No.

In the Supreme Court of the United States

MICHAEL E. SULLIVAN,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

Article 25(d)(2) of the Uniform Code of Military Justice requires convening authorities to detail to court-martial panels (juries) those officers who are, in their opinion, "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."

Is it structural error for a convening authority to violate that requirement in the case of a very senior officer by excluding *ex ante* all admirals, who by statute must be the "best qualified"? If not, may the violation be deemed harmless simply because the officers who *did* serve seemed to be conscientious?

II

Must a judge recuse himself when he is in competition for military promotion with the defendant and all of the jurors and both the prosecution and the defense request recusal?

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PETITION FOR A WRIT OF CERTIORARI

Michael E. Sullivan respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces ("CAAF").

OPINIONS BELOW

The CAAF opinion, App. 1a, is reported at 74 M.J. 448. The judgment is reproduced at App. 27a. The unreported opinion of the United States Coast Guard Court of Criminal Appeals ("the CCA") is reproduced at App. 28a.

JURISDICTION

The judgment below was entered on August 19, 2015. This Court's jurisdiction rests on 28 U.S.C. § 1259(3).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The governing statute is Article 25(d)(2) of the Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. § 825(d)(2), App. 54a. The implementing *Manual for Courts-Martial* provision is Rule for Courts-Martial ("R.C.M.") 502(a)(1).

R.C.M. 902(a), App. 56a, governs the recusal of military judges.

STATEMENT

Petitioner, a senior captain in the U.S. Coast Guard, was convicted of cocaine use following a random urinalysis. He was tried by a general court-martial – the highest level of military court – and sentenced to a fine and a reprimand. The officer who

picked the jury illegally excluded all admirals from the venire. The judge and jurors were all in competition with Captain Sullivan for promotion. The judge also was burdened by a host of past relationships that impelled both the prosecution and the defense to seek his recusal. The case involves fundamental issues that are both important and recurring.

A. Legal background

There are three kinds of court-martial. In ascending order of punishment powers, these are summary, special, and general courts-martial. *See generally Weiss v. United States*, 510 U.S. 163, 166-67 (1994). In special and general courts-martial, guilt and sentence are decided, at the accused's option, either by a military judge or a panel. The panel, composed of "members," is the military equivalent of the jury in a civilian trial. Unlike civilian jurors, however, court-martial members are not selected at random. Nor does the UCMJ require that the pool from which they are chosen be a fair cross-section of the community. Instead, they are selected and "detailed" by the convening authority, a military commander who is authorized to bring courts-martial into existence as the need arises.

Article 25(d)(2) governs convening authorities' selection of members. It provides in pertinent part:

> 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. . . .

"When it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade." Art. 25(d)(1), UCMJ, 10 U.S.C. § 825(d)(1). This means that, in addition to meeting the "best qualified" standard, the members must either be serving in a higher pay grade than the accused (*i.e.*, the defendant) or, if they are in the same pay grade, have earlier dates of rank.

This case involves a Coast Guard general court-martial tried before members. The accused was a captain, which is the equivalent rank to colonel in the Army, Marine Corps and Air Force. It is the rank immediately below rear admiral (lower half) (brigadier general) (one star). Admirals (four stars), vice admirals (three stars), and rear admirals (one or two stars) rank above captains. The only active duty Coast Guard personnel who were eligible to serve on Captain Sullivan's court-martial were the 60-70 captains senior to him and the 41 rear, vice and full admirals.

Coast Guard officers are competitively selected by promotion boards that apply a "best qualified" standard. 14 U.S.C. § 259(a). Promotion to rear admiral (lower half) is extremely competitive because, although captains may constitute up to 6% of the officers corps, rear admirals (lower half) may constitute only 0.375%. 14 U.S.C. § 42(b)(1).

In addition to the Coast Guard's 41 active duty admirals, reserve and retired Coast Guard admirals called to active duty as well as admirals and generals of the other armed forces could have been detailed to the panel. *See* R.C.M. 502 (Discussion).

Coast Guard military judges, like other Coast Guard judge advocates, compete for promotion against all eligible officers in their pay grade. Army, Navy and Air Force military judges, in contrast, compete for promotion only with other judge advocates. Uniformed Coast Guard lawyers do not form a separate "competitive community" for promotion purposes. *Cf.* 10 U.S.C. § 612(a)(2).

The President has directed in the *Manual for Courts-Martial* that "a military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned." R.C.M. 902(a). A military judge may preside over cases in which the accused is a member of another armed force. R.C.M. 201(e)(4).

B. Factual background

Captain Sullivan was, at the time of trial, an active duty career Coast Guard officer serving ashore in Alameda, California. In a random urinalysis, he tested positive for cocaine, slightly above the established cutoff level. Subsequent hair test results also revealed a very low level. He denied that he had ever used cocaine.

At his request, his wife's and daughters' hair was also tested for cocaine. His wife's results were positive at a very high level. One daughter's test was, like his, very marginal; the other's was negative. Eventually, his wife admitted – and, without a grant of immunity, testified at trial – that she was a cocaine user and had routinely used and kept her cocaine in the family home.

After eliminating any other possibility, Captain Sullivan realized that he must have innocently ingested cocaine in the house.

The convening authority referred the case to a general court-martial and selected the members from a list furnished to him by subordinates. That list included captains who were senior in precedence to Captain Sullivan, and admirals. Without making any individualized inquiry into their actual availability to serve, the convening authority decided not to include any officer above the grade of captain, thus disqualifying nearly 40% -- indeed, the best qualified 40% -- of the eligible officers. He did so because, based on his own experience, flag officers are very busy people, and because he was about to assume a new billet in Washington in which he would be responsible for their future assignments.

At the time of trial, Captain Sullivan, the judge, and all members of the panel were eligible for competitive promotion to rear admiral (lower half). The judge had had social and duty contacts with virtually everyone involved in the case. App. 23a. Many of the communications between the convening authority's staff and the members were on a first-name basis.

Both the prosecution and the defense asked the military judge to recuse himself. He offered to see if he could find a substitute from another branch of the service, since he was at the time the Coast Guard's sole general court-martial judge, but only on two conditions: (1) that the trial date he set would not be altered, *see* App. 25a n.2, and (2) that the substitute

would be a senior captain.[1] Apparently unable to find a substitute who would both agree to the first condition and meet the second, the military judge refused to recuse himself, despite the parties' requests.

C. Proceedings below

On June 17, 2009, Captain Sullivan was convicted of one specification of cocaine use following a trial before a Coast Guard captain serving as a military judge and other Coast Guard captains serving as members. The members acquitted him of the only other charge: conduct unbecoming an officer. He was sentenced to a reprimand and a $5,000 fine.

Captain Sullivan's sentence was too low to entitle him to appellate review as of right, art. 66(b)(1), UCMJ, 10 U.S.C. § 866(b)(1),[2] but he persuaded the

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[1] The first condition was illegal because it would have limited the discretion of the replacement judge. Art. 51(b), UCMJ, 10 U.S.C. § 851(b) (military judge may change ruling on "all interlocutory questions" "at any time during the trial"); 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 second condition was improper because there is no requirement that a military judge be in or above the accused's pay grade. The conditions would have precluded or deterred eligible judges in other armed forces from trying the case.

[2] *See* Steve Vladeck, *The Alarming Gaps in Military Appellate Review*, JUST SECURITY, Aug. 26, 2015, *available at*

acting Judge Advocate General of the Coast Guard to exercise his power under art. 69(d), UCMJ, 10 U.S.C. § 869(d), to send the case to the CCA for review "with respect to matters of law." Art. 69(e) UCMJ, 10 U.S.C. § 869(e). That court affirmed the findings and sentence.

Captain Sullivan raised a variety of issues at the CCA. As to the two presented in this petition, the CCA held, first, that the convening authority had violated Article 25(d)(2) but the violation was harmless, App. 33a, and second, that the military judge did not abuse his discretion when he declined to recuse himself. App. 42a.

CAAF limited its grant of review of those two issues. 2015 CAAF LEXIS 215 (C.A.A.F. 2014); *see* App 2a. On the first, it held that although the convening authority "deviated from the Article 25, UCMJ, criteria by categorically excluding flag officers from the venire," there was no appearance of unfairness because those who sat were "fully qualified," there was no evidence that they "failed to fully, carefully, and appropriately consider" the case, the convening authority was not trying to "stack" the panel, but rather "relied on his experience in concluding that the flag officers would not be available to actually" serve. App. 6a.

CAAF held that the government had carried its burden of showing that categorical exclusion was harmless in light of the convening authority's innocent motivation. In addition, it asserted that those who served met the statutory requirements and their

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https://www.justsecurity.org/25625/alarming-gaps-military-appellate-review/.

"actions in this case demonstrate that they were fair and unbiased" because they (1) said they would be during *voir dire*; (2) participated actively in the trial by posing unbiased questions; (3) deliberated over three days; (4) acquitted on one of the charges; and (5) imposed a lenient sentence. App. 7a.

CAAF dismissed as "speculative" Captain Sullivan's objection that the members and he were in the same promotion pool "because the trial record does not reveal that the members acted with any improper motive." App. 7a n.5. CAAF made no reference to his argument that a violation of Article 25(d)(2) is structural error (and therefore not tested for prejudice).

On the recusal issue, CAAF split 4-1. The majority concluded that the military judge "acted within his discretion in finding that his various relations with court-martial participants did not constitute a basis for disqualification. App. 20a. The majority thought the "potential promotion conflict" between the military judge and Captain Sullivan was "illusory" and "did not create an appearance of bias." App. 18a. The majority "caution[ed] military judges to be especially circumspect in deciding whether to disqualify themselves" when both parties seek recusal, but without further explaining why found that there was not "an adequate basis to conclude that the military judge abused his discretion when he decided not to disqualify himself." App. 19a.

Chief Judge Erdmann dissented as to the recusal issue, noting that even in a small jurisdiction like the Coast Guard, which at the time had only one general court-martial judge, "'[a]n accused has a constitutional right to an impartial judge.'" *United States v.*

Martinez, 70 M.J. 154, 157 (C.A.A.F. 2011)." App. 22a. He wrote:

> The military judge in this case had a personal or professional relationship with nearly everyone involved in the court-martial process, to include the Staff Judge Advocate who advised the convening authority, the Article 32 hearing officer, the trial counsel, the assistant trial counsel, the defense counsel, three defense witnesses, the Judge Advocate General (TJAG) (his supervisor and a potential witness), the panel members, and the accused himself. Additionally, the military judge found himself in the same promotion pool as the accused. At some point, too much is simply too much.

App. 20a-21a. After reviewing the facts, Chief Judge Erdmann concluded:

> It is the third *Liljeberg* [*v. Health Svcs. Acquisition Corp.*, 486 U.S. 847 (1988)] factor that is relevant to this inquiry. Is there a risk of undermining the public's confidence in the military justice system where the judge knows almost everyone in the proceeding, is in the same promotion pool as the accused, and has contacted his boss, who was a potential witness, to give him a "heads-up"? I believe there is. Adding to the lack of public confidence is that the matter could have been resolved by making a formal request for a military judge to the Judge Advocate General of a sister service. *See* Rule for Courts-Martial 503(b)(3). The failure to remedy the issue when it was relatively easy to do so

> could only create additional doubt in the public's mind.[3]
>
> For these reasons I believe that a reasonable person, knowing all the circumstances, might reasonably question the military judge's impartiality. Consequently, the military judge's failure to recuse himself undermined public confidence in the integrity of the military justice system.

REASONS FOR GRANTING THE PETITION

Because court-martial appeals are centralized at CAAF, the decision below sets a national rule for courts-martial. Although circuit splits cannot arise in such cases, this petition fully satisfies the Court's other standards for a grant of certiorari. The issues are important, recurring, and implicate public confidence in the administration of justice. The case is a proper vehicle for their resolution.

