IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

United States Appellee **v.** Midshipman **Nixon KEAGO** United States Navy Appellant	*Amicus Curiae* Brief Crim. App. Dkt. No. 202100008 **USCA Dkt. No. 23-0021/NA**

Brief of the National Institute of Military Justice in Support of Neither Party

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

I. INTEREST OF AMICUS

The National Institute of Military Justice (NIMJ) is a private non-profit organization, founded in 1991, and dedicated to the fair administration of justice in the armed forces and improved public understanding of military justice. NIMJ's leadership includes former judge advocates, private practitioners, and legal scholars.

II. ISSUE PRESENTED

DID THE MILITARY JUDGE ERR BY DENYING THREE ACTUAL AND IMPLIED BIAS CHALLENGES FOR CAUSE AGAINST THREE MEMBERS?

This brief is limited to the question of the appropriate standard of review for challenges for cause. It does not take a position on the merits of Appellant's case.

III. RELEVANCE OF THE BRIEF

To answer the issue presented, the Court must first decide the standard of review—how much, if any, deference to grant. Currently, the Court categorizes challenges for cause as for either actual bias or implied bias. Actual bias challenges are reviewed for an abuse of discretion. Implied bias challenges are reviewed "pursuant to a standard that is less

deferential than abuse of discretion, but more deferential than de novo review." *United States v. Hennis*, 79 M.J. 370, 385 (C.A.A.F. 2020) (quoting *United States v. Dockery*, 76 M.J. 91, 96 (C.A.A.F. 2017) (cleaned up)). *Amicus* argues that so categorizing the grounds for challenges for cause is not supported by the language of the rule and is neither required nor helpful; federal civilian jurisprudence on challenges for cause is of little assistance in evaluating R.C.M. 912(f) challenges; and the standards promulgated by this Court for reviewing trial court rulings on such challenges for cause are in many instances contrary to the legal community's understanding of standards of review.

IV. Statement of the Case

Amicus accepts Appellant Keago's statement of the case.

V. A Selective History of Challenges for Cause

The common law recognized four classes of challenges for cause: (1) on account of respect for nobility; (2) on account of crime; (3) on account of defect (personal or legal incapacity); and (4) on account of favor or bias. William Winthrop, *Military Law and Precedents* 320 (2d ed. 1920). By 1917, the President, at least for the Army, had reduced that number to two: (1) principal challenges; and (2) challenges for favor.

Manual for Courts-Martial, U.S. Army ¶ 121 (1917 ed.); *see Manual for Courts-Martial, U.S. Army* ¶ 120, n.1 (1921 ed.). In addition, the President ordered that "[c]ourts should be liberal in passing upon challenges." *Manual*, ¶ 128 (1917 ed.).

In 1928, the President abandoned categorizing the grounds for challenges. He simply listed each ground separately. *Manual for Courts-Martial, U.S. Army* ¶ 58*e* (1928 ed.). The so-called liberal-grant mandate remained. *Id.* ¶ 58*f*.

There is no federal civilian equivalent establishing grounds for challenges for cause. The Supreme Court discovered two classes of challenges for cause—actual bias and implied bias—based on an accused's constitutional right to "trial by an impartial jury." *United States v. Wood*, 299 U.S. 123, 133–35 (1936).

After the enactment of the Uniform Code of Military Justice (UCMJ) in 1950, the President issued a new *Manual*. Like its 1928 predecessor, the President did not categorize the grounds for challenges for cause; he simply listed 13 of them. *Manual for Courts-Martial, United States* ¶ 62*f* (1951 ed.). He also retained the liberal-grant mandate. *Id.* ¶ 62*h*(2).

The UCMJ also established a new appellate court system. Articles 66 & 67, UCMJ, 10 U.S.C. §§ 866, 867. In *United States v. Deain*, the granted issue presented the Court of Military Appeals the opportunity to review a challenge for cause based on what was then the 13th ground for challenge: "in the interest of having the trial and subsequent proceedings free from substantial doubt as to legality, fairness, and impartiality." 17 C.M.R. 44 (1954) (quoting ¶ 62*f*(13)). This Court decided that the question of whether bias exists was one of fact, *id.* at 49, which would normally be reviewed for clear error. Nevertheless, the Court cited Iowa and California cases for the proposition that "[t]here must be a clear abuse of discretion in resolving the [challenge] before an appellate tribunal, which lacks the power to reweigh the facts, will reverse a decision." *Id.*

Only one year later, without stating the standard by which it reviewed another challenge based on the same 13th ground, the Court seemed to review the issue *de novo*. *United States v. Zagar*, 18 C.M.R. 34, 38–41 (1955). *See also*, *United States v. Richmond*, 28 C.M.R. 366, 372 (C.M.A. 1960) ("we believe *as a matter of law* there was no disqualification" of the law officer under the 13th ground for challenge (emphasis added)).

