IN THE UNITED STATES COURT OF
APPEALS FOR THE ARMED FORCES

UNITED STATES, Appellee, v. Donna L. BUTCHER 147 54 6451 Captain (0-3) U.S. Air Force, Appellant.	)	BRIEF OF NATIONAL INSTITUTE OF MILITARY JUSTICE AS *AMICUS CURIAE* Crim. App. No. 33519 USCA Dkt. No. 00-0632/AF

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Introduction

The National Institute of Military Justice (NIMJ) respectfully submits this Brief as *amicus curiae*. A motion for leave is being submitted contemporaneously. NIMJ is a District of Columbia nonprofit corporation organized in 1991. Its overall purpose is to advance the administration of military justice in the Armed Forces of the United States. NIMJ limits its brief to the first two granted issues and takes no position with respect to any issue raised by appellant, or as to any other matter, except as stated below.

Issues Granted

I

WHETHER THE MILITARY JUDGE'S DECISION TO NOT DISQUALIFY HIMSELF FROM APPELLANT'S COURT-MARTIAL SHOULD BE REVIEWED ON APPEAL DE NOVO OR AS AN ABUSE OF DISCRETION?

II

WHETHER APPELLANT'S DUE PROCESS RIGHT TO A FAIR TRIAL UNDER THE CONSTITUTION AND RECUSAL STATUTES WAS VIOLATED WHEN HER CASE WAS HEARD, OVER HER OBJECTION, BY A MILITARY JUDGE WHOSE SOCIAL CONTACTS WITH TRIAL COUNSEL BEFORE AND DURING APPELLANT'S COURT-MARTIAL OCCURRED UNDER CIRCUMSTANCES THAT WOULD CAUSE A REASONABLE PERSON WITH KNOWLEDGE OF ALL THE APPLICABLE FACTS TO HAVE A REASONABLE DOUBT REGARDING THE MILITARY JUDGE'S IMPARTIALITY AND WHETHER APPELLANT RECEIVED A FAIR TRIAL?

Statement of the Case

NIMJ adopts the Statement of the Case as presented by appellant's brief.

Statement of Facts

From June 22, 1998 to July 8, 1998, Captain Butcher was tried by a general court-martial before Colonel J. Jeremiah Mahoney, the presiding military judge, at Lackland Air Force Base on charges relating to the alleged theft of Percocet tablets from the Wilford Hall Medical Center. Captain Vance Spath was the circuit trial counsel detailed to prosecute Captain Butcher, along with Captain Natalia Vallejo, an assistant staff judge advocate. Captain Butcher was represented by Captains Kelly Herzik and Robert Ramey. The court-martial found her guilty of all charges, and on July 8, 1998, Captain Butcher was sentenced to a dismissal.

On July 3, 1998, while Captain Butcher's court-martial was in a three day recess, Captain Spath hosted a private going-away party. *See* Appellate Exhibit XXVI at 1. The party invitation stated that the reason for the event was "To Promote Peace, Love and Harmony Among Trial & Defense Counsel in the Greater San Antonio Metropolitan Area. Yeah, Right!" Appellate Exhibit

XXI. Judge Mahoney chose to attend the party hosted by Captain Spath during the recess, and also agreed to play doubles tennis with Captain Spath and two other player the following day, July 4, 1998. *See* Record at 989-90. None of Captain Butcher's defense counsel was present at the party or the tennis match. *See* Appellate Exhibit XXVIII at 3.

On July 7, 1998, defense counsel made a motion for the military judge to disqualify himself and a simultaneous motion for a mistrial on grounds that the social contacts between the military judge and Captain Spath created an appearance of partiality on behalf of the judge for the prosecution, thereby casting substantial doubt over the fairness of the proceedings. Record at 896. The military judge concluded that his conduct did not raise a reasonable appearance of partiality, and on October 30, 1998 denied defense's motion for a mistrial. Appellate Exhibit XXVIII.

