CLEARING THE HIGH HURDLE OF JUDICIAL RECUSAL: REFORMING RCM 902(a)

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An independent judiciary is indispensable to our system of justice. Equally important is the confidence of the public in the autonomy, integrity and neutrality of our military judiciary as an institution. Army judges must strive to maintain the dignity of judicial office at all times and avoid both impropriety and the appearance of impropriety in their professional and personal lives.[1]

I. Introduction

The military justice system should be efficient and transparent in order to maintain the good order and discipline of servicemembers.[2] Likewise, a transparent system helps maintain public confidence.[3] To enhance the military justice system's efficiency and transparency with regard to military judge recusal, the President should amend Rule for Courts-Martial (RCM) 902(a).

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[1] Memorandum from The Judge Advocate General, U.S. Army, to Army Judges, subject: Army Code of Judicial Conduct (16 May 2008) [hereinafter Army Code of Judicial Conduct Memo].

[2] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. I, pmbl. para. 3 (2008) [hereinafter MCM] (stating that one of the purposes of military law is to maintain good order and discipline); *see also* U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 5-21 (16 Nov. 2005) [hereinafter AR 27-10] (establishing a quick timeline for processing courts-martial). Implied in efficiently maintaining good order and discipline is that servicemembers subject to the Uniform Code of Military Justice (UCMJ) will have a transparent system for them to readily see justice.

[3] In drafting the UCMJ, Congress was concerned with maintaining a positive imagine in the public's esteem and proscribed service discrediting conduct. MCM, *supra* note 2, pt. IV, ¶ 60c(3).

Recent developments in military jurisprudence demand a closer look at a once-sacrosanct arena: judicial impartiality. In May 2008, the Court of Appeals for the Armed Forces (CAAF) addressed a military judge's recusal duty for implied bias in *United States v. Greatting*[4] and *United States v. McIlwain*.[5] These companion cases involved situations in which military judges made statements that would cause someone to question their impartiality as they sit on related cases.[6] Furthermore, they raise the question of when judicial economy yields to the perception that a military judge is no longer impartial.

This article examines the military judge's sua sponte duty of recusal when an observer would likely believe the judge lacks impartiality. It begins by exploring the basic rules governing judicial recusal and how appellate courts have historically treated cases where judges may have demonstrated a lack of impartiality. It then looks at the increased oversight from appellate courts in the recent term. Finally, this article discusses various theories that would improve the courts' treatment of potential judicial bias.

This article concludes that a party should be able to ask an independent judge to review its challenge to a military judge's impartiality. Instead of allowing appellate review as the only viable alternative for reviewing a military judge's recusal ruling, a party should be able to appeal to the Chief Circuit Judge of the jurisdiction. The Chief Circuit Judge would detail a new military judge to review the initial recusal motion, with the additional review balancing the concerns of the party moving to recuse the military judge and adding only minor delay into the court-martial process.

II. The High Hurdle of Proving Judicial Bias

In its infancy, the Uniform Code of Military Justice (UCMJ) was seen as a progressive criminal justice statute that gave strong protections to servicemembers.[7] The military justice system continues to provide

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[4] 66 M.J. 226 (C.A.A.F. 2008).
[5] 66 M.J. 312 (C.A.A.F. 2008).
[6] *Greatting*, 66 M.J. at 229; *McIlwain*, 66 M.J. at 313.
[7] NAT'L INST. OF MILITARY JUST., REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE 2 (May 2001) [hereinafter COX COMMISSION], *available at* http://www.wcl.american.edu/nimj/documents/Cox_Comm_Report.pdf. The Cox Commission begins its report by highlighting the

many protections missing in other state and federal systems.[8] To ensure that servicemembers receive these rights, an impartial judiciary must oversee the military justice system.[9]

The system is not without its critics, however. In the fiftieth anniversary of the UCMJ, the National Institute of Military Justice (NIMJ) created a "blue-ribbon panel that examined the military justice system."[10] This led to the Cox Commission, named after Chief Judge Walter Cox of the CAAF, which concluded that the military judiciary should have greater independence to "preserv[e] public confidence in the fairness of courts-martial."[11] To determine perceived impartiality of the judges, this article first turns to the underlying rules.

A. The Basic Rule Provides Little Guidance on Determining a Military Judge's Bias

Although a practitioner should be able to turn to the "rules" to find an answer, the RCM offer little help in evaluating the potential bias of a

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development of the UCMJ in its first fifty years. *Id.*

[8] These protections include automatic appellate review, *Care* inquiry, and access to expert witnesses paid at Government expense. Uniform Code of Military Justice (UCMJ) art. 66 (2008); United States v. Care, 40 C.M.R. 247 (C.M.A. 1969); MCM, *supra* note 2, R.C.M. 703.

[9] *See* THE FEDERALIST No. 78 (Alexander Hamilton) (advocating for a strong, independent judiciary "to secure a steady, upright, and impartial administration of the laws").

[10] H.F. "Sparky" Gierke, *The Thirty-Fifth Kenneth J. Hodson Lecture on Criminal Law*, 193 MIL. L. REV. 178, 193 (2007). *See also* COX COMMISSION, *supra* note 7, at 2. The Cox Commission was led by Judge Walter Cox of South Carolina Supreme Court. *Id.* at 4–5. Judge Cox is a former member of the Court of Military Appeals and the Court of Appeals for the Armed Forces (CCAF). *Id.* Three other members were retired Air Force and Navy Judge Advocates, including a former Judge Advocate General of the Navy. *Id.* A fifth member serves as a law professor and a member of the Rules Advisory Committee to the CAAF. *Id.*

[11] COX COMMISSION, *supra* note 8, at 9. *But see* Lieutenant Colonel Theodore Essex & Major Leslea Tate Pickle, *A Reply to the Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice (May 2001): "The Cox Commission,"* 52 A.F. L. REV. 233, 256–58 (2002) (criticizing the Cox Commission for its failure to demonstrate cases lacking judicial impartiality, to enumerate powers possessed by civilian judges that are not held by military judges, and to provide references other than "fringe groups"). On the contrary, the Cox Commission listed Citizens Against Military Justice, the United States Council on Veterans Affairs, Sailors United For Self Defense, American Gulf War Veterans Association, and www.militarycorruption.com. COX COMMISSION, *supra* note 7, at 3 n.5.

military judge. Under RCM 902(a), with regard to implied bias, unless waived by both parties,[12] "a military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned."[13] The vague language of RCM 902(a) creates a broad standard using implied bias where reasonable minds may differ,[14] as opposed to the specific examples of RCM 902(b), which illustrate scenarios where judges may not preside over a case due to actual bias.[15] For example, recusal is mandatory if the military judge was the accuser, the military judge's spouse will testify as a material witness, or the military judge has personal knowledge of disputed evidentiary facts.[16] Rule for Court-Martial 902(a)'s meager guidance forces practitioners to look outside the Rule's text, requiring a review of the drafters' analysis to glean the Rule's intent.

From the drafters' analysis, one learns that the drafters intended to mirror provisions of the U.S. Code:[17] "This rule is based on 28 U.S.C. § 455, which is itself based on Canon III of the *ABA Code of Judicial Conduct*, and on paragraph 62 of MCM, 1969 (Rev.)."[18] The current version of 28 U.S.C. § 455 is substantially similar to RCM 902[19] with parallel provisions that allow for persuasive guidance from analogous situations in civilian courts.

To better understand the rules governing judicial implied bias, Professor Leslie Abramson examines the interplay between the obvious mandatory disqualifications and the less-clear cases in which a judge's

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[12] Neither RCM 902(e) nor 28 U.S.C. § 455(e) gives the authority to waive implied bias to a specific party. MCM, *supra* note 2, R.C.M. 902(e); 28 U.S.C. § 455(e) (2006). Accordingly, the right should belong to both sides.

[13] MCM, *supra* note 2, R.C.M. 902(a).

[14] For example, the CAAF issued a decision of 4–1 in determining whether a military judge's conversation with the convening authority's staff judge advocate (SJA) about an ongoing series of companion cases constituted implied bias. United States v. Greatting, 66 M.J. 226 (C.A.A.F. 2008). Another example is the CAAF's 3–2 decision assessing a military judge's in-court statement that "her participation in companion cases 'would suggest to an impartial person looking in that [she] can't be impartial in this case.'" United States v. McIlwain, 66 M.J. 312, 312 (C.A.A.F. 2008).

[15] MCM, *supra* note 2, R.C.M. 902(b); *see also id.* R.C.M. 902(e) (prohibiting waiver in RCM 902(b) situations).

[16] *Id.* R.C.M. 902(b).

[17] *Id.* R.C.M. 902 analysis, at A21-52.

[18] *Id.*

[19] *Compare* 28 U.S.C. § 455 (2006) (including additional provisions with minimal relevance to military judges, such as allowing a judge to divest of a financial disqualification in certain cases), *with* MCM, *supra* note 2, R.C.M. 902.

