications for a panel member with the qualifications for a flag officer. While an officer selected to be a flag or general officer is of the highest caliber, that does not equate to proper judicial temperament. For example, some flag officers are quick to make decisive judgments, often before all the facts and circumstances are available. This may make an officer an exceptional operational commander but that does not make him or her a sound juror, one who must contemplate all the evidence. Undoubtedly, flag and general officers in the armed forces are presumed to be superb officers who are extraordinary leaders and strategic thinkers. But that does not necessarily make them best suited to painstakingly deliberate over details of a case while considering all evidence and viewpoints. The Coast Guard's criteria for a flag officer and Article 25's criteria for a panel member are not synonymous, are not meant to be synonymous, and should not be regarded as such.

Second, the Appellant's assertion does not withstand a commonsense analysis. If by their rank, flag officers are the best qualified to serve as panel members, they, and only they, should serve on every court-martial panel, regardless of rank of the accused. If one were to accept the Appellant's contention

that the flag officers are best qualified because of their length of service and command experience, that argument would be equally applicable for the cases of an E-5 accused of using cocaine and an O-6 accused of using cocaine. If "best qualified" under Article 25 actually means "flag or general officer," that is true in every court-martial. Yet, no one except the Appellant disputes that there are competent panel members at every rank, with the exception of the lowest enlisted ranks. *See United States v. Yager*, 7 M.J. 171, 172-73 (C.M.A. 1979). This Court and the service courts consider dozens of cases a year where the highest ranking panel member was an O-6 or below, and yet have never found that those lower-ranking members were not the best qualified because there were flag and general officers who should have served instead.

Further, the Appellant argues that flag officers are the best qualified because they are the oldest members, with the most experience, and are likely to possess graduate degrees and to have served in command. Appellant Br. at 16. If that is the criteria that the Appellant was looking for in a court-martial panel, the panel that heard his case fits his description. These are the very same traits that were present in the captains who were selected to serve in this case.

All eight court-martial members had graduate degrees; CAPT Marhoffer and CAPT Vance both had two masters degrees.[5] Six of the eight panel members had served multiple tours as a commanding officer.[6] CAPT Bardo had a total of five commands and was in command of a cutter at the time of the trial. AE 112. CAPT Mathieu was a sitting commanding officer of a shore unit, his third such command tour. AE 110. CAPT Swanson was the Commander of Activities Far East, a remote Coast Guard unit located in Japan. JA at 322.

With respect to longevity in the service, all had served in the Coast Guard for at least twenty seven years. *See* JA 420-22 (listing the year of commission of each panel member as 1982 or earlier). In fact, CAPT Hooper had over thirty four years of active duty service at the time of the court-martial. JA at 294. That is more time in service than thirty three of the thirty five rear admirals (both upper and lower half) whom the Appellant urges should have been selected over CAPT Hooper in part because of their greater length of service. *See* JA at 294, 421.[7]

Each member also brought a unique operational or logistics background to the panel. For example, CAPT Hooper spent the

[5] *See* JA at 309 (CAPT Marhoffer); 424 (CAPT Dombeck); 323 (CAPT Swanson); 295 (CAPT Hooper); 289 (CAPT Holtzman-Bell); AE 112 (CAPT Bardo); AE 118 (CAPT Vance); AE 110 (CAPT Mathieu).
[6] *See* JA at 308 (CAPT Marhoffer); 323 (CAPT Swanson); 294 (CAPT Hooper); 289 (CAPT Holtzman-Bell); AE 110 (CAPT Mathieu); AE 112 (CAPT Bardo).
[7] CAPT Hooper's year of commission was 1980, but he served seven years as an enlisted member before receiving his commission. His year of entry into the Coast Guard was 1974. JA at 294-95.

majority of his career at sea. JA at 294-95. CAPT Holtzman-Bell was a civil engineer, a relatively rare career field for a woman. JA at 289. CAPT Dombeck was the senior reserve officer for the Seventh Coast Guard District. JA at 424. CAPT Vance was serving in Beijing as the Coast Guard's liaison to the People's Republic of China. JA at 445. The other four members also had varied experiences that they relied upon while serving in the case.