Captain Butcher subsequently appealed to the Air Force Court of Criminal Appeals. The court held that the military judge did not abuse his discretion by failing to disqualify himself and granting a mistrial. *United States v. Butcher*, 53 M.J. 711 (A.F. Ct. Crim. App. 2000). The Air Force Court analyzed each social event separately, and held that the military judge's attendance at the party would not cause a disinterested observer to have significant doubts that Captain Butcher received a fair trial and that the military judge's playing of tennis with the circuit trial counsel also would not cause a disinterested observer to have significant doubts that Captain Butcher received a fair trial. In reaching its conclusions, the Air Force Court relied heavily on the unchallenged assertion by the military judge and trial counsel that no *ex parte* communications occurred during the party, and that it was well known that the military judge refused to discuss pending cases while playing tennis.

The Court granted Captain Butcher's petition for review on January 23, 2001.

Summary of Argument

The military judge's refusal to disqualify himself from appellant's court martial should be reviewed on appeal *de novo*, because the question of whether the evidence requires disqualification is patently a mixed question of law and fact. The standard of review universally applied to all other mixed questions of law and fact is that the legal conclusions within these questions are reviewed *de novo*.

Appellant's due process right to a fair trial was violated when her case was heard, over her objection, by a military judge whose social contacts with the trial counsel before and during appellant's court-martial would have caused a reasonable person with knowledge of all the applicable facts to doubt the military judge's impartiality and whether appellant received a fair trial. In coming to its conclusions, the Air Force Court failed to recognize that the appearance of impropriety is sufficient to warrant recusal and that an ongoing trial places restrictions on the social interaction between a military judge and a trial counsel that may not otherwise exist. The Air Force Court also failed to assess the cumulative impact of repeated social contacts between the military judge and the lead trial counsel over the short three day recess and to see that the military judge's conduct during the proceedings indicates a lack of attention regarding the need to avoid the appearance of impropriety.

Argument

I.

THE MILITARY JUDGE'S REFUSAL TO DISQUALIFY HIMSELF FROM APPELLANT'S COURT-MARTIAL SHOULD BE REVIEWED ON APPEAL *DE NOVO.*

This Court uses the *de novo* standard to review issues of law. *See, e.g., United States v. Wright*, 53 M.J. 476, 478 (2000). Yet, despite styling a disqualification decision by a military judge as an "issue of law," this Court has held that a military judge's decision on disqualification is reviewed for an abuse of discretion. *United States v. Wright*, 52 M.J. 136, 141 (1999). The Court's inconsistent holding in *Wright* emphasizes the contradiction underlying decisions in the area of law dealing with judicial conduct. This Court should resolve this inconsistency by applying a *de novo* standard to review issues of judicial conduct.

When a reviewing court conducts discretionary review of the decision of a trial court it gives a certain amount of deference to the trial court's ruling. The deference is inappropriate for the issue of judicial conduct. Allowing a military judge to assess his personal bias and to then give deference to that decision under the abuse of discretion standard is to allow the proverbial fox to decide whether his raid on the chicken coup was acceptable .

Deference is given to the rulings of the trial court primarily for three reasons: (1) the trial court judge is experienced in making such rulings; (2) the trial judge is in a better position to make an informed determination of the issues compared to the appellate court, which is one level removed from the trial court milieu; and (3) the desirability of avoiding frequent appellate review of factual matters. Richard H.W. Maloy, *"Standards of Review" – Just A Tip of the Icicle*, 77 U. DET. MERCY L. REV. 603, 629 (2000). In reviewing a disqualification decision by a judge, the

appellate court should not defer to the trial court because: (1) the trial judge is not experienced in making rulings about the propriety of his or her own conduct; (2) the appellate court, not the trial judge, is in a better position to make an informed determination of whether the trial judge acted properly or not; and (3) the issue does not involve merely factual matters.

Additionally, the question of whether the evidence requires disqualification is best characterized as a mixed question of law and fact. Dissenting judges in other federal appellate decisions have argued that an action for recusal brings up a mixed question of law and fact and thus should be reviewed *de novo*. *In re Billedeaux*, 972 F.2d 104, 106-07 (5th Cir. 1992) (DeMoss, J., dissenting); *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1321 (2nd Cir. 1988)(Lumbard, J., dissenting), *cert. denied*, 490 U.S. 1102 (1989), *In re United States (Franco)*, 158 F.3d 26, 36 (1st Cir. 1998) (Torruella, J., dissenting).