"impartiality might reasonably be questioned."[20] Professor Abramson classifies recusal for implied bias as an "inclusive 'catch-all' provision available as the source for evaluating recusal in two situations: (1) when facts do not altogether match the language of the specific examples; or (2) when the situation obviously falls outside the specific scenarios."[21] On this view, the implied bias rule is "a 'fall-back' position for any judge or party considering judicial disqualification."[22]

Professor Abramson recognizes that implied bias challenges could be abused because of the relative ease of making allegations against a judge.[23] Accordingly, he stresses the need for proof to justify a recusal under the standard that "a reasonable person knowing all the facts [would] conclude that the judge's impartiality might reasonably be questioned."[24] Some examples of sufficiency of proof include a judge improperly threatening a witness with contempt charges[25] and a judge's knowledge of various facts about a case from an improper extrajudicial source.[26]

Although the standard for determining judicial bias is analogous in civilian and military judicial systems, the two systems are not identical.[27] The main difference is the procedures for judicial disqualification.[28] Under 28 U.S.C. § 144, when a party moves to disqualify a federal judge for personal bias or prejudice, the judge shall proceed no further.[29] The military system does not follow the same process: "This procedure is not practicable for courts-martial because of the different structure of the military judiciary and the limited number of military judges."[30] As one of many distinctions between the two systems, this difference demonstrates the significant logistical differences between the standing

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[20] Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned,"* 14 GEO. J. LEGAL ETHICS 55, 55 (2000).
[21] *Id.* at 59.
[22] *Id.*
[23] *Id.* at 60.
[24] *Id.* at 72.
[25] *Id.* at 76–77.
[26] *Id.* at 79–81. Knowledge of external facts could include a judge having a pretrial conversation with a witness and learning facts about the case or a judge reading media coverage of the case.
[27] MCM, *supra* note 2, R.C.M. 902 analysis, at A21-52 (basing the rule on 28 U.S.C. § 455 and not 28 U.S.C. § 144).
[28] *Id.*
[29] 28 U.S.C. § 144 (2006).
[30] MCM, *supra* note 2, R.C.M. 902 analysis, at A21-52.

civilian courts and the military courts that existed at the time the rules were created. Today, there are still many distinctions between civilian and military courts, but technology has narrowed the gap.

Unlike most civilian jurisdictions where a judicial center houses multiple judges, military installations still have only a few judges.[31] For example, in the Army, only Fort Campbell, Fort Hood, and an installation in Vilseck, Germany, have multiple judges assigned to one installation.[32] The remaining installations only feature one sitting military judge; other installations require a military judge to travel there to hear cases.[33] Yet, advances in technology may help judges overcome geographic barriers.[34] For example, the President amended RCM 914B in 2007 to allow military judges to "take testimony via remote means," using technology such as "videoteleconference, closed circuit television, telephone, or similar technology."[35] Likewise, advancements in digital scanning and electronic mail have reduced the need to wait for postal services to deliver transcripts and documentary evidence. Consequently, these technological and legal developments allow changes to the military justice system because they are closing the geographical gaps between military judges sitting at different installations.[36] Nevertheless, these changes do not eliminate the obstacles faced when a party challenges a military judge for bias. Because a military judge may only use remote means to preside over Article 39a sessions, a military judge from a different installation may use this technology to review recusal motions.[37]

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[31] OFFICE OF THE JUDGE ADVOCATE GENERAL, JAG PUB. 1-1, THE DIRECTORY 2009–2010, at 12–16 (2009 ed.) [hereinafter JAG PUB. 1-1].
[32] *Id.*
[33] *See id.* (listing the numbers and locations of military judges in the Army). One should look to the Army's First Judicial Circuit for an example of the dispersion of military judges. *Id.* at 13. The circuit only has four active duty military judges. *Id.* Consequently, a smaller installation, like Fort Knox, Kentucky, must have a judge travel to its courtroom.
[34] The analysis to the RCM were originally drafted in 1984. MCM, *supra* note 2, intro. to R.C.M. analysis, at A21-1.
[35] *Id.* R.C.M. 914(B).
[36] These technological advancements spur the argument for changing RCM 902's recusal adjudication procedures in Part IV.B *infra*.
[37] MCM, *supra* note 2, R.C.M. 805(a).

B. When Looking at a Lack of Impartiality, Appellate Courts Require Substantial Evidence to Overcome the Strong Presumption that a Military Judge is Impartial

The rules governing judicial bias provide little guidance for determining a lack of judicial impartiality. The phrase "might reasonably be questioned" is so broad that it creates an exception that can swallow the rule.[38] With the lack of the authoritative guidance in the Rule's text, one must turn to case law for much-needed interpretation.

1. The United States Supreme Court Adds Clarity to the Interplay Between 28 U.S.C. § 455a and 28 U.S.C. § 455b

The Supreme Court, in *Liljeberg v. Health Services Acquisition Corp*,[39] drew a distinction between the scenarios that require judicial recusal in § 455b and the broader requirements of § 455a. Although the Court focuses on § 455, it is relevant to military cases because the drafters based RCM 902 on § 455.[40] The facts in *Liljeberg* involved a contract dispute between a corporate promoter and a health service company over the construction of a hospital.[41] Part of the deal included purchasing land from a university.[42] The trial court ruled in favor of the promoter, thus placing the health service company in an advantageous position in its follow-on negotiations.[43] The district court judge who presided at trial was a trustee for the university, but disclaimed knowledge that the university owned the property in question.[44] The trial judge later defended himself against allegations of bias, stating that he had no actual bias because he was unaware of his involvement as a trustee.[45]

The Supreme Court cautioned readers not to confuse § 455(a) and § 455(b),[46] identifying a distinction between implied bias and actual bias.[47]

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[38] *Id.* R.C.M. 902(a). *See* discussion at note 14 *supra*.
[39] 486 U.S. 847 (1988).
[40] MCM, *supra* note 2, R.C.M. 902 analysis, at A21-52.
[41] *Liljeberg*, 486 U.S. at 850.
[42] *Id.* at 853.
[43] *Id.* at 850.
[44] *Id.*
[45] *Id. at* 851.
[46] *Id.* at 861 n.8.
[47] *Id.*

On one hand, § 455(b) prohibits a judge from presiding over a case in specific factual scenarios as they are tantamount to actual bias, such as knowing of a fiduciary interest in a disputed parcel of property.[48] Here, the parties may not waive judicial disqualification in a § 455(b) situation.[49] On the other hand, where judicial disqualification for implied bias under § 455(a) is much broader, an implied bias disqualification may be waived.[50] In creating this distinction, the Court expanded implied bias by stating that scienter is not an element of a violation of § 455(a).[51] Focusing on the perception of fairness, the Court reasoned that although a judge may genuinely be unaware of a disqualifying circumstance, this "does not eliminate the risk that 'his impartiality might reasonably be questioned' by other persons."[52]

2. Service Courts Weigh Allegations of a Judge's Lack of Impartiality in Light of the Totality of the Circumstances

To determine how a reasonable person would assess a judge's impartiality, courts must look to all relevant facts. *United States v. Wright* offers additional insight in how military courts ascertain whether a military judge's impartiality might reasonably be questioned.[53] The military judge in *Wright* had previously served with an investigator who was a key witness in a suppression motion.[54] In voir dire, the judge explained that he had previously served as the senior trial counsel in a jurisdiction serviced by the investigator and he had worked with the investigator on numerous cases over a three-year period.[55] The military judge further explained that he "came to the opinion that [the investigator] was an honest and trustworthy person, and he was a very competent [Naval Criminal Investigative Service] agent."[56] The military judge then explained that he would weigh the credibility of the investigator's testimony in the same manner as other witnesses.[57]

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[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.* at 859.
[52] *Id.* (quoting 28 U.S.C. § 455 (2006)).
[53] 52 M.J. 136 (C.A.A.F. 1999).
[54] *Id.* at 137–38.
[55] *Id.* at 138.
[56] *Id.*
[57] *Id.*

On appeal, the CAAF stated that although the implied bias test is objective, that the military judge's "subjective analysis is a relevant factor in the application of an objective standard."[58] In affirming the judge's decision, the court reasoned, "The military judge's full disclosure, sensitivity to public perceptions, and sound analysis objectively supported his decision not to recuse himself, and these factors contribute to a perception of fairness."[59] Analyzing a military judge's statements of subjective beliefs with objective thought is akin to the fact-finding role that juries face. In essence, appellate courts weigh the military judge's "side" of the events with the surrounding circumstances to determine whether a reasonable person would evaluate the military judge's statements as believable. Accordingly, *Wright* demonstrates the need to look at the totality of the circumstances in evaluating how a "reasonable person" would view a court-martial.

Additionally, to help understand whether one can reasonably question the military judge's impartiality, appellate courts turn to ethics rules for guidance.[60] Two terms after *Wright*, the CAAF gave additional guidance in weighing implied bias in *United States v. Quintanilla*.[61] In *Quintanilla*, the military judge confronted a witness both on and off the record.[62] The military judge initially confronted the witness because he believed the witness delayed another witness from entering the courtroom.[63] The military judge became frustrated at the delay, called a recess, and left the bench.[64] Rather than turn to counsel to resolve the issue, he elected to confront the witness himself.[65] The military judge left the courtroom on three occasions, lasting from four to thirty-nine minutes.[66] Although the record is vague on the nature of the out-of-court interactions between the military judge and the witness,[67] the witness claimed that the military judge pushed him and called him a

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[58] *Id.* at 142.
[59] *Id.*
[60] *See, e.g.*, United States v. Quintanilla, 56 M.J. 37, 42 (C.A.A.F. 2001) (looking to ethics rules to assess a judge's conduct).
[61] *Id.* at 47.
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.* at 48–50.
[66] *Id.*
[67] *Id.* Consequently, the opinion only explains the witness's version of the events and the military judge's response. *Id.* The record is vague because it only captures narration of the out-of-court events as depicted on the record. *Id.*

"m*****f*****."[68] The witness became so upset that he called the military judge's superior in the trial judiciary.[69] The confrontations were so severe that they "not only affected procedural aspects of the trial, but also became the focus of evidence introduced for consideration by the members during trial on the merits."[70]

To determine the appropriateness of the military judge's conduct, or lack thereof, the CAAF turned to ethics canons for guidance.[71] Citing Canon 3 of the *American Bar Association's (ABA) Model Code of Judicial Conduct*, the court admonished military judges: "Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial."[72]