The panel represented some of the best captains in the Coast Guard. They had diverse experiences, diverse backgrounds, and successful careers spanning decades. They were very well qualified to serve as panel members pursuant to Article 25, UCMJ.

D. Whether the Members were Fair and Unbiased

In addition to being qualified under Article 25, UCMJ, the panel members were fair and unbiased, diligently carrying out their duties before rendering a just verdict. During *voir dire,* each member indicated multiple times that he or she would be impartial and make judgments based solely on the evidence presented. Their actions during the trial buttressed their declarations.

The Appellant raises in this Court the possibility that the members were biased against him because they were all under consideration for promotion to flag officer. Appellant Br. at

17-18. But the trial defense counsel had ample opportunity during individual *voir dire* to explore this alleged bias and chose not do so. The defense did not ask any of the members about their promotion potential nor seek assurances that it would not affect their impartiality.[8] If this truly was a concern, the defense counsel would have raised it during *voir dire.* Their decision not to shows they had no trepidation about it. Despite an assurance from the military judge that he would be especially liberal in granting challenges for cause (JA at 244), the defense did not challenge any member for bias or implied bias based on the promotion selection process.[9] The CCA found the argument that the members saw the accused as a competitor for promotion to be "speculative" and not one advanced at trial. JA at 5.

Also, there is nothing in the record to indicate that the panel members acted as they did because they wanted to eliminate a possible competitor for promotion. The members deliberated for eighteen hours over three days before concluding that the Appellant had wrongfully used cocaine. This was not a quick deliberative process with an agenda to oust the competition.

[8] The *voir dire* process spans almost 200 pages of the record and for the sake of brevity was not included in the joint appendix. *See* R. at 403-580.

[9] The defense did make two challenges for cause, one of which was granted and one denied. The granted challenge was based on the potential member's extensive chemistry background. JA at 249-252. The denied challenge was based on the member's implied bias as a law enforcement officer, which the military judge found to be unfounded even in light of the liberal grant mandate. JA at 253-65.

They also ultimately acquitted him of the conduct unbecoming charge.

They spent an additional two hours determining an appropriate sentence, one that the CCA noted was relatively benign. JA at 5. The members took an active role in the trial, posing 279 questions to the prosecution and defense witnesses, indicating their willingness to fully explore and comprehend the issues. *See generally* AE 122-309. The questions did not indicate a bias or prejudice against either party.

This case is similar in many ways to *Bartlett,* where this Court found that the error from the improper exclusion of officers was harmless. 66 M.J. at 430-31. In that case, the convening authority did not consider selecting officers from the medical and dental corps because he was under the misguided impression that those officers were exempt from court-martial service. *Id.* at 427. After finding error, this Court nonetheless affirmed the findings and sentence of the lower court. In doing so, this Court noted that there was no evidence of improper motive in the selection process, the panel members were personally chosen by the convening authority, and they fit the criteria of Article 25, UCMJ. *Id.* at 431. *See also Gooch,* 69 M.J. at 361 (where this Court found no error after "[t]he military judge conducted a rigorous and diligent voir dire

process, in which he properly applied the law, including consideration of actual and implied bias").

Similarly, in this case, the military judge found that the convening authority was properly advised of his Article 25 obligations and applied them during the selection process, that there was no evidence of a desire or attempt to stack the panel, and that there was no unlawful command influence in how the panel was selected. JA at 240-44. The military judge, having heard the testimony of the witnesses and counsels' arguments, was convinced "beyond a reasonable doubt that this action has had no negative impact on the court." *Id.* at 244. The applicable standard for this error is not as high as beyond a reasonable doubt, but yet the military judge still found that the government had met this extremely high bar.

