IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

Jason M. Bagstad, Staff Sergeant (E-6), *Appellant,* *v.* UNITED STATES, *Appellee.*	*AMICUS CURIAE* BRIEF OF NATIONAL INSTITUTE OF MILITARY JUSTICE Crim. App. No. 2006-2454 USCA Dkt. No. 09-0429/MC

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

In accordance with Rule 26 of this Court's Rules of Practice and Procedure, the National Institute of Military Justice ("NIMJ") respectfully submits this brief as *amicus curiae*. For the reasons explained below, the Court should reverse the Navy-Marine Corps Court of Appeals' decision in this case.

Assignment of Error

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING APPELLANT'S CHALLENGE FOR CAUSE OF CAPTAIN STOJKA, CREATING SERIOUS DOUBTS AS TO WHETHER APPELLANT HAD A FAIR AND IMPARTIAL PANEL WHERE THE SENIOR MEMBER AND ONE OF HIS SUBORDINATES COMPRISED THE TWO-THIRDS MAJORITY SUFFICIENT TO CONVICT APPELLANT.

Interest of the Amicus

NIMJ is a District of Columbia nonprofit corporation organized in 1991. Its overall purpose is to advance the fair administration of military justice in the Armed Forces of the United States. NIMJ participates actively in the military justice process through such means as the filing of *amicus* briefs, rulemaking comments, its website (www.nimj.org), and its publications program, including the unofficial *Guide to the Rules of Practice and Procedure for the United States Court of Appeals for the Armed Forces* (12th ed. 2006). A significant part of the fair administration of courts-martial is having panels which appear free from taint or unlawful influence.

Jurisdiction, Statement of the Case, and Facts

This case is properly before the Court in accordance with Article 67(a)(3), Uniform Code of Military Justice (UCMJ). Petitioner has submitted statements of the case and of the facts which require no comment.

Law

This Court reviews a military judge's denial of a challenge for cause for an abuse of discretion. *United States v. Leonard*, 63 M.J. 398, 402 (C.A.A.F. 2006). However, a military judge's denial of a challenge based on implied bias is given less deference than a claim of actual bias. *United States v. Clay*,

64 M.J. 274, 276-277 (C.A.A.F. 2007). This is especially true when the military judge does not articulate on the record his grounds for denying the challenge. *United States v. Terry*, 64 M.J. 295, 305 (C.A.A.F. 2007).

Rule for Court-Martial (R.C.M.) 912(f)(1)(n) provides that a member should be excused for cause when it is necessary to preserve the "interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." Such implied bias arises when an objective appearance of unfairness exists at trial. Implied bias in the military focuses on whether there is "too high a risk that the public will perceive" that the accused received less than a court composed of fair, impartial, equal members. *United States v. Moreno*, 63 M.J. 129, 134 (C.A.A.F. 2006) (*quoting United States v. Wiesen*, 56 M.J. 172, 176 (C.A.A.F. 2001)). Accordingly, implied bias must be adjudged "'through the eyes of the public,' focusing on the appearance of fairness." *United States v. Townsend*, 65 M.J. 460, 463 (C.A.A.F. 2008) (internal citation omitted).

Argument

THIS COURT SHOULD ADOPT A STANDARD BY WHICH ALL SENIOR-SUBORDINATE DIRECT REPORTING RELATIONSHIPS BETWEEN COURT MEMBERS CREATE A CONCLUSIVE PRESUMPTION OF IMPLIED BIAS.

Few elements of military justice are the subject of such intense public scrutiny as the impact of the senior-subordinate relationship on the administration of justice generally, and the outcome of courts-martial specifically. While Congress originally addressed this issue in Article 37, UCMJ, military courts have long struggled with the issue of implied bias and the superior-subordinate relationship. Although arguments against a *per se* rule prohibiting superiors from sitting on courts with their immediate subordinates have prevented the implementation of such a rule, now is the time to overrule *United States v. Murphy*, 26 M.J. 454 (C.M.A. 1988), and revise the rules regarding one member of the panel who rates another.

Testimony and Congressional Action

In hearings during the consideration of the UCMJ, both legislators and witnesses voiced their concerns about the effect of the senior-subordinate relationship on military justice. The issue of actual bias was explicitly addressed through the codification of Article 37, which, as amended, reads in part:

> [n]o authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding.

Article 37, UCMJ.

This Article provides redress to actual bias created by superiors' direct actions undertaken to influence subordinate members. *See United States v. Levite*, 25 M.J. 334 (C.M.A. 1987) (discussing both convening authorities and superior officers generally); *United States v. Carlson*, 21 M.J. 847 (A.C.M.R. 1986) (including characterizing NCOs as superiors).

Many members of Congress, as well as witnesses, realized, however, that Article 37 might prove insufficient to dispel the poisonous influence that senior-subordinate relations amongst members had on the fairness of courts-martial. E.M. Morgan, chairman of the UCMJ drafting committee, noted that "[t]he main objection voiced by [groups such as the ABA and other civilian organizations] was that we hadn't gone far enough in eliminating command control . . ." *Testimony of E.M. Morgan before the Senate Armed Services Committee on S. 857 and H.R. 4080*, April 27, 1949.