The CAAF stated that all violations of the ethical canons do not require reversal, however.[73] Instead, the court viewed the ethical canons as "principles to which judges should aspire" and that violations of those canons "are enforced primarily through disciplinary action and advisory opinions, rather than through disqualification."[74] Stressing this point, the court stated, "There is a strong presumption that a judge is impartial, and a party seeking to demonstrate bias must overcome a high hurdle, particularly when the alleged bias involves actions taken in conjunction with judicial proceedings."[75]

The CAAF then articulated the standard of assessing implied bias: "Any conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge's 'impartiality might reasonably be questioned' is a basis for the judge's disqualification."[76] In finding evidence that the military judge's impartiality might reasonably be questioned, the court next articulated

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[68] *Id.* at 50 (asterisks supplied by the court).
[69] *Id.*
[70] *Id.* at 47.
[71] *Id.* at 42.
[72] *Id.* The canon's warning against inappropriate facial expressions and body language demonstrates the difficulty of using appellate courts to overcome implied bias, because a court transcript will unlikely capture a situation where a judge demonstrates disdain towards a witness.
[73] *Id.* at 42–43.
[74] *Id.*
[75] *Id.* at 44.
[76] *Id.* at 78 (quoting United States v. Kincheloe, 14 M.J. 40, 50 (C.M.A. 1982)).

the appellate test for implied bias as whether the military judge's actions would cause an objective observer to question the "court-martial's legality, fairness, and impartiality."[77]

Not surprisingly, the CAAF found that the military judge's actions constituted implied bias.[78] The court reasoned that the military judge's actions created an appearance of partiality and "adversely reflect[ed] on his own professional conduct."[79] *Quintanilla* offers two important lessons. First, and most importantly, courts should look to outside sources to determine appropriate judicial conduct, such as ethical canons or guidance from the judiciary.[80] Second, the CAAF acknowledged its reluctance to find judicial bias by addressing a counsel's burden of demonstrating judicial bias as a high hurdle.[81]

In analyzing whether a military judge's impartiality may reasonably be questioned, military courts require much more than a speculative allegation of bias. Instead, courts will expand the inquiry to all relevant factors surrounding the allegation and make a decision in light of the totality of the circumstances. Courts will examine the salient facts and whether the military judge was acting in a judicial or extrajudicial role.[82] Appellate courts will also review the military judge's subjective statements and willingness to show transparency within the military justice system.[83] The courts will then compare the statements with evidence in the record to determine what a reasonable person apprised of all the facts would perceive by looking into the case.[84] Ultimately, one challenging a military judge under an implied bias theory must expansively develop the record and masterfully marshal the facts to overcome this high hurdle.

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[77] *Id.* (quoting United States v. Burton, 52 M.J. 223, 226 (2000)).
[78] *Id.* at 80.
[79] *Id.*; *cf.* Liteky v. United States, 510 U.S. 540, 555–56 (1994) (requiring recusal when a judge displays a "high degree of favoritism or antagonism as to make fair judgment impossible").
[80] *Quintanilla*, 56 M.J. at 46.
[81] *Id.* at 44.
[82] *See* Abramson, *supra* note 20, at 77–78 (describing an extrajudicial source as a judge's source of information about "parties or a litigation issue result[ing] from information discovered outside the judicial proceeding") (citing *Liteky*, 510 U.S. at 554).
[83] *See* United States v. Wright, 52 M.J. 136, 141 (C.A.A.F. 1999).
[84] *Quintanilla*, 56 M.J. at 78.

C. More Than a Moral Compass: Judicial Ethics Canons Illuminate Places Where a Person Might Reasonably Question a Judge's Impartiality

With disqualification being an extreme remedy, one must consider a different alternative to ensure a military judge is impartial.[85] A potential avenue for enforcing judicial conduct is through the rules of professional responsibility.[86] While each service prescribes different policies to maintain these rules, this article focuses on the Army's rules.[87] Even though the *Army's Code of Judicial Conduct* (*Army Code*) illustrates appropriate judicial behavior, the professional responsibility system is not well-suited to review scenarios where a judge's actions cause one to question the judge's impartiality.

The Army judiciary recently adopted the *Army Code of Judicial Conduct for Army Trial and Appellate Judges*.[88] The *Army's Code* is similar to the *ABA Model Code of Judicial Conduct* but contains changes that apply specifically to the military courts.[89] One of its goals is to ensure that judges promote "public confidence in the . . . judiciary" and that judges "shall avoid impropriety and the appearance of impropriety."[90] The *Army Code* gives generalized guidance similar to the Army regulations (AR) governing professional responsibility.[91] The *Army Code of Judicial Conduct* states that its rules are binding and may result in disciplinary action.[92] The *Army Code* also outlines its

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[85] *Id.* at 43.

[86] *See id.* at 42–43 (C.A.A.F. 2001) (stating that violations of judicial ethics canons "are enforced primarily through disciplinary action and advisory opinions, rather than through disqualification").

[87] *See generally* U.S. DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES ch. 7 (30 Sept. 1996) [hereinafter AR 27-1] (prescribing the review mechanisms for professional responsibility allegations in the Army).

[88] *See* Army Code of Judicial Conduct Memo, *supra* note 1 (requiring the Army's military judges to abide by the *Army Code of Judicial Conduct*).

[89] U.S. ARMY TRIAL JUDICIARY, CODE OF JUDICIAL CONDUCT FOR ARMY TRIAL AND APPELLATE JUDGES, Scope para. 1 (16 May 2008), *available at* www.jagcnet.army.mil [hereinafter ARMY CODE OF JUDICIAL CONDUCT] (follow "Military Justice" hyperlink; then follow "Trial Judiciary" hyperlink; then follow "Code of Judicial Conduct 2008" hyperlink); *see* MODEL CODE OF JUDICIAL CONDUCT (2007) [hereinafter MODEL CODE OF JUDICIAL CONDUCT] (listing the ABA's model code).

[90] ARMY CODE OF JUDICIAL CONDUCT, *supra* note 89, R 1.2.

[91] *See generally* U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992) [hereinafter AR 27-26] (prescribing the rules governing the practice of law in the Army's Judge Advocate General's Corps).

[92] ARMY CODE OF JUDICIAL CONDUCT, *supra* note 89, at scope, para. 5.

disciplinary enforcement mechanisms.[93] Nevertheless, its rules are so broad that the professional responsibility enforcement system is an ineffective method in confronting judicial implied bias.

Like its ABA counterpart, the *Army Code* speaks in broad terms. For example, Rule 2.2 states, "A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially."[94] When referring to disqualifications, Rule 2.11 states, "Army judges shall disqualify themselves from a proceeding when required by R.C.M. 902 or other provision of law."[95] Upon reading these rules, it is hard to reconcile *Quintanilla's* concept of reliance on discipline through professional responsibility with the professional responsibility rules' ability to regulate judicial decision-making,[96] as these rules provide little guidance other than for judges to do their jobs. Consequently, Rule 2.11 does little more than curb anything but the most severe violations of RCM 902.

While the *Army Code* prohibits more egregious situations, also prohibited by RCM 902(a), such as judges serving as business partners with lawyers who practice in their courts[97] and accepting inappropriate gifts[98] these occurrences are so rare, they provide little help ensuring that judges recuse themselves for implied bias.[99] The rules also prohibit judges from making public statements that may "affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing."[100] This rule would curb some actions that lead to recusal. In particular, Rule 2.10 prevents judges from making public comments on pending or ongoing cases,[101] which strengthens the appearance of impartiality from the bench and removes issues like those in *Greatting*, where a military judge tainted a pending court-martial by

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[93] *See id.* (referring to AR 27-1 and AR 27-10).
[94] *Id.* R 2.2.
[95] *Id.* R. 2.11.
[96] *See* United States v. Quintanilla, 56 M.J. 37, 42–43 (C.A.A.F. 2001) (stating that ethics violations "are enforced primarily through disciplinary action and advisory opinions").
[97] ARMY CODE OF JUDICIAL CONDUCT, *supra* note 89, R. 3.11(B)(3).
[98] *Id.* R. 3.13.
[99] There are no reported cases involving military judges violating these rules. Instead, the violations are much more amorphous.
[100] *Id.* R 2.10(A).
[101] *Id.*; *see also* MODEL CODE OF JUDICIAL CONDUCT, *supra* note 89, R. 2.10.

discussing the accused's companion cases with the staff judge advocate (SJA).[102]

Although the *Army Code of Judicial Conduct* prohibits these situations, none will warrant professional responsibility investigations. The Army limits professional responsibility investigations to infractions "that raise a substantial question as to a lawyer's honesty, trustworthiness, or fitness as a lawyer."[103] While a military judge's actions could cause someone to question the judge's impartiality, there are few scenarios imaginable where one could argue that the judge's actions call into question the judge's honesty, trustworthiness, or fitness as a lawyer. Indeed, there have been no professional responsibility allegations against a military judge since at least 2006.[104] Accordingly, ethics rules give little relief to a party challenging a military judge's actions for implied bias outside of reliance on the ethical canons while attempting to clear the high hurdle of appellate review.

III. Lowering the Hurdle: Courts May Be Willing to Question a Military Judge's Impartiality

By allowing military judges, alone, the authority to adjudicate allegations of their own lack of impartiality, the current law gives an accused little recourse other than the appellate courts.[105] The Government has even less recourse because it cannot appeal a military judge's recusal ruling.[106] To determine whether the system needs change, this article examines how appellate courts have been interpreting implied bias allegations. Though these courts have been hesitant to

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[102] United States v. Greatting, 66 M.J. 226 (C.A.A.F. 2008); *see also* discussion *infra* Part III.B.1.

[103] AR 27-1, *supra* note 87, para. 7-3.