An analysis of the record shows that the military judge's findings of fact were not erroneous. There is nothing from which to infer that the members approached their duties without an open mind, or that they otherwise conducted themselves in such a way as to impugn their impartiality. They expressed an ability to judge the Appellant based only on the evidence presented in court, asked thoughtful questions that indicated that their minds were open during the findings phase, and deliberated extensively before ultimately deciding on the Appellant's guilt.

E. Whether there is Concern over the Integrity of the System

Lastly, in *Kirkland*, this Court expressed a concern with the appearance of impropriety and its effect on the "essential fairness and integrity of the military justice system." 53 M.J. at 25. Here, considering all the steps that the convening authority took to ensure that the Appellant was tried by a panel of qualified unbiased officers, there can be no apprehension that allowing the verdict to stand will be an affront to the integrity of the system.

First, it is important to look at the reason behind the exclusion of flag officers. Although this Court's holding in *Gooch* concluded that an exclusion based on the potential for a conflict was error, the motive of VADM Pekoske was pure. As a three-star officer himself, the convening authority, more than almost anyone else, knew what type of time pressure is imposed on rear admirals as a result of their duties. He believed, probably correctly, that the flag officers would have obligations that would make serving on the panel impossible. The purpose behind his decision was to seat the best possible panel, not to seat one that would somehow work an injustice against the Appellant.

Also, this was not a case where the government disregarded a ruling of this Court and then sought protection under the "harmless error" mantle. The decision in *Gooch* that prohibited

the exclusion of members based on the potential for conflicts was made eighteen months after the panel selection in this case. The convening authority and the SJA who advised him did not have the benefit of the *Gooch* decision when deciding whether to exclude the admirals based on the possibility of scheduling conflicts. A member of the public could be assured that there was nothing in case law prohibiting the convening authority from taking the actions he did, until this Court decided *Gooch* a year and a half later.

In fact, there was some precedent from this Court prior to *Gooch* that a blanket exclusion of flag officers was in fact permissible. In *United States v. Roland*, 50 M.J. 66, 67 (C.A.A.F. 1999), this Court considered the panel selection process by which the SJA solicited qualified personnel between the ranks of E-5 and O-6. This Court considered whether the nomination process was proper, but never took issue with the blatant exclusion of those officers in the rank of O-7 and above.

The Appellant argues that flag officers should have been included on his panel because he was an O-6. But he was not a flag officer and thus was not entitled to a panel of flag officers, just as the accused in *Roland* was not entitled to a panel of general officers.

One should also look to the lengths at which the government went to in order to ensure that the court-martial panel was made up of a diverse mix of officers with varied experiences. Rather than limit himself to only officers within his command, the convening authority sought members from across the entire Coast Guard. JA at 423. Every eligible O-6 was considered. *Id.*

Although the trial was held in California, the convening authority did not consider only those officers within the continental United States when deciding who was best qualified to serve. CAPT Swanson was pulled from his command of Activities Far East in Fussa-shi, Japan. JA at 322. CAPT Vance flew from Beijing, where he was stationed at the U.S. Embassy, in order to be available.

There were other panel members who adapted their circumstances in order to serve. CAPT Dombeck had already publicly celebrated her retirement and was awaiting final retirement orders before being seated on the panel. R. at 472-75. In addition to CAPT Swanson, CAPT Bardo and CAPT Mathieu were in command billets, requiring that their leadership void be filled by subordinates in their absence. JA at 444.

The convening authority's efforts to pull members from across the globe, and from across a diversity of operational commands, is evidence of his commitment to the Appellant's rights to a fair trial and the lengths he went to ensure he had

the best possible panel to hear the case. The court-martial of an O-6 is uncommon in the armed forces, and is even rarer in a service that convenes fewer courts-martial by far than any other. It created some logistical issues that do not occur in most cases. But the panel that was sworn had been thoroughly vetted by the convening authority and diligently and deliberately considered all the evidence before rendering a fair and just verdict. Participating actively in the trial and deliberating for a significant amount of time, they carried out their duties with honor and integrity, and gave the Appellant a fair trial. It was the overwhelming evidence of guilt, rather than any action done by the convening authority in assembling the panel, that sealed the Appellant's fate. The integrity of the military justice system remains in place. Therefore, the United States respectfully asks this Court to affirm the finding and sentence.

II. THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION WHEN HE DID NOT RECUSE HIMSELF.

Standard of Review

This Court reviews a military judge's decision on the issue of recusal for an abuse of discretion. *United States v. McIlwain*, 66 M.J. 312, 314 (C.A.A.F. 2008) (citations omitted).

Argument

A. The Military Judge did not Abuse his Discretion When He Did Not Recuse Himself.

Rule for Courts-Martial (R.C.M.) 902(a) states that "a military judge shall disqualify himself or herself in any proceeding in which the military judge's impartiality might reasonably be questioned." This Court has held that "[t]here is a strong presumption that a judge is impartial, and a party seeking to demonstrate bias must overcome a high hurdle . . . ." *United States v. Quintanilla*, 56 M.J. 37, 44 (C.A.A.F. 2001). Here, the Appellant has not presented any evidence of actual or apparent bias to overcome that high hurdle, and therefore the military judge did not abuse his discretion in not recusing himself, nor did the CCA err in finding the same.

At trial, the Appellant repeatedly stated that his concern was with the appearance of bias by the military judge, not with actual bias. JA at 110, 111, 115, 116, 117, 121, 284-85. The CCA found that the Appellant conceded that actual bias did not exist. JA at 9. That court focused only on the appearance of bias, an argument which it ultimately found unconvincing. *Id.* at 9-10.

Now, for the first time, the Appellant argues to this Court that the military judge was actually biased because his relationships "cast a cloud over his ability to remain

impartial" and because he and the Appellant were in the same year group for promotion. Appellate Br. at 25. That assertion is wholly without merit. The Appellant points to nothing in the record that would even hint that the military judge was biased. He points to no ruling, statement, or utterance made or written by the military judge within the 5500-page record of trial that suggests he was anything other than impartial, just, and evenhanded.

The Appellant found it "especially troubling" that the military judge and the Appellant were in the same presumptive pool for consideration for promotion to flag officer. Appellant Br. at 21-22. It is true that the military judge, by nature of being a captain, was theoretically promotable to flag officer, as was the Appellant.[10] He certainly had a duty to explain that on the record, and he did so. He also explained that he had a mandatory retirement date in 2011[11] and that, as the chief trial judge, he was insulated from any retaliation if he were to rule against the government in a case. JA at 26-27. He further explained that he pragmatically had no chance of being promoted because he did not serve in a billet that was known to produce a flag officer. JA at 27. He also explained that the only flag billet he could reasonably be considered for was the position of

[10] The military judge also explained to the Appellant on the record that his individual military counsel, then-CAPT Andersen, was also eligible for promotion to flag officer, along with the Appellant. Unlike the military judge, CAPT Andersen was eventually selected for promotion to O-7.
[11] The military judge did retire, as planned, in 2011. He has since been returned to active duty on a retired-recall status to assist in handling a heavy military justice case-load.

Judge Advocate General and, because the accused was not a lawyer, they would not be in competition for that flag assignment. JA at 42.

To assure the court members and the objective observer of his impartiality, the military judge stated several times that the promotion scenario would not affect his decisions. JA at 41-42, 57. Even though the standard for recusal is objective, "the judge's statements concerning his intentions and the matters upon which he will rely are not irrelevant to the inquiry." *United States v. Wright*, 52 M.J. 136, 141 (C.A.A.F. 1999). Because there is no evidence in the record to contradict the judge's statements that he would be impartial, his decision not to recuse himself due to actual bias was proper. It is not reasonable to assume the worst of a military judge's intentions.

Likewise, the military judge did not abuse his discretion when he did not recuse himself based on the appearance of bias. The majority of the contacts that the Appellant insists required recusal were professional contacts, with the exception of some very limited social interactions that the military judge had with the Appellant and the individual military counsel years before the court-martial, before the judge was even on the bench.

