

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Petitioner

**MOTION TO RECUSE JUDGE
EWING**

v.

Colonel (O-6)
PRITCHARD, CHARLES L.
Military Judge
United States Army,
Respondent

Docket No. ARMY MISC 20220001

Lieutenant Colonel (O-5)
DIAL, ANDREW J.
United States Army,
Real Party in Interest

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

COME NOW the undersigned appellate defense counsel, under Rule 23 of the Rules of Appellate Procedure, and move for recusal of Judge James A. Ewing in any further participation in the present case.

Facts

On 5 January 2022, the Army Court of Criminal Appeals granted the government's request for a stay of proceedings in LTC Dial's trial. On 24 January 2022, the government filed their petition for writ of prohibition. On 19 February 2022 the RPI filed his brief in opposition. On 21 March 2022, this court, on its own motion, decided to consider the case *en banc*. Oral argument was held in this case on 14 April 2022. Judge Ewing participated in the oral argument.

At a question and answer session held after oral argument in *United States v. Steele* on 30 March 2022, Judge Ewing mentioned that he was a Reserve officer and, in his civilian capacity, an appellate attorney for the U.S. Attorney's office. RPI has learned that Judge Ewing is an appellate attorney in the U.S. Attorney's office (AUSA) in the Northern District of Ohio. In panel composition memorandums that were effective 15 October 2021, 29 October 2021, 6 December 2021, and 2 February 2022, Judge Ewing was listed as a member of panel 4.

In a pleading submitted in the United States District Court for the Northern District of Ohio-Eastern Division, AUSA James A. Ewing entered a notice of appearance on behalf of the United States of America on 12 November 2021. In that pleading "AUSA Ewing as attorney of record for the government in the within action, and respectfully requests that this Court substitute AUSA Ewing for, and in place of AUSA [JG], for all further proceedings and notices in the within action, as attorney of record for the United States of America." (Appendix A). On 6 December 2021, AUSA Ewing filed a twenty-one page pleading on behalf of the United States. In this substantive pleading, AUSA Ewing asserted, "the government's position" and discussed the government's view on principles of the Fourth and Sixth Amendments, prejudice analysis, and the government's inadvertent viewing of privileged material. (Appendix B). On 12 January 2022,

AUSA Ewing filed a motion to dismiss on behalf of the United States of America. (Appendix C).

Judge Ewing participated in decisions of this court that were released on 19 November¹, 23 November², 28 December 2021³, and 27 January 2022⁴.

Law

“[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). *See also* 28 USCS § 455. Title 28 USC § 455 applies to judges on the Courts of Criminal Appeals. *United States v. Hamilton*, 41 M.J. 32, 39 (C.M.A. 1994). “The test for determining if recusal is necessary under 28 U.S.C.S. § 455 is whether a reasonable person who knew all the facts might question the appellate military judges’ impartiality.” *United States v. Mitchell*, 39 M.J. 131, 143 (C.M.A. 1994). The Supreme Court has explained that “what matters” in making an objective determination of recusal under § 455(a) is “not the reality of the bias or prejudice but its appearance.” *Liteky v. United States*, 510 U.S. 540, 548 (1994).

¹ [*United States v. Ruffin*, 2021 CCA LEXIS 635 \(A. Ct. Crim. App. 19 Nov. 2021\).](#)

² [*United States v. Campbell*, 2021 CCA LEXIS 638 \(A. Ct. Crim. App. 23 Nov. 2021\).](#)

³ [*United States v. Kenneh*, 2021 CCA LEXIS 706 \(A. Ct. Crim. App. 28 Dec. 2021\).](#)

⁴ [*United States v. Pannel*, 2022 CCA LEXIS 18 \(A. Ct. Crim. App. 27 Jan. 2022\).](#)

This is particularly important in the military justice system given the unique nature of the process and the rating structure of the judge advocates involved. “The 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, 445 (C.A.A.F. 2021). “The appearance standard is designed to enhance public confidence in the integrity of the judicial system.” *United States v. Quintanilla*, 56 M.J. 37, 45 (C.A.A.F. 2001). “The appearance of impartiality may be especially important in the military justice context.” *United States v. Roach*, 69 M.J. 17, 19 (C.A.A.F. 2010).

The Army currently has a policy that allows sitting reserve judges to simultaneously represent the United States as AUSAs in their civilian capacity. “The administrative framework in which the military judiciaries operate should promote judicial independence affirmatively, not by taxing the moral courage of the judges to compensate for adverse structural conditions, which, by their very existence, create a perception of judicial self-interest in the outcome of decisions among the judges themselves, accused, and members of the public.” *United States v. Mitchell*, 39 M.J. 131, 152 (C.A.A.F. 1994).

Unlawful command influence provides a framework to analyze the reasonable person standard used to determine the appearance of bias. “The objective test for the appearance of unlawful command influence is similar to the tests we apply in

reviewing questions of implied bias on the part of court members or in reviewing challenges to military judges for an appearance of conflict of interest.” *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006).