[104] The Army's Chief Trial Judge is responsible to ensure the Army Judiciary follows the Army Code of Judicial Conduct. Telephone Interview with Colonel Stephen R. Henley, Chief Trial Judge, Army Trial Judiciary (Dec. 15, 2008) [hereinafter Henley Telephone Interview]. He has not received any allegations of implied bias during his tenure as Chief Judge. *Id.* He has served as the Chief Judge since July 2006. JAG PUB. 1-1, *supra* note 31, at 12.

[105] *See generally* MCM, *supra* note 2, R.C.M. 902(d) (granting military judges the authority to rule on their recusal motions).

[106] *See id.* R.C.M. 908(a) (limiting the Government's ability to appeal to narrow circumstances involving "an order or ruling that terminates the proceedings with respect to a charge or specification, or excludes evidence that is substantial proof of a fact material in the proceedings," and other situations involving classified information).

question a trial judge's impartiality, the CAAF was more willing to disqualify trial judges in the 2008 term.[107]

A. Beyond Reproach: Appellate Courts Historically Have Been Reluctant to Find that a Military Trial Judge Lacked Impartiality

In 1979, the Court of Military Appeals (COMA) struggled to protect the judiciary from recusal challenges.[108] In *United States v. Bradley*,[109] the court faced a case where a military judge sat as a fact-finder when the accused changed his plea.[110] At trial, the accused pled guilty to eight of eleven charged specifications.[111] The military judge accepted the accused's plea and announced findings of guilty for those eight specifications.[112] During trial on the remaining three specifications, the defense discovered new evidence, prompting the accused to withdraw his plea.[113] The accused then unsuccessfully moved to recuse the military judge.[114]

In a 2–1 decision, the COMA reversed the conviction, creating an exception to the rule that a military judge will rarely be disqualified.[115] The COMA stated that exposure to facts normally does not disqualify a military judge, reasoning "the judge's 'philosophical credentials (as a trained jurist) are sufficient to bar the appearance of impurity.'"[116] Nevertheless, the military judge "manifested those conclusions" by accepting the accused's guilty pleas and entering the findings of guilty.[117]

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[107] *See Greatting*, 66 M.J. 226 (finding error in a military judge's out-of-court comment to the SJA); *see also* United States v. McIlwain, 66 M.J. 312 (C.A.A.F. 2008) (finding error in a military judge's in-court comment).
[108] United States v. Bradley, 7 M.J. 332 (C.M.A. 1979); United States v. Cooper, 8 M.J. 5, 6 (C.M.A. 1979).
[109] 7 M.J. 332.
[110] *Id.* at 333.
[111] *Id.*
[112] *Id.*
[113] *Id.* After the accused entered a plea of guilty, the defense counsel learned that witness statements that the Government claimed were sworn were actually unsworn. *Id.*
[114] *Id.*
[115] *Id.* at 334.
[116] *Id.* (quoting United States v. Hodges, 47 C.M.R. 923, 925 (C.M.A. 1973) and citing MANUAL FOR COURTS-MARTIAL, UNITED STATES para. 62f(13) (1969) (current version at MCM, *supra* note 2, R.C.M. 902)).
[117] *Bradley*, 7 M.J. at 334.

The COMA revisited the *Bradley* ruling in an analogous case two months later.[118]

In *United States v. Cooper*,[119] the COMA limited *Bradley* in a per curiam opinion.[120] In *Cooper*, the accused pleaded guilty and articulated the necessary facts to establish his guilt.[121] Then, prior to the military judge accepting his plea, the accused stated "that he did not feel in his own mind that he was guilty of the alleged offenses."[122] Consequently, the military judge did not accept his plea and entered pleas of not guilty on behalf of the accused.[123] The trial defense counsel then voir dired the military judge on whether the military judge formed an opinion to the accused's guilt or innocence.[124] The military judge responded that he had formed opinions to the accused's guilt in his judicial capacity, but that he could disregard those facts and refused to recuse himself.[125]

Upholding the military judge's decision to remain on the case, the COMA distinguished *Bradley* on two bases.[126] First, "[T]he appellant did not fully and unequivocally admit his guilt."[127] Second, the military judge did not announce that the accused was guilty; instead, the military judge stated that "something may come out later in the inquiry which would also have indicated I should not have accepted his plea of guilty."[128] In its ruling, the COMA minimized *Bradley* to an extremely narrow circumstance where the military judge has moved beyond an accused's guilty plea and into the next phase of trial.[129]

Reading the *Bradley* and *Cooper* cases together reveals the COMA's desire to minimize judicial recusal.[130] Both cases, which are factually similar,[131] involve the military judge's examination of the underlying factual basis and the accused's admission to the elements of the charged

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[118] *See* United States v. Cooper, 8 M.J. 5 (C.M.A. 1979).
[119] *Id.*
[120] *Id.* at 7.
[121] *Id.* at 6.
[122] *Id.*
[123] *Id.*
[124] *Id.* at 6–7.
[125] *Id.*
[126] *Id.* at 7.
[127] *Id.*
[128] *Id.* at 6.
[129] *Id.* at 7.
[130] United States v. Bradley, 7 M.J. 332 (C.M.A. 1979); *Cooper*, 8 M.J. 5.
[131] *Bradley*, 7 M.J. at 333; *Cooper*, 8 M.J. at 6.

offenses.[132] Both also began as guilty pleas where the military judge sat as factfinder.[133] The difference, however, is that the *Cooper* accused withdrew his plea before the military judge accepted it.[134] The COMA's reasoning for distinguishing the two cases is specious. Although both accused admitted the factual predicates for the charged offenses, the COMA held that a reasonable person would question the military judge's impartiality only after he enters findings of guilty.[135]

These cases not only demonstrate appellate courts' difficulty creating bright-line rules for judicial bias, but also that courts are loathe to question fellow judges. This dichotomy stresses the obstacles that counsel and military judges face when dealing with judicial recusal: On one hand, a military judge should fully disclose any potential issues and enter necessary findings to move the court-martial along;[136] on the other hand, appellate courts seem to punish military judges who make too many statements during the proceedings.[137]

1. Courts Have Been Equally Hesitant to Require Judges Recuse Themselves Despite the Judge's Previous Involvement With a Case

The COMA continued its aversion to judicial recusal in *United States v. Kincheloe*.[138] There, an appellate judge, sitting on the Coast Guard Court of Military Review, previously prosecuted the appellant in an unrelated court-martial for unauthorized absence.[139] After completion of that case, the appellant submitted a deferment to his sentence to confinement and went AWOL again.[140] After the appellant returned to military control, a different trial counsel subsequently prosecuted the appellant at a different court-martial; that case was under review.[141] The appellate judge in question was still serving as a trial counsel and gave

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[132] *Bradley*, 7 M.J. at 333; *Cooper*, 8 M.J. at 6–7.
[133] *Bradley*, 7 M.J. at 333; *Cooper*, 8 M.J. at 5.
[134] *Cooper*, 8 M.J. at 6.
[135] *Id.* at 7.
[136] *See* MCM, *supra* note 2, R.C.M. 902(d) (allowing counsel to question military judges for potential grounds for recusal).
[137] This assertion follows the logic in *McIlwain*, where a military judge made an honest, but imprudent, in-court statement concerning her service on companion cases. United States v. McIlwain, 66 M.J. 312, 313 (C.A.A.F. 2008).
[138] 14 M.J. 40, 50 (C.M.A. 1982).
[139] *Id.* at 46.
[140] *Id.* at 45–46.
[141] *Id.* at 46.

supporting evidence to the new trial counsel in the case on review, however.[142] Rule for Court-Martial 902 was not yet in effect, so the court turned to 28 U.S.C. § 455 for guidance.[143]

The *Kincheloe* court did not rule that the judge should have recused himself.[144] As a general rule, an appellate judge may not hear a case where he served as a party to the original court-martial.[145] Because the appellate judge prosecuted the accused at a different court-martial, the COMA did not apply the § 455(b) mandatory disqualifications.[146] The court then turned to implied bias under § 455(a).[147] Ultimately, the court relied on the six years that transpired since the first court-martial and found that the appellate judge's actions did not raise sufficient evidence to mandate his recusal.[148]

In his dissent, Judge William Cook demonstrated how reasonable minds may differ—or, perhaps, the lengths appellate courts will go to affirm a military judge's decision to deny recusal.[149] Judge Cook focused on the need to gauge implied bias by an objective standard.[150] That is, what would a reasonable person think of the propriety of the judge hearing the case?[151] He noted that the judge was a source of some evidence in the appeal and was once contemplated as a witness to the court-martial.[152] Thus, Judge Cook could not "see how a reasonable man, upon reading the transcript of the second trial and knowing the evidentiary facts upon which an important issue was resolved, would not question his further participation in the proceeding."[153] Judge Cook's adept dissent underscores the COMA's hesitance to disqualify a military judge.

Nine years later, the CAAF still remained hesitant to require judicial disqualification in *United States v. Oakley*.[154] The *Oakley* case was the

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[142] *Id.*
[143] *Id.* at 48.
[144] *Id.* at 50.
[145] *Id.* at 49; 28 U.S.C. § 455(b)(3) (2006).
[146] *Id.* at 49.
[147] *Id.* at 50.
[148] *Id.*
[149] *See id.* at 51–54 (Cook, J., dissenting).
[150] *Id.* at 54.
[151] *Id.*
[152] *Id.*
[153] *Id.*
[154] 33 M.J. 27 (C.M.A. 1991).

last of a series of three companion cases involving stolen property.[155] The military judge denied suppression motions in the two other cases and both resulted in guilty pleas that implicated the accused.[156] The accused's counsel moved to disqualify the military judge, arguing that the military judge had made prior determinations of facts by accepting the companion's guilty pleas that the accused disputed.[157] The defense counsel claimed that the military judge's prior decisions involving the facts of the case would cause a reasonable person to question the military judge's impartiality.[158] The military judge disagreed, and so did the CAAF.[159]

The CAAF's decision reinforced the principle that a military judge's standing should be venerated. In affirming the conviction, the court reasoned that the military judge did not sit as fact-finder.[160] The CAAF also relied on the military judge's "philosophical credentials," which the court had also mentioned in *United States v. Bradley*.[161] The court further rationalized that the evidence in the accused's case was related "only to suppression motions and to providence of guilty pleas tendered by" co-accused at their trials.[162]

Oakley continued the trend in which appellate judges defend military judges, maintaining that all judges have "philosophical credentials" that create public confidence in judicial decisions.[163] In its reliance on *Bradley*, the *Oakley* Court relied on the theory that people should find comfort in a judge's training.[164] Yet, there are few mechanisms that enforce this comfort other than judicial proclamations that the public should trust other judges.