In January 1982, the Supreme Court released its opinion in *Smith v. Phillips*. 455 U.S. 209 (1982). Phillips claimed he had been denied due process of law under the Fourteenth Amendment because during his state trial, one of his jurors, Smith, had submitted an application for employment as a major felony investigator in the district attorney's office. The federal district court denied relief on the grounds of actual bias but "imputed bias to Smith because the average man in Smith's position would believe that the verdict of the jury would directly affect the evaluation of his job application." *Id.* at 214 (quotation marks and citations omitted).

The Supreme Court held that Phillips was not entitled to relief. The lack of clarity in the opinion, however, caused Justice O'Connor to write separately, expressing her "view that the opinion does not foreclose the use of 'implied bias' in appropriate circumstances." *Id.* at 221 (Connor, J., concurring).

Two years later, a Supreme Court opinion on challenges for cause created quite a stir. In *McDonough Power Equip., Inc. v. Greenwood*, in two concurring opinions, five justices agreed challenges for implied or inferred bias still existed but three of those justices required a showing of exceptional circumstances for such challenges. 464 U.S. 548, 556 (1984)

(Blackmun, J., joined by Stevens & O'Connor, J.J., concurring); *Id.* at 557 (Brennan, J., joined by Marshall, J., concurring in the judgment).

Thereafter, the circuit courts of appeals could not agree on the standard of review for challenges for cause. *See, e.g.*, *United States v. Kuljko*, 1 F.4th 87, 92 (1st Cir. 2021) ("challenges to the seating of a juror are reviewed for an abuse of discretion," but appearing to review *de novo* the question of implied bias); *United States v. Fulks*, 454 F.3d 410, 433 (4th Cir. 2006) (the district court did not abuse its discretion in denying challenge of juror whose "nondisclosure of her husband's murder was inadvertent"); *United States v. Abreu*, No. 21-60861, 2023 WL 234766, at *1 (5th Cir. Jan. 18, 2023) ("determination of implied bias is an objective legal judgment made as a matter of law" and reviewed *de novo*); *United States v. Russell*, 595 F.3d 633, 641–42 (6th Cir. 2010) (admitting the court had avoided explicitly stating the proper standard of review for implied bias); *United States v. Kvashuk*, 29 F.4th 1077, 1092 (9th Cir.), *cert. denied*, 214 L. Ed. 2d 136, 143 S. Ct. 310 (2022) (reviewing actual bias determinations for an abuse of discretion, but questions of implied bias as mixed questions of law and fact reviewed *de novo*; *Zia Shadows, L.L.C. v. City of Las Cruces*, 829 F.3d

1232, 1243 (10th Cir. 2016) (concluding that implied bias is a question of law to be reviewed *de novo*); *Caterpillar Inc. v. Sturman Indus., Inc.*, 387 F.3d 1358, 1367 (Fed. Cir. 2004) (implied bias is a legal question reviewed *de novo*).

Although the Court of Military Appeals had mentioned in passing the Supreme Court's two categories of challenges for cause, it did not discuss them until *United States v. Harris*, 13 M.J. 288 (C.M.A. 1982). The issue was whether the accused's exercise of a peremptory challenge precluded the possibility of prejudice from the military judge's failure to grant an implied bias challenge. The standard of review for such challenges was not dispositive but took a prominent role in the opinion. One judge determined the failure to grant an implied bias challenge was error as a matter of law, *id.* at 292 (Fletcher, J.); another that the issue of bias is "essentially a question of fact," reviewed for an abuse of discretion, *id.* at 293 (Cook, ,J., concurring in the result);, and the third expressed no opinion on the standard to apply. *Id.* (Everett, C.J., dissenting).

For the most part, the majority of the Court of Military Appeals refused to adopt Judge Fletcher's concept of implied bias challenges, except for in "those situations where there are implications of fifth or sixth amendment violations."

United States v. Porter, 17 M.J. 377, 380 (C.M.A. 1984) (citing *Smith v. Phillips*, 455 U.S. at 223 (O'Connor, J., concurring)).