The United States Supreme Court defines mixed questions of law and fact as "questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." *Pullman-Standard v. Swint*, 456 U.S. 273, 290 n.19 (1982). In this case, the facts and the governing law are undisputed. Both the judge and trial counsel admit that they had social contacts while the trial was ongoing, and federal statutes, the Rules for Courts-Martial, the Model Code of Judicial Conduct, and case law have established that misconduct or the appearance of misconduct, as determined by a hypothetical reasonable person, is sufficient grounds for recusal. Consequently, the issue in this case is whether social contacts between the trial counsel and the military judge while a trial is in a short recess would plant a seed of doubt with regard to the judge's impartiality in the mind of a

reasonable person. The question for the reviewing court is whether what can be inferred from the facts does or does not satisfy the standards set forth by statute.

The standard of review universally applied to all other mixed questions of law and fact is that the legal conclusions *within* these questions are reviewed *de novo*. See *United States v. Shover*, 45 M.J. 119 (1996). The Seventh Circuit has expressly held that the question of whether the evidence presented under the 28 U.S.C. §455(a) (2000) (the federal rule equivalent to R.C.M. 902) requires disqualification is a question of law which should be reviewed on appeal *de novo*. *Hook v. McDade*, 89 F.3d 350, 353-54 (7th Cir. 1996); *Taylor v. O'Grady*, 888 F.2d 1189, 1200-01 (7th Cir. 1989), *In re Hatcher*, 150 F.3d 631, 637 (7th Cir. 1998). This Court should similarly hold that an appellate court should apply a de novo standard of review when assessing a military judge's recusal ruling.

II.

THE APPELLANT'S DUE PROCESS RIGHT TO A FAIR TRIAL WAS VIOLATED WHEN HER CASE WAS HEARD, OVER HER OBJECTION, BY A MILITARY JUDGE WHOSE SOCIAL CONTACTS WITH THE TRIAL COUNSEL BEFORE AND DURING THE COURT-MARTIAL WOULD HAVE CAUSED A REASONABLE PERSON WITH KNOWLEDGE OF ALL THE APPLICABLE FACTS TO DOUBT THE MILITARY JUDGE'S IMPARTIALITY AND WHETHER APPELLANT RECEIVED A FAIR TRIAL.

A. The lower court failed to recognize that the appearance of impropriety is sufficient to warrant recusal.

The standard for recusal of a military judge is set forth under Rule for Courts-Martial 902(c), which provides that "a military judge shall disqualify himself in any proceeding in which that military judge's impartiality might reasonably be questioned." An identical standard applies

to civilian judges under 28 U.S.C. § 455(a). In interpreting § 455(a), the United States Supreme Court has stated that "the very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety when possible." *Liljeberg v. Health Services Acquisition Corp.* , 486 U.S. 847, 865 (1987). Courts have consistently recognized that the appearance of bias is just as fatal to the legitimacy of a trial as the presence of actual bias. According to the Supreme Court:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of bias actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness....Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, "justice must satisfy the appearance of justice."

In re Murchison, 349 U.S. 133, 136 (1955).

Congress explicitly recognized the importance of maintaining an impartial appearance by amending 28 U.S.C § 455 in 1975 to broaden the grounds and loosen the procedure for disqualification in the federal court, and weakening the "duty to sit" requirement so that "the benefit of the doubt is now to be resolved in favor of recusal." *United States v. Alabama,* 828 F.2d 1532, 1540-1541 (11th Cir. 1987). According to the Eleventh Circuit, "Congress expressly intended the amended § 455 to promote public confidence in the impartiality of the courts by eliminating even the appearance of impropriety." *Id.* at 1541.