A. **The questions presented are important**

Few questions are as central to the administration of justice as the proper composition of the jury and the impartiality of the judge. Both are directly at stake. A judge in a criminal case must be independent and impartial, and must not be burdened by the

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[3] Another way of looking at the issue is to consider whether a military judge in another service, without the size constraints of the Coast Guard, would have recused him/herself under similar circumstances. [Footnote renumbered from the original.]

kind of web of relationships in which the Coast Guard's judge found himself enmeshed. For a judge to be competing with the defendant in a criminal case for promotion to a limited number of more senior positions with their common employer strikes at the heart of the judicial process. A judge should neither have, nor appear to have, an interest in convicting the defendant. *Tumey v. Ohio*, 273 U.S. 510 (1927). That fatal defect is only aggravated when, in addition, *the jurors* also are competing with the defendant for promotion.

Equally important is CAAF's use of a misguided harmless error analysis in connection with the violation of Article 25(d)(2). There is no way to test such an error for harmlessness, as the decision below itself makes clear, since it relies on factors that are clearly without probative value as to whether the violation was harmless. That the members asked many questions, took their time, acquitted on one charge, and did not "throw the book" at Captain Sullivan, with whom they were in competition for promotion, when it came time to adjudge a sentence says nothing whatever about what would have happened had those who were indeed "best qualified" – the admirals – not been excluded *ex ante* and *en masse* from the process.

The UCMJ's harmless-error provision states: "A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." Art. 59(a), UCMJ, 10 U.S.C. § 859(a).

Article 25(d)(2) is not some mere technicality.[4] It confers a substantial right *in itself*. Denial of that right *is* material prejudice. It is no answer to say that the trial was otherwise very nice.

Article 25(d)(2) violations are a classic case for the application of structural error, *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991), as we argued below, because they defy analysis by harmless error standards. Having refused to apply structural error to the Article 25(d)(2) violation in *United States v. Bartlett*, 66 M.J. 426, 430 (C.A.A.F. 2008), CAAF's decision ignores Captain Sullivan's structural error argument, and instead proceeds to find that the government had met its burden of showing harmlessness. We explain in Point C *infra* why that conclusion was mistaken.

The errors complained of in this petition are fundamental and profoundly disturbing. The consequences go far beyond simply whether this or any other particular case or set of cases has been tried in compliance with the statute: having abandoned conscription following the Vietnam War, our national

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[4] Requiring that court-martial members be "best qualified" is central to the jury substitute Congress fashioned for military personnel. Indeed, the sharp contrast between the jury randomly selected "from a fair cross section of the community" mandated by the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861, and the blue-ribbon "best qualified" members explicitly required by the UCMJ provides strong confirmation that Article 25(d)(2) confers a substantial right.

defense effort relies on the abiding confidence of potential recruits that they will be treated fairly and in keeping with contemporary American standards of justice. Similarly, the retention of personnel who are already in the armed forces cannot be taken as a given: they too must be confident that they will be treated fairly and afforded the basic protections, *mutatis mutandis*, that we associate with the administration of criminal justice.

Congress in 1950 labored to create a system that, viewed as an organic whole, reasonably approximated civilian standards. As a counterweight to the numerous respects that, viewed in isolation, fell below those standards, the UCMJ conferred *other* rights that exceeded those standards. For example, it conferred rights to defense counsel without regard to indigence.

On the other side of the ledger, Article 25(d)(2) does not replicate civilian jury-selection criteria or processes, and vests critical powers in officials who, because of their responsibility for ensuring good order and discipline, cannot be said to be impartial in the way a civilian jury commissioner is impartial.

The choices Congress made in designing a military jury system make it critical that the protection afforded by the Article 25(d)(2) criteria be scrupulously respected and not thwarted by misapplication of the rule of harmless error.

B. The first question presented is recurring

Described by the National Institute of Military Justice's Commission on the 50th Anniversary of the Uniform Code of Military Justice[5] as "an invitation to mischief," Article 25 – especially Article 25(d)(2) – has proven to be a recurring source of error that CAAF has been unable to stem. Despite numerous appellate decisions, convening authorities continue to exclude whole categories of personnel from consideration for service as members based on their rank – a factor that is not included among the six set forth in the statute. *United States v. Greene*, 20 U.S.C.M.A. 232, 238, 43 C.M.R. 72, 78 (1970); *see also United States v. Daigle*, 23 U.S.C.M.A. 516, 517, 1 M.J. 139, 50 C.M.R. 655 (1975). Article 25 implies all ranks and grades are eligible for appointment. *United States v. Crawford*, 15 U.S.C.M.A. 31, 36, 35 C.M.R. 3, 8 (1964) (2-1 decision) (Quinn, C.J.).

Commands have made across-the-board judgments to exclude junior enlisted personnel. *E.g., United States v. Kirkland*, 53 M.J. 22 (C.A.A.F. 2000) (Air Force; excluding personnel below master sergeant (E-7)). Similarly, they have limited their consideration of candidates for service to officers below a certain pay grade. In some cases, the convening authority (or subordinate commands that submit nominees) may exclude personnel at both ends of the pay table. *E.g., United States v. Ward*, 74 M.J. 225 (C.A.A.F. 2015) (Navy; pool limited to personnel be-

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[5] The Cox Commission's 2001 report is available at www.loc.gov/rr/frd/Military_Law/pdf/Cox-Commission-Report-2001.pdf.

tween chief petty officer (E-7) and commander (O-5); *United States v. Thompson*, 2015 CCA LEXIS 345 (N-M. Ct. Crim. App. 2015) (same); *United States v. Hoyes*, 2015 CCA LEXIS 339 (N-M. Ct. Crim. App. 2015) (same); *United States v. Roland,* 50 M.J. 66 (C.A.A.F. 1999) (Air Force; pool limited to personnel between staff sergeant (E-5) and colonel (O-6)).

Captain Sullivan's case of course involves a high-end exclusion, but analytically, it stands on the same footing as low-end exclusions. Both violate the statute. As the cases indicate, moreover, this illegal practice occurs, with rank parameters that vary for no apparent reason from command to command, throughout the armed forces. *See generally* 2 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 15-33.00 (4th ed. 2015) (collecting cases).[6]

C. The decision below renders illusory the important protection Congress conferred on military personnel when it enacted Article 25(d)(2)

Assuming CAAF was correct not to treat Article 25(d)(2) exclusions-by-rank as structural error, the harmlessness jurisprudence to which it clings is so skewed that it renders illusory the statute's central provision and calls for correction by this Court. CAAF's approach sets the government's bar for showing harmlessness so low that it is no bar at all:

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[6] Captain Sullivan has never argued – and does not contend here – that there must be admirals on court-martial panels. They simply cannot be excluded *ex ante* without any investigation into their actual availability.

it will invariably be met, unless this Court intervenes.

CAAF's failure has two aspects. First, its cases focus on a host of extraneous considerations to show that the convening authority on some level deserves a pass. Thus, it looks to whether the convening authority was among the authorized convening authorities, was properly advised of the statutory factors, personally decided who should sit on the panel, acted out of an improper motive such as stacking the panel to the accused's detriment, and the panel as ultimately constituted was "well-balanced across gender, racial, staff, command and branch lines." *See Bartlett, supra*, 66 M.J. at 431. Passing over the fact that there is no basis for either a "good faith exception" to Article 25(d)(2) or a balance requirement, none of the cited considerations are pertinent to whether those who were selected were "best qualified" in light of the criteria enumerated by Congress.

CAAF also claimed to look at whether the members "all met the criteria" in Article 25. *Id*. On its face, this seems responsive, except that CAAF disregards the overarching "best qualified" standard. Congress did not require convening authorities to select merely those they deemed "qualified"; it insisted that members be those deemed "best qualified." The decision below lets the cat out of the bag when it observes that the convening authority "provided [Captain Sullivan] with a venire of fellow senior captains who were *fully qualified* to sit on a court-martial panel." App. 6a (emphasis added). CAAF was not at liberty to disregard the word "best." *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883). A person can certainly display traits such as those Congress pre-

scribed, but it is quite another matter to determine that, in a necessarily comparative judgment, that individual is "best qualified" with respect to those traits.

The second respect in which CAAF's decision (and the precedents on which it rests) is flawed is it willingness to pile up a variety of considerations with a view to showing that a rank-exclusion violation of Article 25(d)(2) is harmless. CAAF pointed to five factors as proof that the members who sat were "fair and unbiased":

> [1] the fact that the members stated that they would be impartial during *voir dire*; [2] they were active participants throughout the trial who posed unbiased questions during the course of the trial; [3] they deliberated over the course of three days before rendering a verdict, [4] which included an acquittal of one charge; and [5] they imposed a lenient sentence.

App. 7a (numbering added). The sheer number suggests a certain desperation in the effort to find harmlessness, as does the inclusion of self-serving claims on *voir dire* to be impartial.

In any event, none of the factors cited below go to the question the court needed to address: was the violation of Article 25(d)(2) harmless? No one will ever know what questions a panel from which admirals – by law the best of the Coast Guard's officer corps – had not been excluded would have asked; how long they would have deliberated; whether they would have acquitted on both charges, rather than just one; or whether they would have concluded that some

other sentence, including one to "no punishment" (which the UCMJ permits, R.C.M. 1002), was warranted.

In *Ward*, decided only a few months before Captain Sullivan's case, CAAF upheld yet another violation of Article 25(d)(2) on harmlessness grounds. It observed in a footnote:

> This court recognizes that, under the current state of the law, even if an appellant establishes a violation of Article 25, UCMJ, there exists no remedy for that violation if the government shows it was harmless. We note this situation to alert the Joint Service Committee on Military Justice,[7] in the event it may wish to consider a recommendation [*sic*; presumably should read "recommending"] to the President a procedure by which the requirements of Article 25, UCMJ, may be enforced in the absence of prejudice.

74 M.J. at 229 n.5 (footnote added).

It is comforting to know that the judges of the court below on some level have recognized that there is a problem lurking in the "anything goes" harmless error jurisprudence they have fashioned for Article 25(d)(2) violations. It's more than a lurking problem: the case law turns the "best qualified" clause into a dead letter. The court had the opportunity to remedy that problem in this case (as well as in *Ward*). Nothing in the *Manual for Courts-Martial* dictates the easy road to harmlessness CAAF has paved for the government, and we do not see why (or, for that mat-

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[7] *See* 32 C.F.R. Pt. 152 (2015).

ter, how) the President can fix what CAAF broke when it gave the government a free pass for exclusion-by-rank violations of Article 25(d)(2).

D. The decision below undermines public confidence in the integrity of the judicial process

Chief Judge Erdmann's dissent with respect to the second Question Presented is unanswerable. The circumstances he outlined plainly undermine public confidence in the integrity of the judicial process in the military justice system and would never be tolerated in a civilian court. The majority's contrary conclusion cannot be reconciled with *Liljeberg*, 486 U.S. at 858 n.7, which it cites only in connection with the military judge's web of personal and professional relationships, App. 14a, but not, significantly, in connection with his competition with Captain Sullivan for promotion to flag grade. The judge and Captain Sullivan (as well as all of the members) were on the same "single active duty promotion list," 14 U.S.C. § 41a(a), and hence were in competition for a coveted promotion for which only very, very few are selected. None of them ultimately got picked, but that they were in competition could not be clearer, and that is fatal.[8]

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[8] The military judge insisted that he wasn't really in competition unless the Coast Guard happened to need another lawyer admiral. *See* App. 18a, 38a-39a. His point – a transparent make-weight – was not well-taken: the Coast Guard has only one flag billet that requires a lawyer (the Judge Advocate General), yet at the time of trial five of its scores of uniformed lawyers either held or had been selected for flag rank. The same is true today.