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[155] *Id.* at 33.
[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] *Id.* at 33–35.
[160] *Id.* at 34.
[161] *Id.* (quoting United States v. Bradley, 7 M.J. 332, 334 (CMA 1979)).
[162] *Id.*
[163] *Id.* (quoting *Bradley*, 7 M.J. at 334).
[164] *See id.*

2. Circling the Wagons: The Perils of a Government Challenge

The cases discussed thus far have dealt with an accused's right to challenge a military judge. While RCM 902 applies to both parties, the Government has far fewer remedies and much less sympathy from the courts.[165] Rule for Court-Martial 902(d) vests in the military judge the authority to decide whether the military judge should be disqualified.[166] Thus, if the military judge denies a Government challenge, then the Government has no further recourse because appellate courts then only hear cases brought by the accused.[167] Nevertheless, in 2006, the CAAF confronted an unlawful command influence case that stemmed from a Government motion to disqualify a military judge.[168]

The dispute in *United States v. Lewis* stemmed from the judge's relationship with defense counsel.[169] During the court-martial, the Government questioned the military judge concerning her interactions with civilian defense counsel.[170] The military judge characterized them as limited social interactions involving casual contact at a stable where they both kept horses.[171] Yet, the military judge omitted the fact that she and the civilian defense counsel attended a play together after she detailed herself to the case.[172] After refusing to recuse herself, the Government submitted a motion stating that the two had gone to the play together.[173] The military judge then responded that it had "slipped [her] mind that [she] had gone to that play with [civilian defense counsel]."[174]

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[165] *See* MCM, *supra* note 2, R.C.M. 902(a)–(b) (using language that favors neither the defense, nor the Government; instead, focusing on the fairness of the proceeding).
[166] *See id.* R.C.M. 902(d).
[167] *See* UCMJ art. 66 (2008) (granting an accused appellate rights). *See also* MCM, *supra* note 2, R.C.M. 908 (providing limited rights for appeals by the United States where a military judge issues an "order or ruling that terminates the proceedings with respect to a charge or specification, or excludes evidence that is substantial proof of a fact material in the proceedings, or directs the disclosure of classified information, or that imposes sanctions for nondisclosure of classified information").
[168] United States v. Lewis, 63 M.J. 405 (C.A.A.F. 2006).
[169] *Id.* at 408.
[170] *Id.* at 407–08.
[171] *Id.* at 408.
[172] *Id.* at 409. The SJA testified during the recusal motion and characterized this interaction as a date. *Id.* at 410.
[173] *Id.* at 409.
[174] *Id.*

But the allegations of a relationship did not stop with the single incident.[175] The Government appeared to have made previous attempts to remove the military judge from cases with this civilian defense counsel.[176] The friendship between the civilian defense counsel and the military judge apparently permeated the jurisdiction so strongly that the Government continually attempted to disqualify the military judge when she sat on the civilian defense counsel's cases.[177] During a motion hearing to recuse the military judge, the SJA testified that the evidence of bias existed in the courtroom.[178] The SJA described the bias as civilian defense counsel appearing to be in charge of the court-martial when she was "strolling around the courtroom" while the trial counsel addressed the court.[179] Yet, the military judge did not admonish the civilian defense counsel. Because of the military judge's close relationship with civilian defense counsel, the military judge's attempt to underrate the nature of their contacts to horse-stabling, the military judge's attendance at a play after the military judge detailed herself to the case, and how that fact slipped the military judge's mind, the Government justly believed that the circumstances would cause an objective observer to question the military judge's impartiality.

The military judge in *Lewis* arguably violated the *ABA Model Code of Judicial Conduct*[180] by allowing her relationship with civilian defense counsel to cause others to question her independence.[181] The military judge's violations of ethical conduct should have been a factor in determining the reasonableness of the Government's actions.[182] Yet, the CAAF dismissed the merits of the disqualification in a few sentences

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[175] *Id.* at 410.

[176] During the voir dire, the trial counsel referenced previous courts-martial where the trial counsel voir dired the military judge. *Id.* at 408–09. Likewise, the military judge questioned why she is frequently "voir dired on [her] acquaintance with" the civilian defense counsel whereas other military judges are not. *Id.* at 414.

[177] *Id.* at 410.

[178] *Id.*

[179] *Id.*

[180] *See* MODEL CODE OF JUDICIAL CONDUCT, *supra* note 89, R. 2.4. (forbidding a judge from permitting social relationships to influence a judge's judicial conduct or "permit[ting] others to convey the impression that any person . . . is in a position to influence the judge"); *see also id.* R. 3.1(C) (prohibiting a judge from engaging in extrajudicial activities "that would appear to a reasonable person to undermine the judge's . . . impartiality").

[181] *See Lewis*, 63 M.J. at 410.

[182] *See* United States v. Quintanilla, 56 M.J. 37, 42 (C.A.A.F. 2001) (stating that courts will turn to the *ABA Model Code of Judicial Conduct* "for guidance on proper conduct in criminal trials").

without discussing the issue.[183] The CAAF had a great opportunity to send a message to the trial judiciary concerning the appearance of impartiality while maintaining its message to the SJAs and counsel on appropriate decorum on their part.[184] But, by summarily rejecting the Government's concerns, the CAAF sent a message that the Government should have no remedy when military judges show potential implied bias towards the Government.

In the past few decades, courts have disfavored questioning a judge's impartiality. Rather, they have continued to zealously tout the judge's "philosophical credentials." [185] On one hand, an affront on a judge is an affront to the arbiters of the legal profession and an attack on the rule of law. On the other hand, it cuts against the rule of law's need for the public to have confidence that courts will be administered justly. Unfortunately, the Government's lack of remedies forced it to aggressively question the military judge because this was its only chance to seek recusal, causing the court-martial to devolve into an unprofessional proceeding.[186] Ultimately, the accused received a windfall when the CAAF set aside the findings for unlawful command influence.[187]

B. Like Pornography, Judges Know Implied Bias When They See It

In the 2008 term, the CAAF revisited implied bias cases in *United States v. Greatting* and *United States v. McIlwain*.[188] Both cases involved companion cases in which military judges made comments about pending cases.[189] More noteworthy is the CAAF's less deferential views toward trial judges handling situations where their impartiality

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[183] *See Lewis*, 63 M.J. at 414.
[184] By no means is this meant to justify the Government's actions.
[185] *See, e.g.*, United States v. Dodge, 59 M.J. 821, 826 (A.F.C.C.A. 2004), *rev'd on other grounds*, 60 M.J. 368 (C.A.A.F. 2004) (demonstrating a court's willingness to go to great lengths to demonstrate the fairness by stressing the case's "27-volume, 3191-page, mixed-plea record" contains nothing "that even remotely suggests that the military judge was anything but the model of judicial probity").
[186] *Lewis*, 63 M.J. at 410–11 (demonstrating the intensity of the Government's challenge from the point of view of the original military judge and the military judge that replaced her after she recused herself).
[187] *Id.* at 416–17.
[188] United States v. Greatting, 66 M.J. 226 (C.A.A.F. 2008); United States v. McIlwain, 66 M.J. 312 (C.A.A.F. 2008).
[189] *Greatting*, 66 M.J. at 230–31; *McIlwain*, 66 M.J. at 314.

might be questioned. The CAAF first grappled with a military judge's private statements concerning companion cases in *United States v. Greatting*.[190] In *Greatting*, a military judge presided over a series of companion cases involving duty-related misconduct.[191] The accused was a staff sergeant and the co-accused were another staff sergeant and three more junior Marines.[192] The accused's case was the fifth and final case to be heard.[193] Prior to hearing the accused's case, the military judge spoke with the SJA about the companion cases.[194] The judge told the SJA that the command was too lenient on the other staff sergeant, but too harsh on the junior Marines.[195] The judge stated that he considered "the level of culpability of [the other staff sergeant] versus the younger Marines who were perhaps more guided or motivated by misguided loyalty to the two staff sergeants that they worked for."[196]

In finding prejudicial error, the court focused on the judge's conversation with the SJA.[197] The court reemphasized that "presiding over companion cases does not alone constitute grounds for disqualification."[198] The CAAF asserted that ex parte communication with an SJA on a pending case is a different matter, however.[199] The court noted that the first cases were still pending clemency and that the accused's case was still pending trial.[200] It further stressed that the SJA is the "individual responsible for advising the convening authority on all aspects of the [companion] cases, including the terms of pretrial agreements and clemency recommendations."[201] The military justice system's unique post-trial processing delays finality of a court-martial's findings and sentence, because a convening authority must approve a sentence before it is complete.[202] Thus, the military judge exerted

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[190] *Greatting*, 66 M.J. 230–31.
[191] *Id.* at 228–29.
[192] *Id.* at 227–28.
[193] *Id.*
[194] *Id.* at 229.
[195] *Id.*
[196] *Id.*
[197] *Id.* at 230.
[198] *Id.*
[199] *Id.*
[200] *Id.* at 230–31.
[201] *Id.* at 231.
[202] *See* MCM, *supra* note 2, R.C.M. 1107. This unique structure makes it inappropriate for a trial judge to make statements concerning an adjourned court-martial until after the convening authority takes action.

influence on the co-accused's post-trial cases while influencing the accused's pretrial case.