These personal contacts were dated and infrequent. This Court "has emphasized that the appearance standard does not

require judges to live in an environment sealed off from the outside world . . . Personal relationships between members of the judiciary and witnesses or other participants in the court-martial process do not necessarily require disqualification." *United States v. Butcher*, 56 M.J. 87, 91 (C.A.A.F. 2001) (citations omitted). Even though the military judge had a few extremely dated social interactions with the Appellant and one counsel, he was not required to recuse himself. With respect to the Appellant, the military judge had no contact of any kind with him or his wife for twenty one years leading up to the trial. JA at 32-35. An objective observer would harbor no doubt that a judge could be impartial despite socializing on a few occasions in a group setting with an accused in the 1980s.

Recusal based on professional relationships requires an even higher hurdle than do social relationships. *See Wright*, 52 M.J. at 141 ("Where association with a witness is concerned, a social relationship creates special concerns which a professional relationship does not"). Judges are expected to have formed professional relationships with colleagues and adversaries throughout their careers, and this does not make them unqualified to serve. *Id.* It is true that the military judge knew many of the participants in the court-martial, including some witnesses, but "[d]isqualification based solely

upon appearances is exceptional." *McIlwain*, 66 M.J. at 316 (Ryan, J., dissenting).

After a long and extensive examination into the contacts and any possible areas for concern, a well-informed observer would rest assured that the military judge was impartial, and recusal unnecessary. See also *United States v. Campos*, 42 M.J. 253, 262 (C.A.A.F. 1995) ("Where the military judge makes full disclosure on the record and affirmatively disclaims any impact on him, where the defense has full opportunity to *voir dire* the military judge and to present evidence on the question, and where the record demonstrates that the appellant was obviously not prejudiced by the military judge's not recusing himself, the concerns of RCM 902(a) are fully met").

Lastly, the military judge's offer to seek out another judge did not necessitate his recusal. The trial counsel discussed in its motion to recuse that, because of the judge's years of service and because many of the officers in the potential jury pool were his Academy classmates, some of the potential members might be familiar with the military judge and would somehow give his instructions too much or too little weight. JA at 282-83. The CCA found that this concern apparently arose because of one potential member's response to the member questionnaire. JA at 8.

The judge correctly responded to the government's concerns that the remedy for a potential member's inability to follow instructions is dismissal of that person from service on the panel, not recusal of the judge. JA at 54, 102. However, the judge was cognizant of the government's concerns that there might be a large number of granted challenges for cause based on the potential members' familiarity with him, and that the pool of potential members itself was small. He stated:

> I don't want to minimize the difficulty of having a small military community and making sure that you have a panel that can do the things that it has to do. You follow the instructions of the judge, not be biased, not appear biased . . . . As I mentioned it before, as a matter of helping apparently both sides find it easier to pick a court-martial panel, I can certainly explore [the possibility of using a substitute judge].

JA at 119. Clearly, the judge was willing to do so because it would limit the possibility that potential members would be challenged for cause due to their familiarity with him as the judge. He later reiterated this by saying he was doing so "[a]s a matter of convenience for the – essentially, I guess, the government, who has to produce a panel." JA at 120. He at no time indicated that he was willing to explore the possibility because of his own bias or the appearance of bias.

The CCA found that the military judge had not indicated that he believed he was biased or appeared biased by offering to

seek a replacement judge. That court said that such an inference "is nowhere supported by the military judge's words. His action in seeking a replacement judge is surely as consistent with his explanation as with Appellant's inference; we see no reason to disregard the judge's explanation." JA at 9.

The CCA also found that the facts of this case stood in stark contrast to *McIlwain*. JA at 9. In that case, the military judge recognized and stated, on the record, that her participation would suggest that she could not be impartial. *McIlwain*, 66 M.J. at 314. She openly acknowledged there was apparent bias with her being detailed to the case. Here, the judge never did so and in fact reiterated several times that there was no appearance of bias. JA at 56, 57, 115. His offer to seek a substitute was soundly based on a desire to help both sides pick members, from a small pool of individuals, who could follow his instructions. It was not motivated by any appearance issues. Therefore, his decision not to recuse himself was not an abuse of his discretion.