The emphasis on appearances is echoed throughout the Air Force Uniform Code of

Judicial Conduct for Military Trial and Appellate Judges and Uniform Regulations and Procedures Relating to Judicial Discipline. TJAGPL-3 (4 Feb. 1998). Canon 2 of the Air Force Code of Judicial Conduct directs judges to "avoid impropriety and appearance of impropriety in all of the judge's activities." *Id.*, Canon 2. The Commentary to Canon 2 acknowledges the heavy burden this imposes on the judiciary and explicitly states that a "judge must expect to be the subject of constant public scrutiny," and "must therefore accept restrictions on his or her conduct that might be viewed as burdensome by the ordinary citizen and do so freely and willingly." *Id.*, Canon 2A, Commentary. Canon 3 holds that the "judicial duties of a judge take precedence over all the judge's other activities" and requires a judge to be "alert to avoid behavior that may be perceived as prejudicial." *Id.*, Canon 3B, Commentary. Finally, Canon 4 recognizes that a judge's obligation to appear impartial reaches beyond the courtroom and provides that a "judge shall conduct all of the judge's extra-judicial activities so that they do not cast reasonable doubt on the judge's capacity to act impartially as a judge." *Id.*, Canon 4. The test for the appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired. *Id.*

The Air Force Court rejected appellant's argument for recusal and asserted that the key inquiry is not whether there was simply an appearance of impropriety, but whether that appearance was sufficient to cause a disinterested observer to question the military judge's impartiality. Congress in amending § 455(a) recognized a strong link between the appearance of impropriety and a disinterested observer's perception that the trial was unfair. Courts have also consistently held that the appearance of impropriety is sufficient to warrant recusal. The lower

court has aptly observed that "[j]udges, like Caesar's wife, should always be above suspicion. An impartial and disinterested trial judge is the foundation on which the military justice system rests, and avoiding the appearance of impropriety is as important as avoiding impropriety itself. *United States v. Berman*, 28 M.J. 615, 616 (A.F.C.M.R. 1989).

The New Jersey Supreme Court echoed this precise sentiment in recommending that a judge who attended the party of a convicted felon be publicly reprimanded:

> [Canon 2 of the Code of Judicial Conduct] makes clear that judges have responsibilities with regard to their personal conduct that greatly exceed those of ordinary citizens. . . . Respondent described his attendance at the picnic [hosted by convicted felon Thomas Robert Heroy] was an innocent mistake. He explained that he had no improper motive, and offered in mitigation that he and Heroy had been close friends for many years. We have no reason to doubt respondent's sincerity and are satisfied that he acted with no improper motive. However, respondent's motivation is not at issue; his conduct is. His presence at the party was the subject of public scrutiny, not his feelings of friendship for Heroy . . . . [A]s in many other instances concerning the conduct of judges, the appearances count as much as facts.

In the Matter of Robert B. Blackman, Judge of the Edison Municipal Court, 591 A.2d 1339, 1341-42 (N.J. 1991) (per curiam).

The court went on to conclude that by "putting his personal feelings ahead of his responsibility as a judge and attending the party, respondent conducted himself improperly and exhibited insensitivity and poor judgment." *Id.* at 1342. While the facts of the New Jersey case

differ from those here, the rationale behind the court's decision is directly applicable. In *Haines v. Liggett Group Inc.*, the Third Circuit ordered the recusal of a district judge who had "been a distinguished member of the federal judiciary for almost 15 years." *Haines v. Liggett Group Inc.*, 975 F.2d 81, 98 (3d Cir. 1992). While openly stating that the Court "would not agree that he is incapable of discharging judicial duties free from bias or prejudice," the test is one of impartiality and the appearance of impartiality. *Id.* at 98. These cases stand for the proposition that the appearance of bias is just as harmful to the administration of justice as actual bias.

In this case, the military judge's conduct clearly created the appearance of impropriety. This appearance is not lessened by the Air Force Court's conclusion that no actual impropriety occurred. The Air Force Court relied heavily on the military judge's statement that he played tennis "with almost anyone he could find" and "it was well known within the Central Judicial Circuit, the military judge did not discuss on-going cases with his tennis partners." *Butcher*, 53 M.J. at 714.

The court's reliance on the military judge's characterization of his tennis habits is particularly unusual given the court's conclusion that reasonable observers may disagree with the judge's distinction between recreational activities, such as golfing and fishing, and competitive sports such as tennis. *Id.* at 713. Furthermore, the court concedes that "a casual observer of this tennis match might well think it cast doubt on the judge's impartiality," and would have preferred that the judge decline to play with trial counsel. *Id.* at 714. In effect, the court acknowledges that the tennis match had the appearance of impropriety, but suggests that this appearance is dispelled by the fact that no improper communications occurred.