Greatting offers a clear example of implied bias. The trial judge made an inappropriate, out-of-court comment during a series of companion cases.[203] The military judge's statement broke the co-accused into two classes: the staff sergeant-leaders and the junior Marines.[204] The military judge made these statements after one of the staff sergeant's cases was complete and after he tried the junior Marines.[205] His statement to the SJA would lead a reasonable person to believe the staff sergeants were more culpable and should receive harsher punishment. In fact, the other staff sergeant received a pretrial agreement that limited his confinement to seventy-five days; whereas, the accused's pretrial agreement limited his confinement to fifteen months.[206] This statement tainted the process by sharing his thoughts of the gravity of the accused's case with the SJA.[207]

Although the CAAF did not rely on ethics rules in reaching its holding, the facts in *Greatting* illustrate the value of using ethics rules to examine a military judge's impartiality.[208] The trial judge's conversation would likely violate the *ABA Model Code of Judicial Conduct.*[209] Rule 2.10 prohibits a judge from making nonpublic statements "that might substantially interfere with a fair trial or hearing."[210] Given the procedural posture of Greatting's case, the judge's statements concerning companion cases probably interfered with accused's ability to receive an advantageous pretrial agreement by giving the Government insight into the military judge's deliberative process for the accused's case.[211] If a

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[203] *Greatting*, 66 M.J. at 229.
[204] *Id.* at 229.
[205] *Id.*
[206] *Id.* at 228.
[207] *Id.* at 231. The CAAF's reasoning does not limit itself to *Greatting's* facts. The holding is consistent with the COMA's *Bradley* requirement that the military judge manifest bias by some act or statement. United States v. Bradley, 7 M.J. 332, 334 (C.M.A. 1979).
[208] *See* United States v. Quintanilla, 56 M.J. 37, 42 (C.A.A.F. 2001) (stating that courts will turn to the *ABA's Model Code of Judicial Conduct* "for guidance on proper conduct in criminal trials").
[209] *See* MODEL CODE OF JUDICIAL CONDUCT, *supra* note 89, R. 2.10.
[210] *Id.*
[211] This assertion applies only to the overlap of facts from the cases the military judge previously heard onto the accused's case. Arguably, a military judge's post-trial statement could yield sufficient evidence to question the judge's impartiality on a previously heard case. *See generally* United States v. McNutt, 62 M.J. 16 (C.A.A.F.

court were to apply the ethics canons to the *Greatting* facts, it would likely come to the same outcome.

Two weeks later, the CAAF set-aside another case when a military judge failed to recuse herself in *United States v. McIlwain*.[212] In finding reversible error, the court forces the trial judiciary to carefully consider its word choices when speaking on the record. Like *Greatting*, the facts in *McIlwain* involve companion cases.[213] In *McIlwain*, the accused and two other Germany-based Soldiers sexually assaulted a local national.[214] Prior to calling on the accused to enter his plea, the trial judge announced that she had presided over the companion cases.[215] The judge further stated that she had not formed an opinion to the accused's guilt, but she would only preside over the court-martial if the fact-finder was a panel.[216] She reasoned that "her participation in companion cases 'would suggest to an impartial person looking in that she can't be impartial in this case.'"[217] In talking through the case, the judge articulated that she would manifest implied bias if she presided over the case.[218] In fact, the language she used to explain how an objective person may view the case was the test to determine whether a military judge is impartial.[219]

The CAAF found prejudicial error and set aside the findings.[220] The court relied on the military judge's conclusory statement that a reasonable person could determine that she would not be impartial in the case.[221] The CAAF also reaffirmed the proposition that a judge sitting on

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2005) (using a military judge's post-trial statement concerning extrajudicial information to reduce an accused's sentence).

[212] 66 M.J. 312 (C.A.A.F. 2008).

[213] *Id.* at 313.

[214] *See id.* (stating that court members convicted the accused of "rape, forcible sodomy, and indecent acts"); *see also* Rick Emert, *Last GI Sentenced in Sexual Assault Case Gets 54 Months*, STARS & STRIPES (European ed.), Jan. 18, 2004, *available at* http://www.stripes.com/article.asp?section=104&article=19914.

[215] *McIlwain*, 66 M.J. at 313.

[216] *Id.*

[217] *Id.*

[218] *Id.*

[219] *See id.*; *see also* MCM, *supra* note 2, R.C.M. 902(a); *see also* United States v. Quintanilla, 56 M.J. 37, 78 (C.A.A.F. 2001) (stating, "Any conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge's 'impartiality might reasonably be questioned' is a basis for the judge's disqualification.") (quoting United States v. Kincheloe, 14 M.J. 40, 50 (C.M.A. 1982)).

[220] *McIlwain*, 66 M.J. at 315.

[221] *Id.* at 314.

companion cases alone does not require judicial disqualification.[222] The most noteworthy detail is that the military judge stated that in prior cases she made credibility determinations favorable to the accused.[223] Consequently, the appearance of judicial bias does not apply only to bias against the accused, but also to bias in the court-martial process itself.

An additional outcome in *McIlwain* is that the CAAF implicitly overruled a portion of both *United States v. Bradley* and *United States v. Oakley*.[224] The CAAF cited to *Oakley* for the proposition that sitting on companion cases alone does not mandate recusal.[225] But, *Oakley* reaffirmed the proposition in *Bradley* that "when acting on the accused's recusal motion, the military judge should have either recused himself or, inasmuch as an accused has no absolute right to trial by judge alone, directed a trial by members."[226] The *McIlwain* judge followed the procedures by refusing to sit as judge alone.[227] This change suggests a shift in the court, demonstrating that it will go further to protect an accused; yet, the CAAF did not express it in those terms.

Reading the 2008 cases together, one sees the history and progression of implied bias in companion cases. The CAAF reaffirmed the proposition that a trial judge sitting on a companion case alone does not mandate recusal.[228] But, each case involved judicial action that would cause a person to question the judge's impartiality: in *Greatting*, the case relied on the judge's out-of-court actions and, in *McIlwain*, the case relied on the judge's conclusory in-court statement.[229] These cases demonstrate that some cases have a triggering event that invites scrutiny.[230] One example of a triggering event is where a judge presides over companion cases. Put another way, the fact that a military judge sat

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[222] *Id.*
[223] *See id.*
[224] United States v. Bradley, 7 M.J. 332 (C.M.A. 1979); United States v. Oakley, 33 M.J. 27 (C.M.A. 1991); *McIlwain*, 66 M.J. at 314.
[225] *McIlwain*, 66 M.J. at 314 (citing *Oakley*, 33 M.J. at 34).
[226] *Oakley*, 33 M.J. at 33–34 (citing *Bradley*, 7 M.J. at 334).
[227] *McIlwain*, 66 M.J. at 313.
[228] United States v. Greatting, 66 M.J. 226, 230 (C.A.A.F. 2008); *McIlwain*, 66 M.J. at 314.
[229] *Greatting*, 66 M.J. at 230; *McIlwain*, 66 M.J. at 314.
[230] However, Judge Baker's dissent in *McIlwain* overstates the case's effect on companion cases by stating that the case created a "de facto per se rule of recusal, rather than a contextual rule of recusal." *McIlwain*, 66 M.J. at 318 (Baker, J., dissenting). *McIlwain* does not create a per se rule against trial judges sitting on companion cases. The deeper issue is what type of evidence is needed to raise the issue.

on companion cases factors into the totality of the circumstances for determining impartiality. Another triggering event could be cases of extrajudicial interaction between judges and one of the parties, such as the judge's interactions with the Government in *United States v. Greatting*.[231] Generally, courts will presume impartiality. But in these unique situations, the courts will scrutinize the record for evidence that demonstrates a lack of impartiality.

These cases also demonstrate another lesson: that judges cannot agree on what a reasonable person would believe. The judicial debate on what is reasonable is similar to Justice Stewart's reasoning in his famous concurrence in *Jacobellis v. Ohio*, which involved obscenity.[232] Here, the courts cannot fashion a per se rule concerning impartiality; instead, they'll know it when they see it.[233] The court in *McIlwain* split 3–2 in a case where the trial judge all but admitted to violating RCM 902(a).[234] The court in *Greatting* split 4–1 where a judge influenced the SJA about pending cases.[235] Both of these cases provided ideal facts for the CAAF to stand with a unanimous voice and send a strong message to trial courts, appellate judges, and practitioners alike. Instead, the majority opinions give precedential weight on specific examples of statements by judges. But, the court's splits attenuate the decisions' weight. While the CAAF gave some guidance, it ultimately raises the question, "Who are these reasonable people that can tell us when they would question a judge's impartiality?" Accordingly, the President should consider possible changes to RCM 902(a) to add predictability to the evaluation of implied bias.

IV. Proposed Solutions From Scholars and Other Jurisdictions

The Joint Service Commission's annual review of the military justice system views military jurisprudence as a continually evolving area of the

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[231] *Greatting*, 66 M.J. at 229–30.

[232] 378 U.S. 184, 197 (1964) (Stewart, J., concurring). In an obscenity case, Supreme Court Justice Potter Stewart stated that a film was not hard core pornography because, "I know it when I see it, and the motion picture involved in this case is not that." *Id.*

[233] *Cf.* Transcript of Oral Argument at 29–30, Capterton v. Massey Coal Co. (2009), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-22.pdf. Pondering whether a state supreme court judge's implied bias could be a constitutional issue, Justice Stevens stated, "This fits the standard that Potter Stewart articulated when he said 'I know it when I see it.'"

[234] *McIlwain*, 66 M.J. 312.