In 1984, pursuant to authority granted under Article 36(a), UCMJ, the President prescribed Rules for Courts-Martial to replace the narrative paragraphs of the previous *Manuals*. Executive Order 12473 (13 April 1984). The President now recognizes 14 grounds for challenges for cause:

> (f) Challenges and removal for cause.
>
> (1) Grounds. A member shall be excused for cause whenever it appears that the member:
>
> (A) Is not competent to serve as a member under Article 25(a), (b), or (c);
>
> (B) Has not been properly detailed as a member of the court-martial;
>
> (C) Is an accuser as to any offense charged;
>
> (D) Will be a witness in the court-martial;
>
> (E) Has acted as counsel for any party as to any offense charged;
>
> (F) Has been a preliminary hearing officer as to any offense charged;
>
> (G) Has acted in the same case as convening authority or as the legal officer or staff judge advocate to the convening authority;
>
> (H) Will act in the same case as reviewing authority or as the legal officer or staff judge advocate to the reviewing authority;
>
> (I) Has forwarded charges in the case with a personal recommendation as to disposition;

> (J) Upon a rehearing or new or other trial of the case, was a member of the court-martial which heard the case before;
>
> (K) Is junior to the accused in grade or rank, unless it is established that this could not be avoided;
>
> (L) Is in arrest or confinement;
>
> (M) Has formed or expressed a definite opinion as to the guilt or innocence of the accused as to any offense charged;
>
> (N) Should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality.

R.C.M. 912.

Absent from the current rules is the instruction in ¶ 62*h*(2) of the previous *Manuals* to grant challenges liberally. The Drafters of the Rules noted the absence but asserted the "deletion is not intended to change the policy expressed in that statement." *Manual for Courts-Martial*, United States, Analysis of the Rules for Courts-Martial app. 21 at A21-62 (2016 ed.). This Court has continued to enforce the liberal-grant mandate. *See, e.g.*, *United States v. Peters*, 74 M.J. 31, 32 (C.A.A.F. 2015) (reversing conviction because "military judge abused his discretion by not applying the liberal grant mandate").

Nine years after the President prescribed the new rules, focus of the Court's majority shifted. In *United States v. White*, the Court held that, as military judges were required

to apply the liberal-grant mandate, appellate courts were not directly reviewing the decision on the challenge but whether the military judge clearly abused his discretion in applying the liberal-grant mandate. 36 M.J. 284, 287 (C.M.A. 1993).

In *United States v. Daulton*, the five-member Court of Appeals for the Armed Forces ruled that the 14th ground for challenges under R.C.M. 912(f)(1)—"in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality" the member should not sit—includes both actual bias and implied bias. 45 M.J. 212, 217 (C.A.A.F. 1996). The military judge's decision on actual bias is "essentially one of credibility," *id.* (citation omitted), for which the military judge is entitled to great deference. Challenges for implied bias are reviewed under an objective standard through the eyes of the public: Would "most people in the same position be prejudiced"? *Id.* (citation omitted).

> Since implied bias is an objective standard, a military judge's ruling on implied bias, while not reviewed de novo, is afforded less deference than a ruling on actual bias. However, deference is warranted only when the military judge indicates on the record an accurate understanding of the law and its application to the relevant facts.

United States v. Briggs, 64 M.J. 285, 286–87 (C.A.A.F. 2007) (citations omitted).

Thus, although the President has not described them in such terms, this Court adopted the Supreme Court's categorization of grounds for challenges for cause. It squeezed these 14 grounds listed in R.C.M. 912(f)(1) into two categories: actual bias and implied bias.

Currently, this Court recognizes challenges for cause for both actual bias and implied bias.

> Actual bias is defined as bias in fact. It is the existence of a state of mind that leads to an inference that the person will not act with entire impartiality. Actual bias is personal bias which will not yield to the military judge's instructions and the evidence presented at trial.

Hennis, 79 M.J. at 384 (quotation marks and citations omitted). As "such a finding is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province," the Court reviews them for an abuse of discretion, even though "the legal question of actual bias ... approximates a factual question." *Id.* (cleaned up).

"Implied bias, on the other hand, is bias conclusively presumed as a matter of law. It is bias attributable in law to the prospective juror regardless of actual partiality." *Id.* at 385 (cleaned up). This Court reviews"implied bias challenges pursuant to a standard that is less deferential than abuse of

discretion, but more deferential than de novo review." *Id.* (cleaned up).