The lower court offers essentially the same rationale regarding the military judge's

attendance at Captain Spath's party. The Air Force Court placed significant weight on the unchallenged statements by the military judge and Captain Spath that "they did not discuss any substantive matter related to the case and the only comment made by the military judge referenced the fact that the trial was 'taking longer' than expected" in concluding that the military judge's attendance at the party did not appear improper. *Id.* at 713.

This interpretation of R.C.M. 902(a) directly contradicts the intent of Congress in amending § 455(a). *See United States v. Alabama*, 828 F.2d at 1540-41. R.C.M. 902(a) and § 455(a) recognize that the mere appearance of bias undermines the judicial system, and mandate that both be purged from the judicial system. Assuming that the absence of bias automatically eliminates the appearance of bias effectively eviscerates the prohibition against activities that only appear improper.

B. The lower court failed to recognize that an ongoing trial places restrictions on the social interaction between a judge and prosecutor that may not otherwise exist.

The lower court failed to distinguish between social interactions occurring during an ongoing trial, and similar interactions after a trial has concluded. Canon 2 of the Air Force Code of Judicial Conduct provides that judges "must expect to be the subject of constant public scrutiny" and "must therefore accept restrictions on his or her conduct that might be viewed as burdensome by the ordinary citizen." TJAGPL-3, Canon 2. In light of this requirement, the military judge's behavior is clearly inappropriate. While the nature of military practice may lead circuit counsel and military judges to travel together, co-locate in the same building and share an administrative area, a balance must be struck between the efficient administration of justice and the rights of the accused to a trial that is impartial in substance and appearance. Regardless of

whether military judges and JAG attorneys can interact socially without sacrificing their impartiality, the due process right to a fair trial requires that the judge presiding over a court-martial refrain from attending parties given by the lead trial counsel and subsequently playing tennis with the same trial counsel during a three day recess in the court-martial. The military judge was not required to abstain from tennis for a prolonged period of time. Indeed, the military judge was not required to abstain from tennis at all, provided he could find a partner who was not appearing before him in the ongoing case. While a military judge need not become a hermit, this Court must ensure that a judge's social activities do not create an appearance of impropriety which deprives the accused of rights guaranteed under federal and military law.

C. The lower court failed to assess the cumulative impact of repeated social contacts between the military judge and the lead trial counsel over the short three day recess.

The courtroom and the outside world are not isolated and self-contained; social contacts between a military judge and the lead prosecutor during a recess have a direct impact on the legitimacy of the proceedings. The Air Force Code of Judicial Conduct recognizes that because "it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code." TJAGPL-3, Canon 2A, Commentary. The test is "whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." *Id.* In this case, the intense and repeated nature of the social contact, coupled with the short time period in which the contact occurred, violate the proscription of the Air Force Code of Judicial Conduct. On July 3, 1998, the military judge attended a private party thrown by the lead trial counsel in the case in which he was

presiding. During the party, the military judge agreed to play tennis with the lead trial counsel the following morning. Defense counsel were not present at the party or at the subsequent tennis match. Neither the military judge nor the trial counsel informed defense counsel that these contacts had occurred. Rather, the defense learned of these events several days later from one of the party attendees. While either event is questionable, in tandem these contacts clearly constitute conduct in violation of the Air Force Code of Judicial Conduct and R.C.M. 902(a). Furthermore, as the Air Force Court conceded, "three and a half days is not such a lengthy time." *Butcher*, 53 M.J. at 713. Over this relatively short period, the trial counsel enjoyed not one, but two, opportunities for social interaction with the presiding military judge outside of the presence of defense counsel. Regardless of whether any improper *ex parte* communications actually took place, the opportunity for such communications undermines the appearance of impartiality.

D. The military judge's conduct during the proceedings indicates a lack of attention regarding the need to avoid the appearance of impropriety.

Despite the consistent emphasis on appearance in the federal statues, the Air Force Code of Judicial Conduct, and the case law, the military judge's conduct during the trial and his Essential Findings and Ruling on Defense Motion for Recusal and Mistrial reveal an inadequate attention to the importance of appearing impartial. As stated previously, courts have held that the appearance of impropriety is sufficient to require recusal. The approach taken by the law emphasizes the need for judges to "freely and willingly" refrain from such conduct, even when such restraint is "burdensome." TJAGPL-3, Canon 2A, Commentary.