[235] *Greatting*, 66 M.J. 226.

law.[236] Accordingly, military justice practitioners should critically examine the state of the law and possible changes. This next section examines possible changes to judicial disqualification and compares them against the status quo.

A. Independent Adjudication of Disqualification Motions Provides Additional Transparency with Little Burden to the System

The President should amend the recusal rules to allow an independent judge to review a disqualification motion. To this end, New York University's Brennan Center for Justice proposes a model where an independent judge adjudicates recusal motions.[237] The Center suggests adopting a rule like the Texas Rules of Civil Procedure where a judge faced with a recusal motion has two options: instituting self-recusal or forwarding the challenge to a superior judge for adjudication.[238] This method eliminates the tension that appears when judges must make objective decisions concerning a personal challenge.[239] The Brennan Center's proposed procedures are useful in principle, but forwarding the case outright to a different military judge is impractical due to the geographic distance between judges.[240] A modified system could work for the military, however.

Military courts should adopt some components of this system with modifications to meet the military's unique geographic challenges. The current method of challenging a military judge should remain in place, but an unsuccessful challenging party should be able to appeal the military judge's ruling. The military judge should receive the challenge and review the evidence and testimony offered by parties and enter

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[236] *See* U.S. DEP'T OF DEF., DIR. 5500.17, THE JOINT SERVICE COMMITTEE ON MILITARY JUSTICE 1 (3 May 2004) [hereinafter DoDD 5500.17] (requiring the Joint Service Commission on Military Justice to review the MCM annually).

[237] BRENNAN CTR. FOR JUST., FAIR COURTS: SETTING RECUSAL STANDARDS 31–32, (2008) *available at* http://www.brennancenter.org/page/-/Democracy/RecusalPaper_. FINAL.pdf) [hereinafter BRENNAN CTR. REPORT]. The Brennan Center's Fair Courts Project works "to preserve fair and impartial courts and their role as the ultimate guarantor of equal justice in our constitutional democracy." *Id.* at intro.

[238] *Id.* at 31 (citing TEX. R. CIV. PROCEDURE 18a(c) (2007) (providing that when a party challenges a judge that "the judge shall either recuse himself or request the presiding judge of the administrative judicial district to assign a judge to hear such motion")).

[239] *Id.*

[240] *See* discussion at Part IV.B *infra* (discussing the geographic challenges the military judiciary experiences).

findings of fact to rule on the motion. In addition to providing military judges the opportunity to recuse themselves, this procedure would create a record for appellate review and provide counsel and the public with an opportunity to understand the military judge's rationale. If the military judge's rationale satisfies the challenging counsel's concerns, then the inquiry ends.

If the challenging counsel is not satisfied with the military judge's ruling, then the counsel may request that the military judge stay the proceedings and submit a motion for reconsideration to the Chief Circuit Judge.[241] The stay is an important component because the counsel is questioning the propriety of the proceeding.[242] The Government would then prepare a verbatim transcript of the portions of the recusal motion and submit the record to the Chief Circuit Judge.[243] The parties may also file supplemental briefs.

Once a Chief Circuit Judge receives a disqualification motion, she can either personally review the motion or detail another military judge to review the motion. If not satisfied with the evidence in the record, the reviewing judge may call an Article 39(a) session to receive additional evidence either in person or via video teleconference.[244] After receiving all necessary evidence, the reviewing judge should review the challenge *de novo*.[245] The *de novo* standard is less deferential than the current standard of abuse of discretion.[246] It is also less deferential than the "somewhat less deferential standard" that appellate courts grant to military judges when reviewing a challenge under the liberal grant mandate.[247] The reviewing judge then rules on the motion. If there is no

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[241] If the parties believe they may challenge the military judge, then the party must submit the motion along with other pretrial motions. Counsel should not normally submit a motion to recuse the judge the day of trial without good cause, such as counsel learning new information concerning the judge.

[242] *See* BRENNAN CTR. REPORT, *supra* note 237, at 31 (distinguishing recusal motions from other motions because recusal motions "challenge the fundamental legitimacy of the adjudication").

[243] This procedure is similar to an appeal by the United States. MCM, *supra* note 2, R.C.M. 908.

[244] *See id.* R.C.M. 804, 805, 914B (allowing military judges to conduct Article 39a sessions using video teleconferencing technology).

[245] *See* BRENNAN CTR. REPORT, *supra* note 237, at 33 (advocating *de novo* review).

[246] *See* United States v. McIlwain, 66 M.J. 312, 313 (C.A.A.F. 2008) (identifying the current standard in holding that the military judge abused her discretion when she refused to recuse herself).

[247] *See* United States v. Townsend, 65 M.J. 460, 463 (C.A.A.F. 2008) ("Although we review issues of implied bias for abuse of discretion, the objective nature of the inquiry

disqualification, then the reviewing judge returns the case to the trial judge. If there is a disqualification, the Chief Circuit Judge would detail a new trial judge.[248] The text of the proposed revisions appears at the Appendix to this article.

This system benefits all parties—the accused, the Government, the military judge, and the appellate courts. The accused benefits by having timely relief for a denied disqualification motion. Under the current system, if a court finds an accused guilty, the accused may have to wait years for appellate relief.[249] Under this independent review mechanism, a reviewing judge can order relief within days. Likewise, the Government benefits from this procedure. Justice should be blind, and judges should be neutral. Accordingly, a military judge should act impartially toward both the accused and the Government. Unfortunately, the Government has no recourse to disqualify a military judge that denies a Government disqualification motion.[250] This independent review procedure gives the Government a remedy from a military judge that refuses to recuse himself.

The judiciary also benefits from this procedure. If the reviewing judge disqualifies the military judge, then the military judge will not face appellate review scrutinizing the judge's behavior. Additionally, the appellate judges receive the benefit of having an additional factor to weigh on appellate review—the reviewing judge's decision. The reviewing judge provides a fresh look into the allegation while retaining a trial judge's fact-finding ability. This second reviews stacks weight in favor of an argument that a reasonable person would find that the military judge was impartial.[251] This mitigates the burden on an appellate judge faced with the Hobson's choice of either affirming a case

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dictates that we accord 'a somewhat less deferential standard' to implied bias determinations of a military judge.") (quoting United States v. Armstrong, 54 M.J. 51, 54 (C.A.A.F 2000)). If appellate courts grant less deference when reviewing a military judge's determination of a panel member's objectivity, then a reviewing court should give no more deference when reviewing a challenge involving a military judge's objectivity.

[248] There is no reason that the reviewing judge could not serve as the trial judge.

[249] *See* United States v. Moreno, 63 M.J. 129, 141–43 (C.A.A.F. 2006) (discussing the length of time to complete appellate review and its effects on due process).

[250] *See* Part III.A.2 *supra* (discussing the difficulties the Government has in challenging a military judge for implied bias).

[251] In fact, an appellant must successfully argue not only that the trial judge lacked impartiality, but also that the reviewing judge abused his discretion in agreeing with the military judge.

where reasonable minds can argue that the judge appears impartial or releasing a convicted criminal.[252] Yet, the independent review procedure could still suffer criticism.

One potential concern is that the procedure allows counsel to unnecessarily delay the proceedings. Currently, counsel have various methods to delay courts, yet they are rarely abused. A savvy defense counsel, for example, could file repeated motions to compel discovery or request a sanity board. The independent review procedure will also likely not be abused. Professional Responsibility Rule 3.2 reminds lawyers of their "responsibilities to the tribunal to avoid unwarranted delay."[253] Abuses of the system could lead to a professional responsibility investigation.[254] A counsel's duty to the tribunal and fear of professional responsibility investigations should deter abuse of the proposed judge recusal procedure.

An additional criticism could be that a reviewing judge will simply rubber-stamp the military judge's decision. This threat will continue unless someone can reduce measuring impartiality to a mathematical equation. Ultimately, whenever reasonable minds may differ, some judges will always ratify their colleagues. But, other judges will not. This proposal seeks to add a "second set of eyes" that will bolster confidence in the courts-martial process.[255] It addresses the concern that judges are fallible and cannot shake their own biases when judging themselves.[256] A neutral reviewing judge with the fact-finding capabilities of a trial judge is in a much better position to ascertain a military judge's impartiality than an appellate court reading a cold record.

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[252] The facts in *McIlwain* demonstrate this difficult decision. *See* United States v. McIlwain, 66 M.J. 312, 313 (C.A.A.F. 2008). The appellant and his co-accused gang raped a nineteen-year-old German college student. Emert, *supra* note 214.

[253] *See* AR 27-26, *supra* note 91, R. 3.2. As the drafters explain in Rule 3.2's comments, "Dilatory practices bring the administration of criminal, civil and other administrative proceedings into disrepute. The interests of the client are rarely well-served by such tactics. Delay exacts a toll upon a client in uncertainty, frustration, and apprehension." *Id.*

[254] *See generally* AR 27-1, *supra* note 87, ch. 7 (providing for review of violations of AR 27-26's ethical rules).

[255] *See* United States v. Wright, 52 M.J. 136, 142 (C.A.A.F. 1999) (stating that disclosure adds to the "perception of fairness").

[256] *See* Debra Bassett, *Judicial Disqualification in the Federal Courts*, 87 IOWA L. REV. 1213, 1243–51 (2002) (discussing the difficulties judges face when examining whether they are impartial).

The benefits of an independent review procedure far outweigh its burdens: The system assists both parties in resolving questions of implied judicial bias; the system decreases the time it takes to resolve an allegation of implied bias and provides the Government with potential relief. Of equal importance, the procedure adds transparency to the military justice system, thus ensuring servicemembers and the public have confidence in the military courts.