George Spiegelberg, chairman of the special committee on military justice for the American Bar Association, expounded on these objections in his testimony, stating "[t]he only possible reason for leaving with the commanding officer the right to influence the court is to influence it incorrectly." He supported his contention, in part, by quoting E.M. Morgan's comments in the Yale Law Journal that "[t]he control of

appointing another superior military authority over the court and its findings is to the civilian the most astonishing and confusing characteristic of the court-martial system." *Testimony of George Spiegelberg before the Senate Armed Services Committee on S. 857 and H.R. 4080*, May 4, 1949, *quoting* 29 Yale Law Journal 52, 60 (1919).

Arthur Farmer, chairman of the War Veteran's Bar Association's Committee on Military Law, echoed Spiegelberg's testimony regarding the public's perception of superior-subordinate influence generally, as well as the possibility that such influence was sufficiently insidious that Article 37's protections would be inadequate. *Testimony of Arthur Farmer before the Senate Armed Services Committee on S. 857 and H.R. 4080*, May 4, 1949. In fact, Farmer remarked, "I would certainly like to second Mr. Spiegelberg's statement that there is absolutely no way of proving an officer guilty of a violation of Article 37 unless he is a hopeless idiot," meaning that it would be easy to circumvent Article 37's limitations on superiors influencing court-martial decisions. Id.

Interpretation of Article 37 by the Military Courts

Courts have held that Article 37 of the UCMJ exists to "assure to all in military service absolutely fair trial[s] in which findings and sentence are determined solely upon evidence,

free from all unlawful influence by a military superior." *United States v. Navarre*, 17 C.M.R. 32, 37 (C.M.A. 1954). However, the courts have also realized, as did the witnesses who testified during the congressional hearings that safeguarding against actual bias is not enough. The underlying respect for superiors inherent in a senior-subordinate military relationship places a great strain on the perception of independent decision making amongst members at trial, raising the threat of implied bias whenever such a relationship exists. As is aptly noted in *Wiesen*:

> [W]ith or without the prohibition against unlawful command influence under Article 37, UCMJ. . . [t]he American public should and does have great confidence in the integrity of the men and women who serve in uniform, including their integrity in the jury room. However, public perception of the military justice system may nonetheless be affected by more subtle aspects of military life. An objective public might ask to what extent, if any, does deference (a.k.a. respect) for senior officers come into play? . . . [T]his [creates] "the wrong atmosphere." In this context, there is simply too high a risk that the public will perceive that the accused received something less than a jury of ten equal members, although something more than a jury of one.

Wiesen, 56 M.J. at 176 (internal citations omitted).

Because of this perception, the Air Force Court of Military Review went so far as to adopt a *per se* rule that senior-subordinate relations among court members created implied bias, and relied upon this Court's decision in *United States v.*

Harris, 13 M.J. 288 (C.M.A. 1982). *United States v. Murphy*, 23 M.J. 690 (A.F.C.M.R. 1986). On granting reconsideration, the Air Force court explained that "such a circumstance raised "an appearance of evil in the eye of disinterested observers," notwithstanding sincere declarations of impartiality by the challenged members." *United States v. Murphy,* 23 M.J. 764 (A.F.C.M.R. 1986), *quoting Harris*, 13 M.J. at 288.

This began a brief dialogue among the service courts over the proper treatment of direct reporting relationships on court-martial panels. The Army Court of Military Review noted the concerns raised by the Air Force in *Murphy* and Article 37 and held that "a rater-rated relationship on a panel ought to be a matter of concern . . . Any circumstance that may evidence an improper influence on a member of the panel, the accused, counsel, or the military judge is always a matter of concern." *United States v. Eberhardt*, 24 M.J. 944, 946 (A.C.M.R. 1987). Ultimately, however, the Army court declined to adopt a *per se* rule for fear that such a rule would hamper commanders in combat zones who had a sharply reduced pool of potential members from which to select. *Eberhardt*, 24 M.J. at 946. The Air Force Court found no such problem, commenting that

> [W]e find it difficult to believe that a special court-martial convening authority cannot select at least three members who are not disqualified under the circumstances we considered in *Murphy,* or that a

> general court-martial convening authority cannot
> select at least five.

Murphy, 23 M.J. at 765.

The dialogue between the service courts ended when this Court reviewed *Murphy*. The Court held that the *Harris* court found factors beyond the senior-subordinate relationship as grounds for implied bias. *United States v. Murphy*, 26 M.J. 454, 455 (C.M.A. 1988). Hence, *Harris* could not be read to create a *per se* rule based on the direct reporting relationship alone, and this Court found that the Air Force Court had erred in implementing such a rule. *Murphy*, 26 M.J. at 455.