Despite professional contacts throughout the Coast Guard judge advocate community and a twenty-one-year-old social interaction with the Appellant, the military judge did not need to recuse himself from the case to maintain impartiality. The Appellant has failed to overcome the high hurdle necessary to warrant relief.

B. Any Alleged Error was Harmless.

Without conceding that the military judge should have recused himself, if this Court disagrees, there was no error in the proceedings. When determining whether a judicial disqualification error requires reversal, this Court shall consider: "(1) the risk of injustice to the parties, (2) the risk that the denial of relief will produce injustice in other cases, and (3) the risk of undermining public confidence in the judicial process." *McIlwain*, 66 M.J. at 315 (citing *Liljeberg v. Health Services Acquisition Corp.,* 486 U.S. 847, 864 (1988)).

The first *Liljeberg* factor weighs heavily against reversal. There was no injustice to the Appellant's case as a result of what the defense at trial consistently called "apparent bias." During the motions practice, the trial defense counsel stated repeatedly that the defense was requesting recusal based solely on the appearance of bias, and that there were no concerns about the judge's actual impartiality. JA at 110, 111, 115, 116, 117, and 121. The Appellant has not pointed to a single ruling, comment, or fact at trial that indicates the military judge demonstrated bias or was prejudiced against the Appellant. The argument that the Appellant was prejudiced by the rulings of a judge that the Appellant himself at trial admitted was actually impartial is without merit.

The second *Liljeberg* factor similarly weighs profoundly against reversal. The military judge's actions indicate a keen awareness of the problems associated with bias and his obligation to fully comply with RCM 902(a). His thorough and diligent approach to the issue, including allowing extensive *voir dire* by both parties and his complete disclosures of past relationships no matter how insignificant, serve as a model for other judges.

Even in a case where the government conceded the appearance of bias, this Court refused to find prejudice under the second *Liljeberg* factor. In *United States v. Butcher*, the military judge attended a party and played tennis with the trial counsel in a case that he was currently presiding over. 56 M.J. at 89. After the government conceded the appearance of bias, this Court still found that the second *Liljeberg* factor weighed against reversal. The majority wrote: "It is not necessary to reverse the results of the present trial in order to ensure that military judges exercise the appropriate degree of discretion in the future." *Id.* at 93. This Court noted that, generally, military judges are keenly aware of their obligations to appear impartial and, despite a clear lack of judgment in the case before it, there was no reason to grant relief to further make that point. *Id.* In the present case, the military judge's interactions with other counsel in the case do not come close to

the familiarity displayed in *Butcher.* Nevertheless, the military judge took appropriate actions to show that he understood the appearance of impartiality and fully explored the issue.

Lastly, there is no risk of undermining the public's confidence in the judicial process by allowing this verdict to stand. Members and not the judge determined the Appellant's guilt and sentence. This case did not involve intimate personal relationships or extensive interaction with any one individual, nor any conduct that had a bearing on the merits of the proceedings. The military judge stated at least three times on the record that none of the prior interactions or relationships would hamper his impartiality, further assuring the public that they could be confident that his motives were pure. There was nothing in the judge's actions that undermined the basic fairness of the judicial process, and therefore reversal is not warranted.

WHEREFORE the United States respectfully requests that this honorable Court affirm the finding and sentence.

Respectfully submitted,

/s/

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(d) because it contains 7810 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in a monospaced typeface using Microsoft Word Version 2007 with CourierPS 12-point typeface.

Date: 01 May 2014

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to the Court on 01 May 2015, and that opposing counsel, Mr. Eugene Fidell and LT Philip Jones, USCG, were copied on that email at efidell@feldesmantucker.com and philip.a.jones@navy.mil, respectively.

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