B. Other Methods of Challenging Military Judges

Another potential reform is to give both parties—or, perhaps, just the defense—the opportunity to peremptorily strike the trial judge. This system would be similar to the current method of peremptorily striking panel members.[257] A counsel could strike the military judge at arraignment. While this practice may work in civilian courts, it would be difficult to apply in the military. The Brennan Center argued that federal courts already apply this protocol.[258] They highlighted how nineteen states allow peremptory disqualification of judges.[259] Likewise, Professor Debra Bassett urges peremptory strikes.[260] She observes that judges "hesitate to impugn their own standards [and that] judges sitting in review of others do not like to cast aspersions."[261]

The peremptory strike protocol would be logistically impracticable in military courts. Unlike federal and state courts, which have many judges close in proximity to one another, the military courts have a different structures and logistical challenges.[262] Military judges are often states—or nations—apart.[263] With the exception of three installations, no

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[257] *See* MCM, *supra* note 2, R.C.M. 912(g) (prescribing procedures and limitations on peremptory challenges to panel members).
[258] BRENNAN CTR. REPORT, *supra* note 237, at 26–27 (arguing for peremptory challenges).
[259] *Id.* (citing RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES 76–79 (1996)). Only eleven states allow a pure peremptory strike; the remaining eight require the parties to show some grounds for prejudice. *Id.*
[260] Bassett, *supra* note 256, at 1251. Professor Bassett limits her arguments to appellate courts; nevertheless, the principles apply to trial judges because her research and analysis focus on how judges react to challenges and public perception to those reactions. *Id.*
[261] *Id.* at 1246 (quoting *In re* Mason, 916 F.2d 384, 386 (7th Cir. 1990)).
[262] *See* MCM, *supra* note 2, R.C.M. 902 analysis, at A21-52 (noting the different structure of the military judiciary).
[263] *See* JAG PUB. 1-1, *supra* note 31, at 12–16.

Army base houses more than one military judge.[264] If a counsel removes a military judge with little or no cause, another military judge would have to travel to the installation to hear the case. A counsel in Iraq or Afghanistan could peremptorily strike a judge without cause, forcing another judge to travel to a combat zone, thus adding both costs and delay into the trial.[265] This cost is acceptable to protect an accused's due process rights, but is excessive without good cause.

Another potential problem with applying the peremptory strike protocol is that the counsel may forum shop.[266] That is, defense counsel will strike tough military judges and trial counsel will strike military judges who tend to give lenient sentences. Professor Bassett confronts this concern with respect to appellate courts.[267] To avoid abuse, she proposes a review system that is similar to the protocol suggested in Part IV.A.[268] The Brennan Center also suggests that parties should be required to file an affidavit stating why they believe the judge should recuse himself to minimize potential abuses.[269] Eight of the nineteen states allowing judicial peremptory strikes require counsel to show grounds for prejudice when they make their challenges.[270]

The Brennan Center's proposal could also be viewed as applying the liberal grant mandate to military judges, which requires military judges to liberally grant defense challenges for cause when defense counsel believes a panel member may have implied bias toward the accused.[271] The CAAF explains that "[c]hallenges based on implied bias and the liberal grant mandate address historic concerns about the real and perceived potential for command influence on members' deliberations."[272] Although some argue that military judges face similar

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[264] *See id.*
[265] For a stateside example: If a counsel stationed at Fort Drum, New York, peremptorily struck the military judge, then a judge from Fort Campbell, Kentucky, may have to travel to hear the case.
[266] *See* Bassett, *supra* note 256, at 1254.
[267] *Id.* at 1254.
[268] *See id.* at 1254–55 (proposing a system where a judge determines whether he should recuse himself and then allowing the other appellate panel members to review the judge's denial).
[269] BRENNAN CTR. REPORT, *supra* note 237, at 27.
[270] *Id.* at 26–27 (citing FLAMM, *supra* note 260, at 76–79).
[271] United States v. Clay, 64 M.J. 274, 276 (C.A.A.F. 2007).
[272] *Id.* at 276–77; *see* UCMJ art. 25 (2008) (describing the convening authority's role in selecting panel members).

pressure from the military establishment as panel members, this contention ignores fundamental differences between the two.[273]

There is a great difference between panel members and military judges. In panel selection, the convening authority—the very same officer charged with commanding an organization—personally selects panel members.[274] These panel members are part of the command, most without legal training.[275] As servicemembers without legal training, panel members will have less understanding of the judicial process than military judges. A 2008 CAAF case illustrates this disparity.[276] In *United States v. Townsend*, a panel member admitted during voir dire that he was wary of defense counsel due to his observations of the television show *Law and Order*.[277] Alternatively, military judges are trained attorneys and subject to professional responsibility rules.[278] As senior judge advocates, military judges are not neophytes.[279]

A liberal grant mandate system will not transfer well to the judiciary because of the vast differences between panel members and military judges. A person who compares both a panel member and a military judge's qualifications and method of appointment cannot reasonably conclude that a military judge faces the same pressures as a panel member. Furthermore, adding the liberal grant mandate ignores the needs of the Government to have a military judge sitting as a neutral

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[273] *See* Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy*, 70 GEO. WASH. L. REV. 649, 667 (2002) (attacking the structure of the military judiciary, claiming that their "promotion and reputation . . . can be significantly affected by their rulings in criminal cases, particularly high profile cases").

[274] UCMJ art. 25.

[275] *See id.* (listing the panel member selection criteria); *see generally* United States v. Bartlett, 66 M.J. 426 (C.A.A.F. 2008) (explaining the types of servicemembers that may sit as panel members.)

[276] United States v. Townsend, 65 M.J. 460 (C.A.A.F. 2008).

[277] *Id.* at 462. The panel member was the son of a police officer who wished to be a prosecutor. *Id.* When asked his opinions concerning defense counsel he responded that he respected military defense counsel, but "had 'lesser of a respect for some of the ones you see on TV, out in the civilian world.'" *Id.* He stated that he came to this opinion because he regularly watched the television show *Law and Order*. *Id.*

[278] *See, e.g.*, ARMY CODE OF JUDICIAL CONDUCT, *supra* note 89.

[279] *See* JAG PUB. 1-1, *supra* note 31, at 12–16 (indicating that all of the Army trial judiciary are field grade officers).

arbiter, regardless of the challenging party.[280] Accordingly, applying the liberal grant mandate to military judges is not a viable alternative.

Another possible solution is to leave the judicial disqualification system in its current form. The military justice system contains substantial protections that may not exist in some other jurisdictions. Despite the discussion above, the current system maintains the accused's due process rights by offering automatic appellate review in many cases.[281] Military judges also have an informal advisory network, in which the trial judiciary may seek advice on recusal from other military judges.[282] Other than the opportunity for military judges to seek advice from their peers, the current system only corrects errors after a court-martial is adjourned. Further, it only corrects errors for one party and overlooks the Government's need to challenge military judges. Accordingly, instead of patching errors, the President should overhaul the system.

V. Conclusion

The President should allow for independent judicial review when a party challenges a military judge for implied bias. This procedure will add transparency and additional protections for both the Government and the accused. As a special segment of society that relies on good order and discipline, the military justice system invites scrutiny. Therefore, the military should aspire to be more transparent. This transparency should not only focus on dealing with actual injustice, but also on warding-off perceptions of injustice.

The military justice system has been a progressive system that regularly reviews itself.[283] As a result, the UCMJ offers substantive and procedural protections not seen in most civilian jurisdictions.[284]

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[280] *See* United States v. Clay, 64 M.J. 274, 276 (CAAF 2007) (stating that liberal grant mandates only apply to defense challenges).

[281] *See* UCMJ art. 66 (2008) (granting appellate review in cases with an adjudged sentence of a punitive discharge or greater than one year confinement).

[282] Henley Telephone Interview, *supra* note 104. The Brennan Center recommends the use of recusal advisory bodies as a possible judicial reform mechanism. BRENNAN CTR. REPORT, *supra* note 237, at 34–35.

[283] *See* DODD 5500.17, *supra* note 236, at 1 (requiring the Joint Service Commission on Military Justice to review the *Manual for Courts-Martial* annually).

[284] *See* UCMJ art. 31(2008) (providing rights in non-custodial questioning); MCM, *supra* note 2, R.C.M. 405(2)(A) (providing defense counsel to accused in pretrial investigations

Accordingly, the military justice system should not be complacent with the status quo, but should continually examine ways to improve itself. Adding independent judicial review for RCM 902 motions adds fairness to the military justice system. In return, it will remain a progressive justice system that emphasizes an efficient and fair adjudication that maintains good order and discipline in the Armed Forces.

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regardless of ability to pay); *id.* R.C.M. 501(b) (detailing defense counsel in general and special courts-martial regardless of ability to pay); *id*. R.C.M. 701 (granting liberal discovery); *id.* R.C.M. 703 (requiring the Government to produce witnesses for the defense).

A**ppendix**

Recommended additions to R.C.M. 902:

(d) *Procedure.*

. . . .

(4) If a military judge denies the motion to disqualify himself or herself, then the moving counsel may request that the court reconsider the motion. The moving counsel must request reconsideration by the earlier of 72 hours or prior to the court receiving evidence.

(A) Record. Upon written notice to the military judge under subsection (d)(4) of this rule, trial counsel shall cause a record of the proceedings to be prepared. Such record shall be verbatim and complete to the extent necessary to resolve the issues appealed.

(B) The military judge shall forward the motion to the Chief, Circuit Judge, who will either personally review the motion or detail another military judge to reconsider the motion.

(C) The military judge reviewing the motion to reconsider shall review the record *de novo*. If necessary, the military judge will consider new evidence during an Article 39a session. The military judge may receive evidence under R.C.M. 804, 805, and 914B.

(D) The military judge reviewing the motion will enter findings of fact and law into the record. If the reviewing judge denies the motion to reconsider, then the original military judge will preside over the case. If the reviewing judge grants the motion to reconsider, however, then the Chief Circuit Judge will detail a new military judge.