VI. STANDARDS OF REVIEW

"[A]ppellate review standards are probably most appropriately analyzed as legislative and common law allocations of decisionmaking authority between trial and appellate judges." Harry T. Edwards & Linda A. Elliott, *Federal Courts Standards of Review* 4 (2007). Appellate courts review preserved issues of law *de novo*, a trial judge's findings of historical fact for clear error, and the judge's discretionary decisions for an abuse of discretion. *Id.* at 5. "The actual degree of scrutiny with which any particular discretionary decision is reviewed depends upon the extent to which a judge's decisionmaking authority is circumscribed by the Constitution, statutes, rules, or case precedent." *Id.*

However, "[w]hen a legal principle is only abstractly defined, it serves not as a standard against which the historical facts can be measured, but rather as something more akin to a general guide for the exercise of considered judgment." *Id.* at 7–8. In such mixed cases of law and fact, the court "must determine whether the question is best left largely to the trial court through deferential review or is more appropriate-

ly decided by the appellate bench pursuant to *de novo* review." *Id.* at 8.

The Supreme Court "favors deferential review when it appears the district court is better positioned than the appellate court to decide the issue in question" or when "probing appellate scrutiny will not contribute to the clarity of legal doctrine." *Id.* at 13 (quoting *Salve Regina Coll. v. Russell*, 499 U.S. 225, 233 (1991)).

VII. ARGUMENT

A. Categorizing the 14 grounds prescribed in R.C.M. 912(f) as either actual bias or implied bias is not supported by the language of the rule and is not helpful.

The President abandoned categorizing the grounds for challenges for cause in 1928. The grounds for challenges speak for themselves. Categorizing them as challenges for actual bias or implied bias adds nothing to the analysis of the proper standard of review to apply. A close reading of the grounds demonstrates that some of the grounds are not easily categorized and doing so merely adds an unhelpful layer to the process of resolving the issue.

B. Federal court jurisprudence on challenges for cause, restricted to constitutional violations, is not appropriate for evaluating challenges under R.C.M. 912(f).

"This Court has held that an accused 'has a constitutional right, as well as a regulatory right, to a fair and impartial panel.'" *United States v. Strand*, 59 M.J. 455, 458 (C.A.A.F. 2004) (quoting *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F.2001)). The President is authorized to prescribe procedural rules for courts-martial, "which so far as he considers practicable, apply the principles of law … generally recognized in the trial of criminal cases in the United States district courts …."Article 36(a), UCMJ. The President could have adopted the federal jurisprudence that challenges for cause were restricted to constitutional challenges based on an accused's rights to due process and to a fair trial by an impartial jury. He chose not to do so. Instead, he prescribed specific grounds for challenges without the artificial labels of "actual bias" and "implied bias." Therefore, this Court need not follow the restrictive federal court jurisprudence on challenges for cause.

C. Each ground for challenge under R.C.M. 912(f) should be evaluated separately to determine the appropriate standard of review to apply.

As noted in Part VI, *supra*, the legal community has arrived at a general consensus on how appellate courts should determine the appropriate standard of review to apply. It is by carefully parsing the statute or rule to determine whether the issue is one of fact, law, or a combination of the two. This Court's jurisprudence is replete with challenge for cause cases in which it correctly diagnosed the nature of the bias as a question of fact or law but then failed to apply the standard of review recognized as appropriate to that determination. *See, e.g.*, *Hennis*, 79 M.J. at 384. Each ground for challenge should be evaluated separately, applying the standard of review appropriate for the amount of deference granted a military judge in the particular instance.

D. Application of the standards of review to R.C.M. 912(f)

(1) After reviewing the 14 grounds for challenges in R.C.M. 912(f)(1), *Amicus* concludes that subparagraphs (B)–(J) and (L)–(M) are questions of fact for which the military judge's decision is entitled to great deference. An appellate court should not reverse the military judge's decision except

for clear error. Subparagraphs (A), (K), and (N) are more complicated and require deeper analysis.

(2) Subparagraph (A) requires the excusal if it appears that the member is not competent to serve under Article 25(a), (b), or (C). Article 25 describes who may serve on courts-martial. The question of whether a member is a commissioned officer or an enlisted member is a question of fact, so the military judge's decision should be reviewed for clear error. But Article 25(c)(4) provides that "[i]f because of physical conditions or military exigencies, a sufficient number of eligible officers or enlisted members … are not available … the trial may nevertheless be held." Whether the officers or enlisted personal are "not available" due to physical conditions or military exigencies appears to be a mixed question of law and fact—an issue "for the exercise of considered judgment." The military judge is best positioned to make this judgment and it is doubtful that probing judicial scrutiny will contribute to the clarity of the issue. Therefore, an appellate court should review the military judge's ruling for an abuse of discretion.