The Coast Guard is a small service. Still, Congress has deemed it best to allow it to maintain its own courts and trial and appellate benches. Indeed, considering its size, it has cast a surprisingly long shadow over the Court's military justice jurisprudence since the certiorari jurisdiction was expanded to cover CAAF cases. *See Solorio v. United States*, 483 U.S. 435 (1987); *Weiss v. United States, supra*; *Ryder v. United States*, 515 U.S. 177 (1995); *Edmond v. United States*, 520 U.S. 651 (1997). Nonetheless, the Coast Guard must live by – and be held to – the same standards that apply to the larger armed forces. After all, the Uniform Code of Military Justice is supposed to be *uniform*. As Chief Judge Erdmann noted, "[a]nother way of looking at the issue is to consider whether a military judge in another service, without the size constraints of the Coast Guard, would have recused him/herself under similar circumstances." App. 26a n.3. That question answers itself.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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November 2015

Appendix A

UNITED STATES, Appellee

v.

Michael E. SULLIVAN, Captain
U.S. Coast Guard, Appellant

No. 15-0186
Crim. App. No. 001-69-13

United States Court of Appeals for the Armed Forces

Argued May 12, 2015
Decided August 19, 2015

OHLSON, J., delivered the opinion of the Court, in which BAKER, STUCKY and RYAN, JJ., joined. ERDMANN, C.J., filed a separate opinion concurring in part and dissenting in part.

Counsel

For Appellant: *Eugene R. Fidell*, Esq. (argued); *Lieutenant Philip A. Jones* (on brief).

For Appellee: *Lieutenant Commander Amanda M. Lee* (argued).

Military Judge: Gary E. Felicetti

This opinion is subject to editorial correction before final publication.

Judge OHLSON delivered the opinion of the Court.[*]

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[*] Former Chief Judge James E. Baker took final action in this case prior to the expiration of his term on July 31, 2015.

A general court-martial composed entirely of captains convicted Appellant, a captain in the United States Coast Guard with more than twenty-seven years of service, of wrongful use of cocaine in violation of Article 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912a (2006). The court-martial panel had no flag officers[1] because the convening authority categorically excluded all such officers from the member pool in violation of Article 25, UCMJ, 10 U.S.C. § 825. In addition, the military judge acknowledged that he had prior relationships, both professional and social, with a significant number of the court-martial participants, but he declined to disqualify himself from presiding over the trial.

We granted Appellant's petition for review on the following two issues:

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

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[1] A flag officer is an officer of the "Coast Guard serving in or having the grade of admiral, vice admiral, rear admiral, or rear admiral (lower half)." 10 U.S.C. § 101(b)(5) (2012).

COUNSEL, SEVERAL MEMBERS, SEVERAL WITNESSES, AND THE STAFF JUDGE ADVOCATE.

Upon analyzing these issues, we conclude that under the particular circumstances of the instant case, the convening authority's exclusion of flag officers from the member pool was harmless. We further conclude that the military judge's decision not to disqualify himself did not constitute an abuse of discretion. Accordingly, we hold that Appellant is not entitled to relief.

I. *BACKGROUND*

In June 2008, Appellant tested positive for cocaine pursuant to a random urinalysis. Subsequent tests of Appellant's hair confirmed the presence of cocaine. A general court-martial was convened and at trial Appellant claimed that his positive drug test stemmed from his wife's admitted use of cocaine in their household. Contrary to his plea, however, the panel convicted Appellant of the cocaine use offense[2] and sentenced him to a fine of $5,000 and a reprimand, which the convening authority then approved. The acting Judge Advocate General of the Coast Guard (TJAG) referred this case to the United States Coast Guard Court of Criminal Appeals (CCA) for review pursuant to Article 69(d), UCMJ, 10 U.S.C. § 869(d). The CCA affirmed the findings and sentence.

II. *SELECTION OF MEMBERS*

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[2] Appellant was acquitted of a charge and specification of conduct unbecoming an officer and a gentleman, in violation of Article 133, UCMJ, 10 U.S.C. § 933.

A. *Facts*

The panel in Appellant's case was selected from a ten-person venire that was composed entirely of captains who had served for at least twenty-seven years in the Coast Guard. Because of the omission of flag officers from the member pool, Appellant moved to dismiss his case for a violation of Article 25, UCMJ.

The military judge denied the motion because he was not convinced that "the convening authority's effort to pick officers who might actually be able to serve on the court [was] improper." He based this conclusion on the following findings: (1) the convening authority had been advised of the Article 25, UCMJ, selection criteria at least six times in writing and twice verbally; (2) the convening authority had determined that the flag officers were not available based on his "personal experience" and "general knowledge" of flag officers' duties and schedules; (3) the convening authority had not inquired "into the availability of any particular flag officer"; and (4) the convening authority had not attempted to "stack the court with post-continuation" captains,[3] but instead "was motivated by a desire to select members who" were qualified and who were available to "actually serve on the panel." The military judge also found that the convening authority "did not categorically exclude all flag officers [from] consideration."

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[3] A post-continuation captain is an officer who has not been selected for promotion to read admiral but has been selected tyo continue service ad as captain with the Coast Guard. *See* 14 U.S.C. § 289(a). Those captains considered, but not selected, for continuation must retired. *Id*. § 289(g).

On appeal the CCA concluded that the military judge clearly erred in finding that the convening authority had not categorically excluded flag officers from the venire panel, and further concluded that this exclusion violated Article 25, UCMJ. However, the CCA determined that the Government had established that this exclusion was harmless, and it otherwise adopted the military judge's factual findings.

B. *Standard of Review*

We review "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). We also conduct a de novo review to determine whether an error in member selection is harmless. *See United States v. Ward*, 74 M.J. 225, __ (7) (C.A.A.F. 2015).

C. *Discussion*

The Government has not challenged the CCA's holding that the convening authority's categorical exclusion of flag officers from the member pool violated Article 25, UCMJ. *See United States v. Kirkland*, 53 M.J. 22, 24 (C.A.A.F. 2000); *United States v. Nixon*, 33 M.J. 433, 435 (C.M.A. 1991) ("[M]ilitary grade by itself is not a permissible criterion for selection of court-martial members."); *see also* Article 25(a), (d)(2), UCMJ. Appellant raises two theories for reversal because of this categorical exclusion: (1) the exclusion created an appearance of unfairness; and (2) the Government did not meet its burden of establishing the exclusion was harmless. We address each argument in turn.

First, there is no appearance of an unfair panel in this case. Although the convening authority devi-

ated from the Article 25, UCMJ, criteria by categorically excluding flag officers from the venire panel, he provided Appellant with a venire of fellow senior captains who were fully qualified to sit on a court-martial panel. Indeed, we find no basis to conclude that the convening authority selected the members on any factors other than their "age, education, training, experience, length of service, and judicial temperament." Article 25(d)(2), UCMJ. Further, the record provides no indication that these panel members failed to fully, carefully, and appropriately consider Appellant's case in arriving at a verdict and sentence. Moreover, the convening authority's motivation in excluding flag officers from this case was not to stack the panel against Appellant. Rather, the convening authority relied on his experience in concluding that the flag officers would not be available to actually sit on the panel and hear the case.[4] *United States v. Gooch*, 69 M.J. 353, 358 (C.A.A.F. 2011). Based on these circumstances, we conclude that there was no appearance of unfairness.

Second, the Government has met its burden of establishing that the categorical exclusion of flag officers was harmless. *See Ward*, 74 M.J. at __ (9) (noting Government has burden of showing Article 25, UCMJ, violation was harmless). As discussed above, the convening authority's motivation in excluding the flag officers was based on his belief that they

[4] We note that instead of relying on his experience in concluding that all of the flag officers would not be available to serve on the panel, the convening authority should have made individualized inquiries on this point.

would be unavailable to actually serve on the court-martial. *See Bartlett*, 66 M.J. at 430 (evaluating convening authority's motivation in determining harmlessness). Further, the selected members, all of whom were captains, met the Article 25, UCMJ, criteria. *See id*. (examining whether selected members met Article 25, UCMJ, criteria). Finally, the members' actions in this case demonstrate that they were fair and unbiased. *See Gooch*, 69 M.J. at 361 (noting fairness and impartiality of members in evaluating for harmlessness). This point is underscored by the fact that the members stated that they would be impartial during *voir dire*; they were active participants throughout the trial who posed unbiased questions during the course of the trial; they deliberated over the course of three days before rendering a verdict, which included an acquittal of one charge; and they imposed a lenient sentence. In light of these factors, we conclude that the Government has met its burden of establishing that the categorical exclusion of flag officers was harmless.[5]

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[5] Although the Government has the burden with respect to harmlessness, we consider, and reject, Appellant's allegation that there was prejudice due to the members being in the same promotion pool as Appellant. This allegation is speculative because the trial record does not reveal that the members acted with any improper motive. *See Bartlett*, 66 M.J. at 431 n.4 (rejecting the appellant's argument for prejudice in member selection case as "speculative at best"). This allegation therefore does not demonstrate that the Government failed to meet its burden.

Because we find no reversible error with respect to the member selection issue, we next examine whether the military judge should have disqualified himself from presiding at Appellant's trial because of his various connections to a number of the court-martial participants.

III. *THE MILITARY JUDGE*

A. *Facts*

At the time of Appellant's trial, the Coast Guard only had one military judge certified to preside over general courts-martial. This military judge served as the Chief Trial Judge of the Coast Guard, had attained the rank of captain, and had almost twenty-eight years of commissioned service in the Coast Guard.

As the military judge noted in his findings of fact, the Coast Guard is a "small service with a much smaller legal community. A large percentage of its commissioned officers, particularly at the more senior levels, attended the Coast Guard Academy." Indeed, the tight-knit nature of the Coast Guard is reflected in the significant number of relationships that the military judge in the instant case had with various participants in the court-martial process, as reflected below.

First, the military judge knew Appellant and his wife. More than twenty years before trial, Appellant and the military judge were stationed at the same Coast Guard facility, and Appellant and his wife socialized with a group of junior officers that included the military judge. However, the military judge had not had any contact with Appellant or his wife for more than twenty years.

Second, the military judge supervised the individual military defense counsel (IMC) for one year in 2002, which was seven years before Appellant's trial. During this supervisory relationship, the military judge and the IMC had dinner at each other's homes once each. The military judge and the IMC also had a few professional contacts regarding organizational or management issues subsequent to this supervisory relationship.

It should also be noted that, after the IMC was detailed to the instant case, he sought to resume his prior status as a collateral duty special court-martial military judge in early 2009. However, although the military judge, as the chief trial judge, ordinarily would make recommendations about the special court-martial judges, he recused himself from the IMC's request.

Third, the staff judge advocate (SJA) to the convening authority was serving as a collateral-duty special court-martial military judge. As the chief trial judge in the Coast Guard, the military judge had "managerial oversight" of the SJA in the SJA's capacity as a military judge. The military judge also knew of the SJA through conferences, trainings, and meetings.

Fourth, the military judge and trial counsel had professional contacts stemming from a different court-martial. The military judge described his professional relationship with trial counsel as "some very limited involvement in a contested members case."

Fifth, the military judge also had a professional relationship with the senior assistant trial counsel

(ATC) concerning the ATC's role as Chief of the Office of Military Justice at Coast Guard Headquarters who had the primary responsibility for military justice policy. At the time of Appellant's trial, this office was in the process of revising the Coast Guard's military justice manual. The military judge had suggested changes to the manual, but he did not discuss Appellant's case with the ATC and instead directed his comments to the ATC's deputy once he learned of the ATC's role in this case.