Argument

A member of the public, knowing all of the facts and circumstances available, would call into question the fairness of the court’s consideration of RPI’s case because of Judge Ewing’s current employment representing a party, as an AUSA, that is adverse to RPI’s case.

The decision in *United States v. King*, 2021 CCA LEXIS 415 (A. F. Ct. Crim. App. 16 August 2021) is instructive. In that case, a reserve judge worked for the Department of Justice in his civilian capacity. However, in *King* the reserve judge did not have a prosecutorial role, and “had not prosecuted a case since the spring of 2009 and that his responsibilities were “personnel,” “policy and legislation far more... than litigation.” *Id.* at 32. The facts that led to the Air Force Court of Criminal Appeals finding the reserve judge did not abuse his discretion by not recusing himself are distinct from the case at hand in several ways. The reserve judge in *King* permitted an almost two-hour defense voir dire into his civilian employment. *Id.* The court found this thorough and transparent inquiry satisfied any concern about his civilian employment. *Id.* at 37. Here, appellate judges “are not subject to voir dire by counsel regarding potential

grounds for challenge,” so RPI is not able to learn of any explanation to what otherwise appears to be a *per se* conflict. Rule 2.11 Comment Code of Judicial Conduct for Army Trial and Appellate Judges, 16 May 2008.

It is beyond question that judges may not adjudicate cases involving their prospective employers. This is applicable to the present case because Judge Ewing will presumably return to representing the United States in criminal appellate proceedings at the conclusion of his reserve mobilization.⁵ When active AUSAs such as Judge Ewing also serve as appellate judges, the public may perceive that they feel compelled to make decisions favorable to their prosecution work. This Army policy (i.e., allowing active AUSAs to serve as appellate judges) may appear to the public to promote bias and weight judicial decisions towards the government. “[A] judge cannot have a prospective financial relationship with one side yet persuade the other that he can judge fairly in the case. This general prohibition applies with equal force to judges serving on military commissions, where, as in every other court, the dignity and independence of the commission are diminished when a judge comes before the lawyers in a case in the role of a suppliant for employment.” *In re Al-Nashiri*, 921 F.3d 224 (D.C. 2019). “A judge’s obligation to avoid seeking employment with a party appearing before him

⁵ RPI recognizes that Judge Ewing’s employment at U.S. Attorney’s office is protected by the Uniformed Services Employment and Reemployment Rights Act. (USERRA).

does not change simply because the prospective employer is a component of the Department of Justice.” *Scott v. United States*, 559 A.2d 745, 750 (D.C. 1989).

“Whenever and however military judges are assigned, rehired, and reviewed, they must always maintain the appearance of impartiality demanded by” R.C.M. 902(a). *In re Al-Nashiri*, 921 F.3d 224 (D.C. 2019).

The pertinent provision of the U.S. Code that discusses part-time United States magistrate judges is instructive on the present issue. “Part-time United States magistrate judges shall render such service as judicial officers as is required by law. While so serving they may engage in the practice of law, *but may not serve as counsel in any criminal action in any court of the United States...*” 28 U.S.C. § 632(b) (emphasis added). This gives a clear indication of what is publicly acceptable, or at least acceptable to Congress, with regard to a judge in federal court also acting as an advocate in actions in federal court. The U.S. Army echoes these requirements. Military magistrates are not permitted simultaneous designation as a military magistrate while performing prosecution functions. Army Reg. 27-10, Legal Services: Military Justice, para. 8-3 (20 Nov. 2020) [AR 27-10].

Furthermore, the National Institute for Military Justice recently issued a policy statement on the “Disqualification of Certain Reservists from Serving as Judges.” In its conclusion it recommends that “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.” (Appendix D). Again, this indicates that there is a *per se* public perception issue.

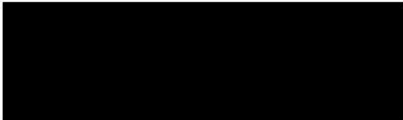
PANEL NO. 3


MOTION TO RECUSE

GRANTED: _____

DENIED: _____

DATE: 16 JUN 2022

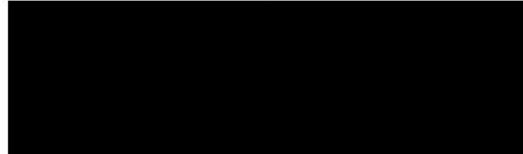

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Major, Judge Advocate
Appellate Defense Counsel
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RACHEL P. GORDIENKO
Major, Judge Advocate
Branch Chief
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WHEREFORE, LTC Dial, through undersigned appellate defense counsel, respectfully requests this court grant this motion to recuse Judge Ewing prior to any further proceedings or reviews in his case.

CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was sent via electronic mail to the Court and served on the Army Court of Criminal Appeals, the Government Appellate Division, and the Defense Appellate Division on 9 June 2022.



JULIA M. FARINAS
Major, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
US Army Legal Services Agency



CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army Court and Government Appellate Division on June 9, 2022.



MELINDA J. JOHNSON
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