The military judge's Essential Findings and Ruling on Defense Motion for Recusal and Mistrial shifts the emphasis from refraining from behavior that appears improper to minimizing the

likelihood that the accused or the public will become aware that such behavior is occurring. The military judge promulgated Rule 54(a) of the Central Circuit Rules which provides:

> Witnesses, spectators, the accused, the victim, and family members are unlikely to understand that opposing counsel and the trial judge may actually have a life or be on speaking terms with each other. Counsel must be sensitive to this fact during preparation and during trial. Don't discuss social events, dining arrangements, or planned sporting activities under circumstances where the discussion may be overheard and misinterpreted.

Appellate Exhibit XXV at 32.

According to the military judge, the purpose of the rule "isn't to hide inappropriate behavior, but to avoid having to explain routine and innocent behavior in one's personal life." Appellate Exhibit XXVIII. He expressed a concern that parties who have an interest in the proceedings may be "unable to comprehend that their lawyer is not a blood-enemy of the prosecutor." *Id.* While this may be a valid concern, it is also possible that inappropriate social contacts may cause both disinterested observers and reasonable participants to question the fairness of the proceedings. A military officer on trial for her career and freedom is entitled to be aware of possible inappropriate social contacts between opposing counsel and the court. Rather than permitting attorneys and judges to engage in conduct that appears inappropriate but is actually innocent, and relying upon an informal code of silence to prevent such information from being relayed to the interested parties or their attorneys, the law requires judges to behave with the expectation that they will be subject to constant public scrutiny, and "freely and willingly" accept restrictions on their conduct "that might be viewed as burdensome by the ordinary citizen."

TJAGPL-3, Canon 2A, Commentary. The military judge's statement that "mercifully, not everything about a judge that could be perceived as affecting the appearance of impartiality gets put on the record in a court martial" because "not everything judges do is done in front of someone likely to report it to the accused or his defense attorney," indicates an unwillingness to fully accept the burdens imposed by the Canon 2 of the Air Force Code of Judicial Conduct. Appellate Exhibit XXVIII. Indeed, the military judge's response to being confronted with behavior that appears inappropriate was to criticize both the defense counsel for advising their client of his conduct, and the system in which "appellate defense counsel make their career second guessing trial level defense counsel and military appellate courts order *DuBay* hearings based upon bizarre, meritless, and unsupported allegations." *Id.* In fact, the military judge concluded that "prudence dictates not being around defense counsel in unofficial or relaxed social setting simply because anything said or done will be reported to a current or future client." *Id.*

The nature of military practice may sometimes lead military judges and counsel to interact to a greater extent than their civilian counterparts. But when a trial is ongoing, the military judge and counsel must refrain from attending the same social functions and initiating occasions for social contact, for the purposes of maintaining the appearance of propriety. Military judges are entrusted with enormous power and serve as the most visible symbols of the judicial system. In light of federal judges' importance, § 455(a) holds them to the highest standard of impartiality and makes even the appearance of bias impermissible. This concern is no less important to the military justice system than to the civilian judiciary. Indeed, because military judges do not enjoy some of the trappings of civilian judicial authority, maintaining an appearance of impartiality may be even more vital for military judges.

Conclusion

For the foregoing reasons, this Court should reverse the opinion of the Air Force Court of Criminal Appeals.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that an original and seven copies of the foregoing Brief of National Institute of Military Justice as *Amicus Curiae* were mailed via first-class mail, postage prepaid, to the Court on August 25, 2000, and that a copy of the foregoing Brief of National Institute of Military Justice as Amicus Curiae was mailed via first-class mail, postage prepaid, to Colonel James R. Wise, USAF, Chief, Appellate Defense Division, AFLSA/JAJA, 112 Luke Avenue, Suite 343, Bolling Air Force Base, Washington, DC 20332-8000, counsel for Appellant, and Captain Christa S. Cothrel, USAF, AFLSA/JAJG, 112 Luke Avenue, Suite 206, Bolling Air Force Base, Washington, DC 20332, counsel for Appellee, on April 2, 2001.

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