Sixth, the military judge had "professional and work-related social contacts" with CAPT Kenney, a defense witness and the initial defense counsel, beginning in 2004. The military judge's most frequent contacts with CAPT Kenney occurred between 2006 and 2008 when CAPT Kenney was a field SJA and the military judge was the Chief of the Office of Legal Policy & Program Development at Coast Guard Headquarters (LPD), the position that CAPT Kenney transferred to following the military judge's departure. As the Chief of the LPD, the military judge's job was to support the field SJAs, which meant he spent "a lot of time on the phone" with SJAs, including CAPT Kenney. The military judge also was in charge of assignments, which led to discussions with CAPT Kenney about the needs of the SJA office and CAPT Kenney's own assignments. The military judge encouraged CAPT Kenney to replace him as the Chief of the LPD and made a recommendation to this effect. Since the parties did not inform the military judge about CAPT Kenney's role as a fact witness in this case until late March 2009, the military judge's professional contacts with CAPT Kenney lasted through February 2009 and concerned the selection of new collateral duty special court-martial military

judges. However, the military judge and CAPT Kenney never discussed Appellant's case.

Seventh, the military judge had relationships with other court-martial participants and potential witnesses that arose from the military judge's attendance at the Coast Guard Academy in the late 1970s and early 1980s and/or from his professional duties during his lengthy service in the Coast Guard.

Eighth, the military judge's direct supervisor was TJAG. The military judge never discussed particular cases with TJAG, including this case. However, the military judge contacted the deputy judge advocate general (DJAG) during Appellant's case so that DJAG would give TJAG "a heads-up" about being a potential witness for motions in this case. The military judge explained that his contact with DJAG was "[j]ust a courtesy" to notify TJAG about the situation. The military judge stated he would not have done this for another witness because he did not "work for any other witness."

Ninth, certain individuals detailed to the original or amended member pools also knew the military judge as a classmate at the Coast Guard Academy and/or through working relationships. One of these members stated that his prior association with the military judge would keep him from following the military judge's instructions.[6]

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[6] This individual ultimately was not selected as part of the final member pool. It is unclear from the record whether his response to this question was a typographical error.

Because of the members' familiarity with him, the military judge stated that he understood "the government's concern with getting members who [could] . . . follow [his] instructions as they're required to do." To try to alleviate this concern and to help the Government assemble a panel, the military judge stated that he would "try to find a senior judge from another service." Regarding this point, the military judge had the following exchange with the IMC:

> IMC: If I may ask a question, sir. Maybe I just don't get it, but why would you do that?
>
> [Military Judge]: 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 [the] relationship with you or [the] perceived relationship with you?
>
> [Military Judge]: 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 you have this, then it makes . . . our life easier.

The military judge later informed the parties that his inquiries for a replacement military judge ultimately "didn't pan out" due to issues with "the motions practice, the posture and the timing."

The Government, with Appellant's concurrence, filed a "Motion for Recusal of the Military Judge." The Government's request was based on an appear-

ance of bias stemming from the military judge's relationships with various court-martial participants. Appellant agreed with the Government's motion and, in a separate filing, noted that this appearance of bias was exacerbated by the fact that the military judge was in the same promotion zone as Appellant, this case had high visibility, and TJAG was the military judge's direct supervisor.

After an extensive proffer by the military judge and a colloquy between the military judge and the parties, the military judge denied the motion for disqualification. The military judge explained that his prior relationships with a number of the court-martial participants did not raise an appearance of bias because the "vast majority" of contacts occurred at routine work-related events and the social contacts were minimal and distant in time. He also stated that the issue of competing with Appellant for a promotion was "illusory," and he noted that he had "more prior contacts with the [d]efense side" than with the Government side.

B. *Standard of Review*

Our review of a military judge's disqualification decision is for an abuse of discretion. *United States v. McIlwain*, 66 M.J. 312, 314 (C.A.A.F. 2008); *United States v. Quintanilla*, 56 M.J. 37, 77 (C.A.A.F. 2001). A military judge's ruling constitutes an abuse of discretion if it is "arbitrary, fanciful, clearly unreasonable or clearly erroneous," not if this Court merely would reach a different conclusion. *United States v. Brown*, 72 M.J. 359, 362 (C.A.A.F. 2013) (internal quotation marks and citation omitted).

Appellant does not claim that the military judge in his case was actually biased, only that the military judge's presence raised an appearance of bias under Rule for Courts-Martial (R.C.M.) 902(a).[7] We apply an objective standard for identifying an appearance of bias by asking whether a reasonable person knowing all the circumstances would conclude that the military judge's impartiality might reasonably be questioned. *Hasan*, 71 M.J. at 418. Recusal based on an appearance of bias "is intended to 'promote public confidence in the integrity of the judicial process.'" Id. (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 858 n.7 (1988)). However, this "appearance standard does not require judges to live in an environment sealed off from the outside world." *United States v. Butcher*, 56 M.J. 87, 91 (C.A.A.F. 2001). Although a military judge is to "broadly construe" the grounds for challenge, he should not leave the case "unnecessarily." R.C.M. 902(d)(1) Discussion.

C. *Overview*

As can be seen by the facts recited above, the military judge had professional and/or social contacts with a significant number of the court-martial participants in this case. Under these circumstances it could fairly be argued that the military judge should

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[7] This rule states: "A military judge shall disqualify himself . . . in any proceeding in which that military judge's impartiality might reasonably be questioned." R.C.M. 902(a).

have disqualified himself out of a sense of prudence.[8] However, as also noted above, that is not the standard of review we are obligated to apply in deciding such cases on appeal. Rather, we are required to apply an abuse of discretion standard in determining whether the military judge's decision not to disqualify himself was error.

In analyzing this issue, we note at the outset the following points: the military judge fully disclosed his relationships with the participants in the court-martial; the record reveals no evidence of any actual bias on the part of the military judge, or of any other actions or rulings by the military judge that would independently raise appearance issues; and the military judge fully heard the views of both parties on this issue and then affirmatively stated on the record that he could remain impartial to both sides. Accordingly, under these particular circumstances we conclude that the military judge's disqualification decision was not "arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *Brown*, 72 at 362 (internal quotation marks and citation omitted).

D. Discussion

We find no abuse of discretion in the military judge's failure to disqualify himself for the following reasons. First, the military judge specifically stated

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[8] *Cf. United States v. Gorski*, 48 M.J. 317 (C.A.A.F. 1997) (noting in a memorandum opinion by Judge Effron that when recusal is interjected into the proceedings and recusal is not required as a matter of law, a judge must still decide if recusal is appropriate as a matter of discretion).

on the record that none of his associations with court-martial participants would influence any of his decisions in Appellant's case. *See United States v. Wright*, 52 M.J. 136, 141 (C.A.A.F. 1999) ("[D]espite an objective standard, the judge's statements concerning his intentions and the matters upon which he will rely are not irrelevant to the inquiry.").

Second, Appellant has not identified any conduct by the military judge which tends to demonstrate that he inappropriately influenced the panel in this case. Indeed, the panel's active participation, lengthy deliberations, and lenient sentence seem to underscore the point that they acted independently in this matter.

Third, although the military judge had to resolve a number of pretrial motions, Appellant has not pointed to any rulings that raise appearance concerns.

Fourth, we note that "[p]ersonal relationships between members of the judiciary and witnesses or other participants in the court-martial process do not necessarily require disqualification." *Norfleet*, 53 M.J. at 270. Further, "a former professional relationship is not per se disqualifying." *Wright*, 52 M.J. at 141.

Here, the military judge was forthcoming and catalogued his relationships with the participants in the trial and subjected himself to voir dire on this subject. As the summary of these relationships outlined above demonstrates, most of the military judge's contacts were professional and routine in nature. Further, although "a social relationship creates special concerns," those relationships that had a so-

cial component occurred years prior to the court-martial and were not close or intimate. *Cf. United States v. Sherrod*, 26 M.J. 30, 31 & n.2 (C.M.A. 1988) (agreeing with lower court that military judge was disqualified where victim was a close friend of the military judge's thirteen-year-old daughter with whom the military judge had socialized); *United States v. Berman*, 28 M.J. 615, 618 (A.F.C.M.R. 1989) (en banc) (finding intimate relationship between military judge and trial counsel in appellants' courts-martial required disqualification). In regard to the military judge's decision to notify DJAG that TJAG might by a witness for some motions in this case, although this step may have been ill-advised, we find an insufficient basis to conclude that it reasonably brought into question the military judge's impartiality.

We note that in certain circumstances, the cumulative nature of a military judge's relationships can create an appearance issue. *See United States v. DeTemple*, 162 F.3d 279, 287 (4th Cir. 1998) ("[A] confluence of facts [may] create a reason for questioning a judge's impartiality, even though none of those facts, in isolation, necessitates recusal."); see also *United States v. Amico*, 486 F.3d 764, 776 (2d Cir. 2007) (noting that recusal is warranted when "in the aggregate, the [circumstances of the case] would lead a disinterested observer to conclude that the appearance of partiality existed"). However, in the instant case the number and type of contacts that the military judge had with the participants in the court-martial appear to simply be the natural consequence of the military judge's length of service in the relatively small Coast Guard, and we do not find a sufficient basis to conclude that a reasonable person fa-

miliar with all the circumstances in this case would conclude that the "military judge's impartiality might reasonably be questioned." R.C.M. 902(a); *see DeTemple*, 162 F.3d at 287 ("'[O]ther things being equal, the more common a potentially biasing circumstance and the less easily avoidable it seems, the less that circumstance will appear to a knowledgeable observer as a sign of partiality.'" (quoting *In re Allied-Signal Inc.*, 891 F.2d 967, 971 (1st Cir. 1989))).

Appellant cites three circumstances of this case that, in his view, serve to increase the appearance of bias. Appellant first argues that the military judge and Appellant were both captains subject to promotion, and thus were in competition with one another for one of the coveted flag officer slots. However, the military judge "disclaimed" any potential conflict, and noted that as a judge advocate, he would not be in competition for the same promotion as Appellant who was not a judge advocate. We agree with the military judge that this potential promotion conflict was "illusory" and did not create an appearance of bias.

Appellant next contends that the parties' joint request for disqualification demonstrates that the circumstances of the case raised an appearance of bias problem. We agree that the parties' joint request did provide support for disqualification under R.C.M. 902(a) because a "disinterested observer would have noted that the government joined the [accused's] motions for recusal -- a very unusual development demonstrating that all parties were seriously concerned about the appearance of partiality." *Amico*, 486 F.3d at 776. Indeed, we caution military judges

to be especially circumspect in deciding whether to disqualify themselves in such instances. Nevertheless, after considering the circumstances surrounding the basis for the disqualification request in the instant case, we again do not find an adequate basis to conclude that the military judge abused his discretion when he decided not to disqualify himself.

Appellant finally argues that under *McIlwain*, the military judge's statement about inquiring into the availability of a military judge from another military service is evidence that the military judge himself recognized that there was an appearance of bias. In *McIlwain*, we found that the military judge abused her discretion in not disqualifying herself because she stated: "[H]er participation would suggest to an impartial person looking in that I can't be impartial in this case." 66 M.J. at 314 (internal quotation marks omitted). However, the military judge's statements in this case about inquiring into the availability of a military judge from another armed service are distinguishable from those in *McIlwain*. Specifically, these statements were meant to address the Government's concern about the efforts they would have to undertake to assemble an impartial member pool, which deals with an issue of member bias, not military judge bias. Further, unlike the military judge in *McIlwain*, the military judge in Appellant's case specifically rejected the notion that there was an appearance problem:

> [D]o I believe [the multiple relationships with court-martial participants] creates an appearance of bias or impartiality in favor or against the accused? No, I don't. I mean obvi-

ously I would have disqualified myself if I did.

