



admin@nimj.org

<https://www.nimj.org>

May 13, 2022

Policy Statement

Disqualification of Certain Reservists from Serving as Judges

“[A] military judge shall disqualify himself or herself in any proceeding in which that military judge’s impartiality *might reasonably be questioned.*” Rule for Courts-Martial (R.C.M.) 902(a) (emphasis added). “[T]he validity of the military justice system and the integrity of the court-martial process depend on the impartiality of military judges in fact and appearance. Therefore, actual bias is not required; an appearance of bias is sufficient to disqualify a military judge.” *United States v. Uribe*, 80 M.J. 442, 446 (C.A.A.F. 2021) (cleaned up).

In the last year, we have observed a number of cases in which full-time civilian prosecutors have been detailed to serve as military judges in their capacity as reserve judge advocates. This practice is inimical to public confidence in the administration of justice.

A reservist whose civilian legal practice is focused on criminal law advocacy, whether for the government or the defense, must suspend, for a few hours a month, the precepts governing his or her daily life as an advocate, take up those of a judge, and then return to those of an advocate. Regardless of whether the reservist is actually impartial, a reasonable member of the general public might question his or her ability to separate his or her concurrent roles as judge and advocate, and thus question the appearance of impartiality. *See, e.g., United States v. King*, 2021 CCA LEXIS 415 (A.F. Ct. Crim. App. Aug. 16, 2021) (unpublished) (as a reserve military judge, the Chief, Child Exploitation and Obscenity Section, U.S. Department of Justice Criminal Division, presided over part of a case in which the accused was charged with child abuse).

By its terms, R.C.M. 902 does not apply to appellate military judges or military magistrates. The Court of Appeals for the Armed Forces, however, held that 28 U.S.C. § 455, the federal statute on which R.C.M. 902 is based, applies to judges of the courts of criminal appeals. *United States v. Lynn*, 54 M.J. 202, 205 (C.A.A.F. 2000). NIMJ recognizes that, individually, the services have, to varying degrees, imposed disqualification rules on appellate military judges by regulation. Nevertheless, the regulations are not uniform and, in some cases, are not as clear as R.C.M. 902.

Therefore, NIMJ recommends that the Joint Service Committee on Military

Justice and the Department of Defense forward to the President a proposed *Manual for Courts-Martial* amendment that would provide:

(1) Appellate military judges and military magistrates are subject to R.C.M. 902.

(2) Reservists whose civilian legal practice is focused on criminal law advocacy, whether for the prosecution or the defense, are barred from serving as military judges, appellate military judges, or military magistrates.

In the meantime, NIMJ recommends that each Judge Advocate General cease designating or certifying as military judges, appellate military judges, or military magistrates, reservists whose civilian careers are focused on criminal law advocacy, and withdraw any such designations or certifications currently in effect.

The Board of Directors
National Institute of Military Justice