(3) Subparagraph (K) requires that no member should be junior in rank to the accused unless it "could be avoided." This appears to be another issue that is best decided by the

military judge. Appellate courts should grant the military judge's ruling deference and review for an abuse of discretion.

(4) Subparagraph (N) requires the excusal of a member who should not sit "in the interest of having the court-martial free from substantial doubt as to its legality, fairness, and impartiality." In the past, this Court has considered R.C.M. 912(f)(1)(N) challenges as ones of implied bias, reviewed objectively—"when most people in the same position would be prejudiced." *United States v. Schlamer*, 52 M.J. 80, 93 (C.A.A.F. 1999) (quoting *United States v. Daulton*, 45 MJ 212, 217 (1996)); *see Hennis*, 79 M.J. at 385.

Under the standards of review noted in Part VII, *supra*, this is a classic mixed question of law and fact—governed by abstract principals with no guidelines. Unlike for subparagraphs (A) and (K) of the rule, however, an appellate court is most likely in a better position to determine how the public would view the appearance of the member's of impartiality. Probing appellate scrutiny will also contribute to the clarity and conformity of decisions on this issue. Therefore, appellate courts should review the military judge's rulings on challenges under this subparagraph *de novo*.

Amicus agrees with this Court's previous decisions that whether a challenge under R.C.M. 912(f)(1)N) should be granted should be subject to an objective test, but disagrees as to its substance. The language of the rule suggests courts should be considering whether a reasonable person understanding all the circumstances would have substantial *doubt* as to the member's impartiality, not that the reasonable person would consider most members in the same position prejudiced.

VIII. This Honorable Court is not bound by the parties' understanding of the applicable law.

Neither of the parties contests the proper standards for reviewing the military judge's rulings on challenges for cause. Nevertheless, as the Supreme Court stated: "the proper administration of the criminal law cannot be left merely to the stipulation of parties." *Young v. United States*, 315 U.S. 257, 259 (1942) (citations omitted).

IX. The doctrine of stare decisis does not inhibit the ability of this Court to overrule precedent in this case.

Under the doctrine of stare decisis, "special justification" must be shown for the Court to overrule its prior precedents. *United States v. Blanks*, 77 M.J. 239, 242 (C.A.A.F. 2018). The Court determines whether "special justification" was es-

tablished by analyzing four factors: "whether the prior decision is unworkable or poorly reasoned; any intervening events; the reasonable expectations of servicemembers; and the risk of undermining public confidence in the law." *Id.* (quoting *United States v. Quick*, 74 M.J. 332, 336 (C.A.A.F. 2015)); *accord United States v. Dinger*, 77 M.J. 447, 452 (C.A.A.F. 2018). "We have overruled prior decisions where the necessity and propriety of doing so has been established." *Dinger*, 77 M.J. at 452 (quoting *Hurst v. Florida*, 577 U.S. 92, 102 (2016) (cleaned up)). This is such a case.

The current interpretation of R.C.M. 912 squeezes the President's 14 grounds for challenge into two general categories when the President rejected such an approach almost 100 years ago. It appears the Court has done so to try to conform military challenges for cause with those in the federal courts. But as shown above, doing so is neither necessary nor helpful. The President has established a rules-based regimen not subject to the restrictions for establishing a constitutional violation.

There are no intervening events.

The reasonable expectation of servicememembers is that they will be treated fairly. Adoption of the proposed changes to deciding and reviewing challenges for cause employing the

standards of review recognized by the legal community will support those expectations.

Finally, the proposed changes bear no risk of undermining public confidence in the law. In fact, it should bolster it by ensuring the public that a military accused will have a fair and impartial trial. Under these circumstances, the doctrine of *stare decisis* does not inhibit this Court from adopting the changes proposed in this brief.

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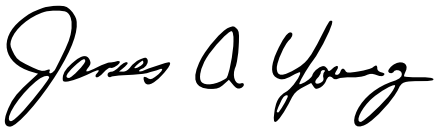
CERTIFICATE OF COMPLIANCE

I certify that this *amicus* brief complies with the maximum length authorized by Rule 26(d) as it contains (less than 7,000 words not including front matter, the certificate of compliance, and the certificate of filing and service. This brief complies with the formatting, typeface, and typestyle requirements of Rule 37, as it was prepared using Century Schoolbook 14-point font.



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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was transmitted by electronic means on 3 May 2023 to the Clerk of the Court; Government counsel (tyler.w.blair.mil@us.navy.mil), and Appellant's counsel (megan.e.horst2.mil@us.navy.mil).

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