Thus the military judge's statement regarding inquiring about military judge availability from other armed services does not conclusively raise any appearance of bias concerns.

We therefore conclude that under the circumstances of Appellant's case, the military judge acted within his discretion in finding that his various relationships with court-martial participants did not constitute a basis for disqualification.

CONCLUSION

We conclude that neither the manner of the member selection nor the presence of the military judge in this case warrants reversal. The decision of the United States Coast Guard Court of Criminal Appeals is therefore affirmed.

ERDMANN, Chief Judge (concurring in part and dissenting in part):

I concur with the majority's decision on Issue I, that under our precedent, the violation of Article 25, UCMJ, was harmless. However, I respectfully dissent from its determination that the military judge did not abuse his discretion when he denied the motions of both parties to recuse himself. The military judge in this case had a personal or professional relationship with nearly everyone involved in the court-martial process, to include the Staff Judge Advocate who advised the convening authority, the Article 32 hearing officer, the trial counsel, the assistant trial counsel, the defense counsel, three defense witnesses, the Judge Advocate General (TJAG) (his supervi-

sor and a potential witness), the panel members, and the accused himself. Additionally, the military judge found himself in the same promotion pool as the accused. At some point, too much is simply too much.

Sullivan argues that in light of these facts, the military judge's failure to recuse himself resulted in an appearance of bias. This is an issue we have addressed many times.

> In the military context, the appearance of bias principle is derived from R.C.M. 902(a): "A military judge shall disqualify himself . . . in any proceeding in which that military judge's impartiality might reasonably be questioned." The standard for identifying the appearance is objective: "[a]ny conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge's impartiality might reasonably be questioned." *Kincheloe*, 14 M.J. at 50 (alteration in original) (internal quotation marks omitted). As in the civilian context, recusal based on the appearance of bias is intended to "promote public confidence in the integrity of the judicial process." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 858 n.7 (1988). "[W]hat matters is not the reality of bias or prejudice but its appearance." *Liteky v. United States*, 510 U.S. 540, 548 (1994). In the military justice system, where the charges are necessarily brought by the commander against subordinates and where, pursuant to Article 25, UCMJ, 10 U.S.C. § 825 (2006), the convening authority is responsible for selecting the members, military

> judges serve as the independent check on the integrity of the court-martial process. The validity of this system depends on the impartiality of military judges in fact and in appearance.

Hasan v. Gross, 71 M.J. 416, 418-19 (C.A.A.F. 2012).

As noted by the majority, at the time of Sullivan's trial, the military judge was the only member of the United States Coast Guard authorized to preside over general courts-martial. It appears this situation is due to the Coast Guard's relatively small active-duty size. Nevertheless, "'[a]n accused has a constitutional right to an impartial judge,'" *United States v. Martinez*, 70 M.J. 154, 157 (C.A.A.F. 2011) (citation omitted), and there exists no exception for the Coast Guard because of its small size. This, of course, is because

> [t]he neutrality [of an impartial judge] required by constitutional due process
>
> > helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. At the same time, it preserves both the appearance and reality of fairness . . . .
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> > . . . .
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> > The appearance standard helps to enhance confidence in the fairness of the proceedings because in matters of bias, the line between appearance and reality is often barely discernible.

United States v. Butcher, 56 M.J. 87, 90 (C.A.A.F. 2001) (citation omitted).

Certainly "[p]ersonal relationships between members of the judiciary and witnesses or other participants in the court-martial process do not necessarily require disqualification." *United States v. Norfleet*, 53 M.J. 262, 270 (C.A.A.F. 2000). Nevertheless, it remains important to remember that "the interplay of social and professional relationships in the armed forces poses particular challenges for the military judiciary." *Butcher*, 56 M.J. at 91. These challenges exist whether the case is tried before members or before a military judge alone. *See United States v. McIlwain*, 66 M.J. 312, 314 (C.A.A.F. 2008) ("[I]f a judge is disqualified to sit as a judge alone, [s]he is also disqualified to sit with members.") (alteration in original) (internal quotation marks and citation omitted). This is because it "is well-settled in military law that the military judge is more than a mere referee." *Id.*

Unlike previous cases we have considered, the military judge in this case had a personal or professional relationship with virtually every individual involved in the court-martial process. The military judge recognized that these relationships were significant when he spent eighteen pages of the record listing them. Then, in response to written questions posed by the government, the military judge continued on the record for approximately fourteen more pages. For the next thirty-five pages, the government and the defense verbally voir dired the military judge. At the conclusion of voir dire, both parties had sufficient concerns that they moved for the military judge to recuse himself.

The voir dire also revealed a situation involving the relationship between the military judge and the Coast Guard TJAG. The military judge reported directly to TJAG, who signed the military judge's performance report. When it appeared that TJAG might be called as a witness, the military judge made a call to the Deputy Judge Advocate General (DJAG) to give TJAG a "heads-up." When asked by the defense whether the military judge would have done that for any other witness, the military judge replied "[p]robably not, because I don't work for any other witness." Also of concern to an objective observer is the fact that the military judge was in the same promotion pool as Sullivan.[1]

Despite all of this, the military judge failed to recognize that these multiple relationships would lead a reasonable person, knowing all the circumstances, to the conclusion that the military judge's impartiality might reasonably be questioned. *United States v. Kincheloe*, 14 M.J. 40, 50 (C.M.A. 1982). Instead, he stated he would seek out other potential military judges from the sister services "as a matter of helping both sides [to] find it easier to pick a court-martial panel" and as "a matter of convenience." When asked by the defense why the military judge would do so if he did not believe there was a problem, the military judge reiterated that it was a matter of

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[1] While there is conflicting evidence regarding whether Sullivan would remain in the promotion pool during the court-martial, assuming he was temporarily removed from the pool for the pendency of the court-martial, a conviction would remove him from the pool permanently.

convenience.[2] Under these circumstances a reasonable person, knowing all the circumstances, might harbor doubts about military judge's impartiality. *See Martinez*, 70 M.J. at 158; *Butcher*, 56 M.J. at 91.

That said, this court has also "recognized that not every judicial disqualification error requires reversal and has adopted the standards the Supreme Court announced in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864 (1988), for determining whether a judge's disqualification under 28 U.S.C. § 455(a) (2000), warrants a remedy." *McIlwain*, 66 M.J. at 315. The *Liljeberg* factors include: "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." *Id.*

It is the third *Liljeberg* factor that is relevant to this inquiry. Is there a risk of undermining the public's confidence in the military justice system where the judge knows almost everyone in the proceeding,

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[2] While the military judge indicated that he would pursue this informal attempt to remedy the situation, his efforts apparently failed due to his insistence that the new military judge be available for trial on certain dates. However, "[o]nce recused, a military judge should not play any procedural or substantive role with regard to the matter about which he is recused." *United States v. Roach*, 69 M.J. 17, 20 (C.A.A.F. 2010); *see also Walker v. United States*, 60 M.J. 354, 358 (C.A.A.F. 2004) ("When a judge is recused, the judge should not take action to influence the appointment of his or her replacement."). In other words, any new judge appointed would be responsible for determining an appropriate trial date.

is in the same promotion pool as the accused, and has contacted his boss, who was a potential witness, to give him a "heads-up"? I believe there is. Adding to the lack of public confidence is that the matter could have been resolved by making a formal request for a military judge to the Judge Advocate General of a sister service. *See* Rule for Courts-Martial 503(b)(3). The failure to remedy the issue when it was relatively easy to do so could only create additional doubt in the public's mind.[3]

For these reasons I believe that a reasonable person, knowing all the circumstances, might reasonably question the military judge's impartiality. Consequently, the military judge's failure to recuse himself undermined public confidence in the integrity of the military justice system. Accordingly, I respectfully dissent from the majority as to Issue II.

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[3] Another way of looking at the issue is to consider whether a military judge in another service, without the size constraints of the Coast Guard, would have recused him/herself under similar circumstances.

Appendix B

United States Court of Appeals
For the Armed Forces
Washington, D.C.

United States, Appellee	)	USCA Dkt. No. 15-0186/CG
v.	)	Crim.App. No. 001-69-13
Michael E. Sullivan, Appellant	)	

JUDGMENT

This cause came before the Court on appeal from the United States Coast Guard Court of Criminal Appeals and was argued by counsel on May 12, 2015. On consideration thereof, it is, by the Court, this 19th day of August, 2015, ORDERED and ADJUDGED: The decision of the United States Coast Guard Court of Criminal Appeals is hereby affirmed in accordance with the opinion filed herein this date.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

Appendix C

UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Michael E. SULLIVAN
Captain (O-6), U.S. Coast Guard

CGCMG 0285
Docket No. 001-69-13

25 September 2014

General Court-Martial convened by Commander, Coast Guard Pacific Area. Tried at Alameda, California, on 7 April 2009 and 4-17 June 2009.

Military Judge: CAPT Gary E. Felicetti, USCG
Trial Counsel: LCDR Stephen J. Adler, USCG
Assistant Trial Counsel: CDR Stephen P. McCleary, USCG
LT Austin D. Shutt, USCGR
Civilian Defense Counsel Mr. Eugene R. Fidell
Individual Military Counsel: CAPT Steven J. Andersen, USCG
Assistant Defense Counsel: LT David P. White, JAGC, USN
Appellate Defense Counsel: Mr. Eugene R. Fidell
CAPT Steven J. Andersen, USCG
LT Jonathan C. Perry, USCGR
Appellate Government Counsel: LCDR Amanda M. Lee, USCG

BEFORE
McCLELLAND, NORRIS & GILL
Appellate Military Judges

McCLELLAND, Chief Judge:

Appellant was tried by general court-martial composed of officer members. Contrary to his pleas, Appellant was convicted of one specification of wrongful use of cocaine, in violation of Article 112a, Uniform Code of Military Justice (UCMJ). The court sentenced Appellant to a fine of $5,000 and a reprimand. The Convening Authority approved the sentence. The Acting Judge Advocate General referred the case to this Court under Article 69(d).

Before this Court, Appellant has assigned the following errors:

> I. The military judge erred by not ordering a new panel of members be convened after the Convening Authority categorically excluded flag officers from Appellant's court-martial.
>
> II. The military judge abused his discretion by failing to recuse himself in light of Appellant's motion.
>
> III. The military judge erred by allowing an expert witness to give improper rebuttal testimony about the profile of cocaine drug users.
>
> IV. The military judge erred by denying the defense motion in limine to exclude all evidence from Psychemedics, including the testimony of Psychemedics' expert, because the company did not produce its standard operating procedures governing hair testing for cocaine.
>
> V. The staff judge advocate and deputy staff judge advocate testified to contested matters in a pretrial Article 39(a) hearing. Therefore, they were

disqualified from providing post-trial advice to the Convening Authority.

VI. The evidence with regard to charge I and its sole specification was legally insufficient in that it did not show that Appellant had used cocaine.

VII. The military judge erred by denying Appellant's motion for additional peremptory challenges based on the Convening Authority's exclusion of court-martial members based on improper selection criteria.

We reject the sixth assignment summarily. We discuss all the others and affirm.

Summary of facts

Appellant, a Coast Guard captain (O-6) with over twenty-six years of service, tested positive for cocaine upon urinalysis in June 2008. (R. at 795.) Thereafter, with his consent, a sample of his hair was tested by Psychemedics Corporation and tested positive for cocaine. (Prosecution Ex. 1.) Appellant then had the hair of his wife and two daughters tested, and his wife's hair tested positive for cocaine at a high level. (R. at 1310-11, 1713; Defense Ex. O.) One daughter's hair tested positive at a low level, the other daughter's hair tested negative. (R. at 1713; Defense Ex. O.)