Writing for the majority in *Murphy*, Judge Cox agreed that superior-subordinate combinations should be avoided, but rejected an inflexible *per se* rule that would set the Air Force apart from the other services. *Id*. at 455-456. He found the service-specific rule to be a slight to senior officers, to whom he believed a *per se* rule would broadly impute ill motives. *Id.* at 456, Judge Cox's footnote. However, these rationales aside, he wrote, "I shall go on record as agreeing with the principle that convening authorities should avoid placing superior-subordinate combinations on courts-martial to the extent practicable." *Id.*

In *Murphy*, Chief Judge Everett discussed the 1968 amendments to Article 37, UCMJ, explaining the continuing

congressional concern surrounding command influence. *Murphy*, 26 M.J. at 457 (concurring in part and dissenting in part). Although he agreed that *Harris* did not create a *per se* rule against raters sitting on panels with their ratees, Chief Judge Everett asserted the Air Force Court was well within its bounds to adopt one on its own based on "administrative convenience and in order to avoid 'an appearance of evil.'" *Id.*

Rationale for Adoption of a Conclusive Presumption

This brief history highlights the ongoing problem surrounding senior-subordinate influence and implied basis. It is a concern that there is "too high a risk that the public will perceive" an accused received less than a court composed of fair, impartial, equal members. *Moreno*, 63 M.J. at 134 (internal citation omitted). A conclusive presumption of implied bias when a subordinate and his immediate superior sit on a court-martial panel would ameliorate this risk, removing the public perception of unfair superior influence from court-martial panels. Compared to the benefit of avoiding perceived unfairness in courts-martial, there seems to be little rationale for opposing such a rule.

Lack of Qualified Members. Some arguments cited for the proposition that members should be allowed to sit with their immediate superiors or subordinates involve the numbers of

individuals assigned to small bases or deployed environments. However, as is noted in Chief Judge Everett's dissent in *Murphy*, the difficulty of providing a pool of members who are not in a direct reporting senior-subordinate relationship is not a great burden to place on a convening authority. *Murphy*, 26 M.J. at 457. This is true even at small duty stations with no tenant organizations assigned to the location.

First, with consolidation of military posts, the likelihood is that all members assigned to a base will not be in the same chain of command. Second, even with a relatively small installation in which there is a single commander to which everyone ultimately reports, the convening authority should be able to find at least a handful of individuals who meet the Article 25 criteria for selecting court members and do not report directly to another member.

Military Exigency. As this Court noted in *Wiesen*, "What is reasonable and fair from the public's perception, as well as this Court's judgment as to what is reasonable and fair, would be different in the case of national security exigency or operational necessity." *Wiesen*, 56 M.J. at 176. Again, even with a small population to choose from, most deployed commanders would be able to find the requisite number of members needed to fill a court-martial panel without the need to select

individuals who are in each other's immediate rating chain.

Affront to Members' Integrity. The final often-espoused concern is that court-martial members make up "blue ribbon panels due to the quality of their membership," making any *per se* rule against superiors sitting with immediate subordinates an "affront" to the members' integrity. *Wiesen*, 56 M.J. at 179 (Crawford dissent); *Murphy*, 26 M.J. at 454. However, though the professionalism and dedication of service members to their oaths as court-martial members are not at issue, grave concerns surrounding impartiality still remain in the eyes of the public.

The problem with the current rule which allows for rebuttal of the superior-subordinate influence issue lies in attempting to parse the unknown. Despite best efforts during *voir dire*, no one can predict how the superior and subordinate panel members will react behind the closed deliberation room door. While each will assure the military judge that he will decide the case based solely on the facts and the military judge's instructions, and each will certainly attempt to put the supervisory relationship aside, this relationship is the basis for military discipline. It may be more difficult to ignore in reality than in theory. Perhaps the subordinate may feel completely comfortable voicing his opinion which is in direct contradiction to the superior who writes his performance report. We just do

not know how to predict when subtle influence will occur, and so we must presume bias in order to ensure fairness of the proceedings, however overprotective such a rule might appear.

Furthermore, actual influence or not, the question is one of public perception. The public will not see or know that a senior enlisted member enjoys a reputation for mentoring young officers, nor that the president of the panel generally defers to the advice of her senior enlisted advisor. The public, especially one which is increasingly distanced from personal military experience, simply notices that Captain Brown directly supervises SMSgt Green, and they are both sitting on the court-martial panel. That, alone, may cause the average citizen to believe the court-martial is rigged. It is difficult to understand why this problem should be ignored due to speculative fears of offending court members' sensibilities. Preventing this situation from becoming a matter of concern by implementing a rule prohibiting the seating of members who are rated by one another is an easy solution, albeit prophylactic.

Conclusion

This Court should reverse the service court's decision in this case, overrule *Murphy,* and implement a conclusive presumption of implied bias when any court member directly reports to another.

Respectfully submitted,

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August 31, 2009

CERTIFICATE OF FILING AND SERVICE

I certify that on August 31, 2009, an original and seven copies of the foregoing *Amicus Curiae* Brief were hand-delivered to the Court and copies thereof mailed to Major Anthony W. Burgos, 1254 Charles Morris Street SE, Bldg 58, Suite 100, Washington Navy Yard, DC 20374; and Director, Appellate Government Division, US Navy-Marine Corps Appellate Review Activity, Bldg. 58, Suite B01, 1254 Charles Morris Street SE, Washington Navy Yard, DC 20374.

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