Appellant asserts that he was prejudiced by the improper exclusion of flag officers from service on his court-martial.

Panel selection is reviewed *de novo*. *United States v. Gooch*, 69 M.J. 353, 358 (C.A.A.F. 2011) (citing *United States v. Dowty*, 60 M.J. 163, 171 (C.A.A.F. 2004)). We are bound by the military

judge's findings of fact unless they are clearly erroneous. Id. An improper motive to "pack" the member pool is not tolerated, and systemic exclusion of otherwise qualified potential members based on rank, race or gender or the like is improper, but good-faith attempts to include all segments of the military community receive deference. *Id.*

The court-martial panel consisted of ten Coast Guard captains (O-6).[1] Testimony from three witnesses describing statements by the Convening Authority and a stipulation of expected testimony of the Convening Authority provide the following thoughts as to why no flag officers (O-7 and above) were included.

First, the Convening Authority, a vice admiral (O-9), was soon to be the Vice Commandant of the Coast Guard. In that capacity, he would be responsible for assigning the other flag officers to billets. He did not want to appoint flag officers to the court-martial whom he would later be assigning to billets.[2] (Deputy SJA, R. at 288, 290; SJA, R. at 293.)

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[1] A few members were replaced by other captains through amendments. Eight members remained on the panel after challenges.

[2] Presumably this was to avoid having officers on the panel who would seek to please him in advance of future assignment decisions. It should be noted that the initial pool selected by the convening authority in response to the SJA's request dated 29 August 2008 (to whom member questionnaire forms were to be provided for completion) consisted of three flag officers (O-7 & O-8) and seventeen captains. (Appellate Ex. 101 at Attachment 4.) The panel was finalized as

Second, the Convening Authority speculated "that seating a flag officer on a panel might unduly sway other members." (Convening Authority's executive assistant, R. at 300).

Third, the Convening Authority wanted to be considerate of flag officers' time demands, and expected availability issues if he appointed any flag officers to the court-martial. (Appellate Ex. 107.)

The military judge found as follows, *inter alia*. The Convening Authority was properly advised of the Article 25 selection criteria several times, including when he picked an initial pool of possible members and when he chose the panel of ten. (R. at 386.) "[T]here was no evidence of an attempt . . . to pack the court with members who would favor the prosecution, a severe sentence or both. The convening authority knew and applied the Article 25 statutory criteria when selecting members" for the convening order for this case. (R. at 388.) These findings are supported by evidence and are not clearly erroneous. Also not clearly erroneous is his finding that "[t]he 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." (R. at 391.)

General Court-Martial Convening Order No. 1-09 dated 13 January 2009. In the interval between the two dates, the Convening Authority had been selected to serve as the Vice Commandant, according to ALCOAST 555/08, COMDT COGARD R 101929 NOV 08 (Appellate Ex. 105 at Attachment 8).

However, the finding that the convening authority "did not categorically exclude all flag officers for consideration" (R. at 392) is inconsistent with his further finding that "his consideration of flag officer availability to actually serve on the court without determining the actual availability of any particular officer resulted in the exclusion of all flag officers" (R. at 392) and is clearly erroneous.

In short, it must be acknowledged that the Convening Authority categorically excluded all flag officers from membership on the court-martial. Hence there was error. *Gooch*, 69 M.J. at 358; *United States v. Kirkland*, 53 M.J. 22 (C.A.A.F. 2000). Where a convening authority intentionally excludes certain classes of individuals, the burden is on the Government to demonstrate lack of harm. *United States v. Bartlett*, 66 M.J. 426, 430 (C.A.A.F. 2008).

We believe the Government has met its burden in this case. As found by the military judge, the Convening Authority was properly advised of the Article 25 selection criteria several times, including when he picked an initial pool of possible members and when he chose a final panel of ten; there was no evidence of an attempt to pack the court with members who would favor the prosecution, a severe sentence or both; and the convening authority knew and applied the Article 25 statutory criteria when selecting members for this case. *See Gooch*, 69 M.J. at 361. The three considerations that led to the exclusion of flag officers of which there is evidence – the Convening Authority's future assignment responsibilities, the possibility of a flag officer's undue influence on other members, and expected availability issues – are not improper ones, but are benign. *See Bartlett*,

66 M.J. at 431. In contrast to reported cases in which error was found based on rank exclusion, this is not a case of excluding lower-ranking personnel but of excluding higher-ranking personnel. *See United States v. Kirkland*, 53 M.J. 22 (C.A.A.F. 2000); *United States v. Roland*, 50 M.J. 66 (C.A.A.F. 1999); *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). Exclusion of lower-ranking personnel invites the suspicion that avoidance of light sentences is intended; this intention was explicit in McClain. No such "court-packing" intention or appearance is reasonably to be inferred from exclusion of higher-ranking personnel. Finally, the panel by which Appellant was tried was fair and impartial.[3] *See Gooch*, 69 M.J. at 361.

Appellant contends that the members were all in direct competition with him for selection to flag officer, and thus may have had a motive to decide adversely to him so as to remove a potential rival and incrementally improve their chances for selection to flag rank; and that therefore the Government cannot meet its burden of demonstrating lack of harm. This

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[3] The panel deliberated for more than fourteen hours before returning a verdict; that verdict resulted in conviction on the sole specification of wrongful use of cocaine, but acquitted Appellant of the only other specification against him, conduct unbecoming an officer. We also note the relatively benign sentence the members imposed.

point was not developed at trial.[4] Whether the members likely or actually saw themselves as being in competition with Appellant is speculative; we do not believe it rises to a level that precludes a finding of no harm. We are convinced that the error in categorically excluding flag officers from the panel was harmless.

Appellant also complains, in Assignment VII, that the Convening Authority excluded potential members from the panel "based on their possible knowledge of Appellant and their specific billets." (Assignment of Errors and Brief at 46.) One member was removed from the panel by Amendment No. 2 to the Convening Order after identifying himself as "classmate and close friend of the defendant." (Appellate Ex. 105 at Attachment 19; R. at 387 (military judge's findings of fact).) A potential member was not placed on the panel after, as the military judge noted, mentioning her "prior involvement in the case as the commandant's [executive assistant]." (R. at 387.)[5] Two other members were removed from the panel by

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[4] What could not have been known at trial but is easily ascertainable now is that all members of the court-martial eventually retired as captains (O-6).

[5] The finding of fact misstates her prior role as "involvement"; her court-member questionnaire states that she had "had extensive discussions" with Appellant's apparent supervisor (the person who testified at trial that he received the urinalysis results and informed Appellant he had tested positive (R. at 795-97)) and with the senior assistant trial counsel. (Appellate Ex. 105 at Attachment 19.)

Amendment No. 1 to the Convening Order after they each indicated that they would be assuming new duties in Chief of Staff positions at the time of or shortly before the trial. (Appellate Ex. 101 at Attachment 8.) Appellant cites Gooch for the proposition that exclusion of potential members based on their possible knowledge of an accused is improper, and argues that similarly, a potential member's billet should be regarded as an improper basis for exclusion.

The court in *Gooch* held "that possible personal knowledge of the case or the accused, based on contemporaneous service alone, is not a proper basis for screening potential members under Article 25, UCMJ." *Gooch*, 69 M.J. at 360. This does not support the proposition that actual personal knowledge of the case or the accused is not a proper basis for screening. In this case, actual personal knowledge was the basis for excusing the first two officers described in the preceding paragraph. We know of no principle under which this would be considered improper. In the absence of any such principle, and with due regard for Rules for Courts-Martial[6] (R.C.M.) 505(c)(1)(A), which allows the convening authority to change the members of the court-martial before the court-martial is assembled without showing cause, we conclude that it was proper.

Likewise, we see no reason to criticize the Convening Authority's apparent decision to remove two

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[6] Rules for Courts-Martial, Manual for Courts-Martial, United States (2008 ed.). The provisions of the Manual for Courts-Martial cited in this opinion are identical in the 2008 and 2012 editions.

members from the panel because of their new, demanding duties as chiefs of staff without requiring precise information concerning schedule conflicts. The military judge took a broad view of "ongoing relief of military duties" as justification for excusing a member. (R. at 388.) This was not error. *See Gooch*, 69 M.J. at 358 (availability in the military context is an appropriate screening factor).

There was no error in the Convening Authority's decisions to exclude the specified members from the panel, and thus they provide no basis for granting the defense additional peremptory challenges. Appellant cites no case or other support for the military judge to have granted additional peremptory challenges. The military judge did not abuse his discretion by declining to do so.

Military Judge's decision not to recuse himself

Appellant asserts that the military judge was disqualified, and erred by failing to recuse himself. A military judge's decision on the issue of recusal is reversed only for abuse of discretion. *United States v. McIlwain*, 66 M.J. 312, 314 (C.A.A.F. 2008). The issue is viewed objectively. *Id.* Military judges should broadly construe possible reasons for disqualification, but also should not recuse themselves unnecessarily. *Id.*

Before trial, the Government moved for the military judge to recuse himself. (Appellate Ex. 9.) The defense concurred. (Appellate Ex. 10.) The military judge's disclosures on the record during an Article 39(b) session two months before trial revealed the following connections with personnel involved in the case. More than twenty years before the trial, the

military judge was stationed in the same location as Appellant, and they were part of a group of junior officers and spouses who socialized together, but the military judge had had no contact of any kind with Appellant or his wife for twenty-one years afterward. (R. at 18-21.) The military judge supervised the individual military defense counsel (IMC) for one year ending seven years before trial, during which they had dinner at each other's home once each, and had had a few professional contacts with each other since then. (R. at 21-22, 32.) The Staff Judge Advocate (SJA) to the Convening Authority was a collateral-duty special court-martial judge, in which capacity the military judge had "managerial oversight" over him, but this collateral duty was ending. (R. at 16, 102.) By its terms, this managerial oversight did not extend to his duties or service as the SJA. The military judge had had recent professional contacts with trial counsel, in relation to a different trial, and the more senior assistant trial counsel, in relation to administrative duties.[7] (R. at 17-18.) The military judge discussed his relationships with various prospective witnesses, including two officers senior to him, two senior (O-6) judge advocates, Appellant's wife, and a special agent, none of which was noteworthy. (R. at 34-37.)

The military judge also noted that he and Appellant were both eligible for selection for promotion to rear admiral. (R. at 28.) He declared that this would not influence any of his decisions in the case; he also

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[7] We consider these contacts with the SJA and both trial counsel as routine contacts with legal professionals that need no further discussion.

made it clear that, as a judge advocate, he did not view himself as competing with Appellant for promotion. (R. at 28.)

The Government's *voir dire* of the military judge also sought to develop information about his relationships with members of the court-martial. According to the member questionnaires, some of the members were his Academy classmates, and others were Academy upperclassmen with respect to him. (Appellate Exs. 23-42.)[8] Beyond such information that was already available, the military judge declined to detail his contacts with potential members, deeming them irrelevant. (R. at 40.) At that time and on other occasions, he made reference to the possibility that a member might have a problem following the instructions of the military judge. (R. at 40, 44, 105.) This concern apparently arose because on one of the member questionnaires, in response to the question "Is there any reason, such as a prior association with [the military judge], that will keep you from following the military judge's instructions?" the member answered "Yes." (Appellate Ex. 42 at 4.) This followed an affirmative response on the questionnaire to the question of whether he knew the military judge, with the additional information that he was a friend.[9] (Appellate Ex. 42 at 3.)

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[8] At the time of the court session at which the motion was considered, the original convening order was unamended; the court-martial questionnaires were from the originally appointed members.

[9] The prospective court-martial member who submitted this questionnaire was later removed from the

Although this response (that the member had a reason that would keep him from following the judge's instructions) most likely reflected a misreading of the question, it was obviously taken seriously by all parties, as it must be. The Government developed voir dire questions for the judge as a result. As noted, the military judge declined to detail his contacts with potential members, pointing out that if a member had a problem following the instructions of the judge, this would not be relevant to whether the judge should be disqualified. (R. at 40.) Rather, as was implicit in his later remarks, it would be a basis for challenging the member. (*See* R. at 44, 105.) After denying the motion to disqualify himself, the military judge offered to seek a military judge from one of the other services "[a]s a matter of convenience" for the Government, to facilitate producing a panel, as well as for any other concerns that might exist. (R. at 106-07.)[10] Ultimately, however, no other judge was found who could serve at the scheduled date of trial. (R. at 267.)

From the military judge's undertaking to seek a replacement military judge, Appellant argues that the judge actually believed himself to be disqualified. We reject this inference, which 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

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court-martial for unrelated reasons. (Amendment No. 1 to General Court-Martial Convening Order No. 1-09.)

[10] The military judge had brought up the idea earlier. (R. at 44.)

reason to disregard the military judge's explanation. Appellant cites *McIlwain*. In that case the military judge announced that "her participation 'would suggest to an impartial person looking in that I can't be impartial in this case,'" leading inexorably to the conclusion that R.C.M. 902(a) required disqualification. *McIlwain*, 66 M.J. at 314. Here, the military judge said no such thing; and we do not believe, viewing the matter objectively, that his continued participation would lead to such a conclusion.

While conceding the absence of actual bias or prejudice, Appellant claims that "the aggregate of the military judge's extensive network of personal and professional relationships" with personnel involved with the court-martial disqualified him. (Assignment of Errors and Brief at 18.) Those personnel included "Appellant and multiple counsel, witnesses and members." (*Id*. at 16.)

A former professional relationship between a military judge or a court member and a witness is not *per se* disqualifying. *United States v. Wright*, 52 M.J. 136, 141 (C.A.A.F. 1999). This is surely as true for a military judge with regard to persons other than witnesses. As Appellant acknowledges, the military judge's professional relationships did not result in actual bias or prejudice; and we further conclude, viewing the situation objectively, that none of the military judge's professional relationships would cause his impartiality to reasonably be questioned.

A social relationship with a witness, however, "creates special concerns which a professional relationship does not." *Id*. The military judge's social relationships were with Appellant and his wife, both of whom later testified at trial, and with one of Appel-

lant's counsel. The relationship with Appellant and his wife, apparently not deep, was surely attenuated by time. We think the relationship with counsel has no greater significance than the professional relationship of supervisor and subordinate from which it derived. Furthermore, we discern no possible prejudice from any of these social relationships.

Appellant's point that both parties concurred in moving to disqualify the military judge is unpersuasive. Also, we reject the assertion that other actions by the military judge were improper.

The military judge did not abuse his discretion when he declined to recuse himself.

Rebuttal testimony about cocaine users

Appellant claims that the military judge abused his discretion by admitting Inspector D's rebuttal testimony over defense objection. A military judge's decision to admit expert testimony is reviewed under an abuse of discretion standard. *United States v. Brooks*, 64 M.J. 325, 328 (C.A.A.F. 2007).

During the defense case, Appellant's wife testified that she had used cocaine during the months preceding Appellant's positive drug test. She testified that she used the cocaine in the home and described her purchases (including how she found a supplier) and use of powder cocaine, the equipment she used to ingest cocaine, and where she stored the equipment, tending to show that cocaine residue could have contaminated areas used by Appellant. In rebuttal, Inspector D, a Senior Inspector for the Contra Costa County District Attorney's Office, was offered and qualified as an expert in street-level narcotics. (R. at 1957.) He testified, based on his experience as

an undercover investigator, concerning the standard process for purchasing powder cocaine, and typical practices for using powder cocaine. (R. at 1959-69.) His descriptions differed in several ways from Appellant's wife's descriptions of her experience and practices.

Appellant complains that Inspector D's testimony was improper human lie detector testimony, as well as improper profile evidence. Human lie detector testimony is "an opinion as to whether the person was truthful in making a specific statement regarding a fact at issue in the case." *Brooks*, 64 M.J. at 328 (quoting *United States v. Kasper*, 58 M.J. 314, 315 (C.A.A.F. 2003). Inspector D never expressed an opinion as to whether certain testimony was truthful. Indeed, he acknowledged that what he was testifying to "doesn't always have to be that way, but that's the majority of the way it happens." (R. at 1960.) His testimony clearly was not human lie detector testimony. Nor was it the functional equivalent of saying that the witness was untruthful or should not be believed. *See Brooks*, 64 M.J. at 329 (admitting a mathematical statement approaching certainty about the reliability of a victim's testimony was plain error).

Nor was the testimony improper profile evidence. "Profile evidence is evidence that presents a 'characteristic profile' of an offender, . . . and then places the accused's personal characteristics within that profile as proof of guilt." *United States v. Traum*, 60 M.J. 226, 234 (C.A.A.F. 2004). "Generally, use of any characteristic 'profile' as evidence of guilt or innocence in criminal trial is improper." *United States v. Banks*, 36 M.J. 150, 161 (C.M.A. 1992). The "ban on

profile evidence exists because this process treads too closely to offering character evidence of an accused in order to prove that the accused acted in conformity with that evidence on a certain occasion and committed the criminal activity in question. This, of course, is prohibited under M.R.E. 404(a)(1)." *Traum*, 60 M.J. at 235 (citing *Bank*s, 36 M.J. at 161). "[T]he focus is upon using a profile as evidence of the accused's guilt or innocence, and not upon using a characteristic profile to support or attack a witness's or victim's credibility or truthfulness." *Brooks*, 64 M.J. at 329. In other words, as a matter of principle, an accused is not to be convicted because the charged offense would be consistent with his own character or because his characteristics are consistent with typical characteristics of other persons who commit that offense. This principle has nothing to say about a profile applied to a witness.

Appellant's wife testified during the defense case concerning her procurement, storage and consumption of cocaine. Her testimony was central to the defense contention that the accused's positive test results were the product of innocent and unwitting exposure to cocaine in the Sullivan household. Her credibility and the plausibility of her account thus became matters for the members to resolve. To rebut her testimony, the Government called Inspector D to describe prevalent practices among cocaine sellers and users in the Bay Area to provide context within which the Government could argue that aspects of her testimony were improbable. The defense objected, in part by suggesting that members would not benefit from the testimony of a local expert on street

level narcotics.[11] The military judge conducted a lengthy Article 39(a) session—which included a full preview of Inspector D's testimony—and heard extensive argument from counsel before determining that Inspector D had specialized knowledge that would be helpful to members charged with determining the facts of the case.[12] (R. at 1864 to 1936,).

The military judge's eventual charge to the members instructed them, "In weighing the evidence, you are expected to use your common sense and your knowledge of human nature. You should consider the inherent probability or improbability of the evidence in light of all the circumstances of the case." (R. at 2007). Notwithstanding the defense contention to the contrary, we do not assume that the procurement, storage, and consumption of cocaine are within the ken of Coast Guard court-martial members simply because they have statutory law enforcement authority. We agree with the military judge's determination that Inspector D's expert testimony would be helpful

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[11] Counsel argued, "[W]e are dealing here with a jury of eight senior Coast Guard captains. The U.S. Coast Guard, last time I looked, was it itself involved in law enforcement. Every Coast Guard officer . . . has law enforcement responsibilities, powers, at least, if not responsibilities and, at times, actual responsibilities. The notion that you would treat these eight senior Coast Guard captains as if they were the next eight or twelve jurors drawn from the Alameda Country registry of motor vehicles roster or the voter roles [sic] and that they needed to be educated about the use of drugs is, again, preposterous." (R. at 1869).

[12] The military judge restricted Inspector D's testimony in some respects. (R. at 1926-27, 1929-36.)

to the members by providing them some relevant context within which to assess the probability or improbability of aspects of Appellant's wife's testimony. The defense had ample opportunity on cross-examination to underscore Inspector D's acknowledgment that not every cocaine sale or use conformed to the typical case he observed. Finally, the military judge properly instructed the members on the limitations of expert testimony.[13]

In sum, the rebuttal evidence at issue related to the testimony of the accused's wife, a witness. The evidence was used to attack her credibility. By definition, see Traum, 60 M.J. at 234, this rebuttal evidence was not the type of evidence subject to the prohibition on the use of profile evidence. Nor was it human lie detector testimony. Rather, it was precisely in the nature of testimony from a person with specialized knowledge that was offered to assist the trier of fact to understand other evidence or determine a fact in issue, which is explicitly permissible under M.R.E. 702. The military judge did not abuse his discretion in allowing the rebuttal testimony.

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[13] "Only you, the members of the court, determine the credibility of the witnesses and what the facts of the case are. No expert witness or other witness can testify that some other witness's account of what occurred is true or not or credible or not, that the witness, expert or non-expert, believes another witness, or that a charged offense did or did not occur." (R. at 2009).

Hair test evidence

Appellant contends that the hair test evidence from Psychemedics should have been excluded because the company refused to provide the standard operating procedures (SOP) governing its hair testing. Appellant also takes issue with some of the military judge's findings of fact on the issue. A decision on whether to admit or exclude evidence is reviewed for abuse of discretion. *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008). Likewise, a ruling on a request for production of evidence is reviewed for abuse of discretion. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004). Findings of fact are reviewed for clear error. *United States v. Flores*, 64 M.J. 451, 454 (C.A.A.F. 2007).

The evidence at issue is the testimony of Psychemedics' Dr. C and the exhibits admitted during his testimony, including the Psychemedics laboratory package concerning the test on Appellant's hair.

On 7 May 2009, after the initial Article 39(a) session but before trial, the defense filed a motion headed "Discovery Motion – Warrant of Attachment," seeking a warrant of attachment to enforce a previously-issued subpoena to obtain the SOP used by Psychemedics in testing hair samples for evidence of drugs. (Appellate Ex. 70.) Psychemedics moved to quash the subpoena, to which the defense filed a response. (Appellate Exs. 71, 72.) On 22 May 2009, the military judge quashed the subpoena, ordering the Government to withdraw it, but encouraged the defense to narrow its request and seek only portions of the SOP. (Appellate Ex. 73.)

On 28 May 2009, the defense emailed Psychemedics' counsel to pursue a narrower request, identifying several specific items, although not giving up its request for the entire SOP. Psychemedics declined to provide a smaller quantity of material while the larger request remained pending, seeking instead a global resolution. (Appellate Ex. 108.)

On 5 June 2009, the defense filed a new Motion in Limine seeking exclusion of all Psychemedics evidence because of Psychemedics' refusal to provide the requested material. (Appellate Ex. 120.)[14] The Government filed its opposition on 7 June 2009, and the motion was argued at an Article 39(a) session on 8 June 2009. (Appellate Ex. 124; R. at 748-69.) The military judge denied the motion, and provided written findings of fact and a ruling. (R. at 785; Appellate Ex. 323.) Dr. C testified later that day and into the next day, and eventually testified in rebuttal as well.

The Defense expert, Dr. K, was the deputy program manager for forensic toxicology at the United States Army Medical Command. (R. at 1470.) He had previously worked at Psychemedics as the vice president of laboratory operations from 1994 to 1998, after retiring from the Army where he had had duties in forensic toxicology. (R. at 1469-70.) These undisputed facts are included in the military judge's findings of fact. (Appellate Ex. 73 at 2; Appellate Ex. 323 at 2.)

The military judge ultimately concluded that although the defense request for some of the specific

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[14] Trial on the merits was scheduled to begin, and in fact did begin, on 6 June 2009.

materials "would normally appear relevant and necessary . . ., this case presents the somewhat unusual situation where the Defense's expert has extensive knowledge of, and confidence in, the Psychemedics' hair testing process and procedures. In other words, the facts show that the SOP documents are cumulative of [the defense expert's] personal knowledge and not helpful to the Defense." (Appellate Ex. 323 at 4-5.) Accordingly, he did not exclude the Psychemedics evidence; nor did he order production of the SOP. (Appellate Ex. 323 at 5.)

A party is entitled to evidence that is relevant and necessary. R.C.M. 703(f)(1). Relevant evidence is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way. R.C.M. 703(f)(1) Discussion.

We agree with the military judge's implicit conclusion that the materials requested were not necessary. The significance of the SOP is its role in ensuring reliability of test results, as Appellant surely agrees. (*See* Assignment of Errors and Brief at 34.) Although Dr. K, the defense expert, cannot be assumed to have known the terms of the current SOP, he knew enough from his knowledge of the prior SOP and his expertise to fully inform the defense's cross-examination of Dr. C, the Psychemedics witness. Based on his advice, the defense could have asked Dr. C whether the laboratory had an SOP, whether it had been followed for Appellant's hair sample, or whether the SOP included particular steps and whether those steps had been followed for Appellant's hair sample. In a slightly different approach, the defense could have asked Dr. C about exactly what steps were performed in testing such as that

conducted on Appellant's hair, the training of the personnel who performed steps in the process, the procedures employed to ensure that the steps in the testing were in fact performed as prescribed, the possible consequences if steps were not performed as prescribed, the considerations for each step, how and why the prescribed steps were changed (if they had been changed) over the time Psychemedics had been doing hair testing, as well as every other detail that might be expected to be found in the SOP and, more to the point, every other aspect that might be important to reliability of test results.[15] Thus, the SOP may properly be called cumulative.

Appellant complains that the military judge**'s** findings blame the defense for creating a "time-critical situation." (Assignment of Errors and Brief at 33; *see* Appellate Ex. 323 at 3.) This characterization is irrelevant to the military judge's conclusion, and ours, that the requested materials were not necessary. Accordingly, we need not address it.

The military judge did not abuse his discretion in concluding that the Psychemedics SOP was not necessary to be provided to the defense and in admitting the Psychemedics evidence.

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[15] Such questioning, which the military judge actively encouraged but which, apparently, the defense never conducted, could also have been carried out at an Article 39(a) session, or before trial. For example, Psychemedics invited the defense to submit specific questions to it. See Appellate Ex. 108; see also Appellate Ex. 323 at 2 ("There is no evidence that [Dr. C] has refused to be interviewed by the Defense or discuss testing methods, equipment, quality control, etc. with the Defense expert or counsel.").

Post-trial advice by witness

Appellant asserts that both the SJA and deputy SJA were disqualified from providing the post-trial advice because they both had testified on a contested matter.

No person who has acted as member, military judge, counsel, or investigating officer in a case may later act as a staff judge advocate upon the same case. Article 6, UCMJ; R.C.M. 1106(b). A staff judge advocate may also be ineligible to provide the post-trial recommendation to a convening authority if he or she has testified as to a contested matter (unless the testimony is clearly uncontroverted), has other than an official interest in the case, or must review that officer's own pretrial action when the sufficiency or correctness of the earlier action has been placed in issue. R.C.M. 1106(b) Discussion. In the absence of a statutory disqualification, "any presumption that a witness cannot later render an impartial evaluation of the case is rebuttable." *United States v. Choice*, 49 C.M.R. 663, 665 (C.M.A. 1975). Even in a case of statutory disqualification, the error is tested for prejudice. *United States v. Stefan*, 69 M.J. 256, 258 (C.A.A.F. 2010). Whether a staff judge advocate or convening authority is disqualified from participating in the post-trial review is a question of law that is reviewed *de novo*. *United States v. Taylor*, 60 M.J. 190, 194 (C.A.A.F. 2004).

As discussed above, during the testimony concerning the Convening Authority's selection of panel members (the first issue discussed herein), the SJA and deputy SJA both testified that the Convening Authority expressed that he did not want to appoint flag officers to the court-martial whom he would lat-

er be assigning to billets. The deputy SJA signed, as acting SJA, the Staff Judge Advocate's Recommendation (SJAR) dated 24 September 2009. In the post-trial submission under R.C.M. 1105 dated 29 October 2009, the defense requested that the SJA and deputy SJA be disqualified because they had testified as to a contested matter, and requested a rehearing due to asserted legal errors, one of which was the categorical exclusion of flag officers from the panel.

R.C.M. 1106(d)(4) requires the SJA to provide an opinion to the convening authority concerning any allegation of legal error in matters submitted under R.C.M. 1105. In compliance therewith, the Addendum to the SJAR dated 2 November 2009, signed by the SJA, advises that the alleged legal errors "are without merit and do not require corrective action on the findings or sentence." The Addendum also notes the argument that the deputy SJA and SJA were disqualified and the consequent request for assignment of a substitute SJA for the purpose of post-trial advice, and demurs, advising, "Our limited testimonial activity on a procedural pretrial motion in this case is not a basis for disqualification."[16]

In conformity with the SJA's advice, the Convening Authority did not act on the defense requests for disqualification of the SJA and deputy SJA and for a rehearing.

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[16] By this time, the original Convening Authority had departed and a new Convening Authority was in place. (See General Court-Martial Order No. 1-10; compare General Court-Martial Convening Order No. 1-09 and both amendments thereto.)

We conclude that neither the SJA, nor the DSJA acting in his stead, was disqualified from participating in the post-trial review in this case. Bearing in mind the R.C.M. 1106(b) Discussion, we are inclined to say the testimony given by the SJA and deputy SJA was uncontroverted. Although there was other evidence of the Convening Authority's thinking, none of it was contradictory to or inconsistent with their testimony. Further, as we see it, the testimony of the SJA and deputy SJA was the strongest evidence in favor of the defense showing that exclusion of flag officers from the panel was categorical and arguably improper. This means that neither of them, in reviewing the issue, would be personally invested in defending their credibility against the interest of Appellant, but would have only an unbiased and official interest. Accordingly, we reject the notion that they could not render impartial advice in the matter. *See Choice*, 49 C.M.R. at 665-66. The SJA and deputy SJA were not disqualified to provide post-trial advice.

Decision

We have reviewed the record in accordance with Article 69, UCMJ. Upon such review, the findings and sentence are determined to be correct in law. Accordingly, the findings of guilty and the sentence, as approved below, are affirmed.

Judges NORRIS and GILL concur.

For the Court,

[seal omitted]

L. I. McClelland
Chief Judge

Appendix D

10 U.S.C. § 825

§ 825. Art. 25. Who may serve on courts-martial

(a) Any commissioned officer on active duty is eligible to serve on all courts-martial for the trial of any person who may lawfully be brought before such courts for trial.

(b) Any warrant officer on active duty is eligible to serve on general and special courts-martial for the trial of any person, other than a commissioned officer, who may lawfully be brought before such courts for trial.

(c) (1) Any enlisted member of an armed force on active duty who is not a member of the same unit as the accused is eligible to serve on general and special courts-martial for the trial of any enlisted member of an armed force who may lawfully be brought before such courts for trial, but he shall serve as a member of a court only if, before the conclusion of a session called by the military judge under section 839(a) of this title [10 USCS § 839(a)] (article 39(a)) prior to trial or, in the absence of such a session, before the court is assembled for the trial of the accused, the accused personally has requested orally on the record or in writing that enlisted members serve on it. After such a request, the accused may not be tried by a general or special court-martial the membership of which does not include enlisted members in a number comprising at least one-third of the total membership of the court, unless eligible enlisted members cannot be obtained on account of physical conditions

or military exigencies. If such members cannot be obtained, the court may be assembled and the trial held without them, but the convening authority shall make a detailed written statement, to be appended to the record, stating why they could not be obtained.

(2) In this article, "unit" means any regularly organized body as defined by the Secretary concerned, but in no case may it be a body larger than a company, squadron, ship's crew, or body corresponding to one of them.

(d) (1) When it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade.

(2) 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. No member of an armed force is eligible to serve as a member of a general or special court-martial when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case.

(e) Before a court-martial is assembled for the trial of a case, the convening authority may excuse a member of the court from participating in the case. Under such regulations as the Secretary concerned may prescribe, the convening authority may delegate his authority under this subsection to his staff judge advocate or legal officer or to any other principal assistant.

Appendix E

Rules for Courts-Martial

Rule 902. Disqualification of military judge

(a) *In general.* Except as provided in subsection (e) of this rule, a military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned.

(b) *Specific grounds.* A military judge shall also disqualify himself or herself in the following circumstances:

(1) Where the military judge has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding.

(2) Where the military judge has acted as counsel, investigating officer, legal officer, staff judge advocate, or convening authority as to any offense charged or in the same case generally.

(3) Where the military judge has been or will be a witness in the same case, is the accuser, has forwarded charges in the case with a personal recommendation as to disposition, or, except in the performance of duties as military judge in a previous trial of the same or a related case, has expressed an opinion concerning the guilt or innocence of the accused.

(4) Where the military judge is not eligible to act because the military judge is not qualified under R.C.M. 502(c) or not detailed under R.C.M. 503(b).

(5) Where the military judge, the military judge's spouse, or a person within the third degree of relationship to either of them or a spouse of such person:

(A) Is a party to the proceeding;

(B) Is known by the military judge to have an interest, financial or otherwise, that could be substantially affected by the outcome of the proceeding; or

(C) Is to the military judge's knowledge likely to be a material witness in the proceeding.

Discussion

A military judge should inform himself or herself about his or her financial interests, and make a reasonable effort to inform himself or herself about the financial interests of his or her spouse and minor children living in his or her household.

(c) *Definitions.* For the purposes of this rule the following words or phrases shall have the meaning indicated—

(1) "Proceeding" includes pretrial, trial, post-trial, appellate review, or other stages of litigation.

(2) The "degree of relationship" is calculated according to the civil law system.

Discussion

Relatives within the third degree of relationship are children, grandchildren, great grandchildren, parents, grandparents, great grandparents, brothers, sisters, uncles, aunts, nephews, and nieces.

(3) "Military judge" does not include the president

of a special court-martial without a military judge.

(d) *Procedure.*

(1) The military judge shall, upon motion of any party or *sua sponte*, decide whether the military judge is disqualified.

Discussion

There is no peremptory challenge against a military judge. A military judge should carefully consider whether any of the grounds for disqualification in this rule exist in each case. The military judge should broadly construe grounds for challenge but should not step down from a case unnecessarily.

Possible grounds for disqualification should be raised at the earliest reasonable opportunity. They may be raised at any time, and an earlier adverse ruling does not bar later consideration of the same issue, as, for example, when additional evidence is discovered.

(2) Each party shall be permitted to question the military judge and to present evidence regarding a possible ground for disqualification before the military judge decides the matter.

Discussion

Nothing in this rule prohibits the military judge from reasonably limiting the presentation of evidence, the scope of questioning, and argument on the subject so as to ensure that only matters material to the central issue of

> the military judge's possible disqualification are considered, thereby, preventing the proceedings from becoming a forum for unfounded opinion, speculation or innuendo.

(3) Except as provided under subsection (e) of this rule, if the military judge rules that the military judge is disqualified, the military judge shall recuse himself or herself.

(e) *Waiver*. No military judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b) of this rule. Where the ground for disqualification arises only under subsection (a) of this rule, waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.