Implied Bias: A Suggested Disciplined Methodology

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Introduction

In recent years, the Court of Appeals for the Armed Forces (CAAF) has addressed the issue of implied bias arising from defense counsel's challenge for cause against a member of the court-martial panel. With a growing sense of frustration, the court has become increasingly critical of military judges who do not specifically address the issue of implied bias on the record and articulate their reasons for denying the challenge in light of the court's liberal grant mandate. The current analysis employed by the appellate courts when reviewing the judge's decision leads to an ad hoc approach that necessarily relies on the subjective view of the facts.[1] This article suggests a more disciplined way of reviewing implied bias.

An accused is entitled to a trial composed of impartial and unbiased panel members.[2] This is a constitutionally,[3] statutorily, and regulatory based right.[4] Under Rule for Courts-Martial (RCM) 912(f)(1)(N), "A member shall be excused for cause whenever it appears that the member: . . . Should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality."[5] The rule addresses both actual and implied bias challenges,[6] although its primary focue is implied bias[7] and "reflects the President's concern with avoiding even the perception of bias, predisposition, or partiality."[8] While not requiring counsel to state that his challenge is for both implied and actual bias, counsel preserves the implied bias issue if challenging the panel member broadly under RCM 912(f)(1)(N) grounds or when articulating reasons that reasonably raise an implied bias concern.[9] Furthermore, there is a duty on the part of the military judge to sua sponte recognize an implied bias issue.[10]

Actual and Implied Bias

The doctrine of implied bias protects the accused's right to a court-martial free from substantial doubt as to the legality, fairness, and impartiality[11] of the proceedings and abates the real and perceived potential for command influence on panel members' deliberations.[12] To ensure the perception of fairness, recognizing the convening authority's role in panel member

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[1] *See* United States v. Wiesen, 56 M.J. 172, 175 (2001). The court addressed the criticism leveled by the dissent in *United States v. Rome*, 47 M.J. 467, 472 (1998) (Crawford, J., dissenting) (accusing the court of adopting an "I know it when I see it" analysis when applying an implied bias standard). Therein the court answers that while the case law may "evolve" the focus remains on the public perception and appearance of fairness. *Wiesen*, 56 M.J. at 175. It is this "evolution" that presents a problem for the trial courts. *Id.*

[2] *Wiesen*, 56 M.J. at 174; MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 912(f)(1)(N) (2008) [hereinafter MCM].

[3] *Wiesen*, 56 M.J. at 174.

[4] United States v. Leonard, 63 M.J. 398 (2006); United States v. Modesto, 43 M.J. 315, 318 (1995).

[5] MCM, *supra* note 2, R.C.M. 912(f)(1)(N).

[6] United States v. Downing, 56 M.J. 419 (2002).

[7] United States v. Strand, 59 M.J. 455, 458 (2004).

[8] United States v. Minyard, 46 M.J. 229, 231 (1997) (quoting United States v. Lake, 36 M.J. 317, 323 (C.M.A. 1993)).

[9] United States v. Armstrong, 54 M.J. 51, 53 (2000) (rejecting plain error review on implied bias challenge first raised on appeal and finding a challenge under R.C.M. 912(f)(1)(N) "'encompasses 'both actual and implied bias.' Actual bias and implied bias are separate legal tests, not separate grounds for challenge.") (citations omitted). *But see* United States v. Ai, 49 M.J. 1 (1998) (applying a plain error review for implied bias, finding that the defense did not preserve a challenge on implied bias grounds when he did not specifically raise the implied bias challenge during trial). The clear weight of authority favors the holding in *Armstrong*. *See* United States v. Hollings, 65 M.J. 116 (2007) (despite defense's challenge to a member under R.C.M. 912(f)(1)(G), disqualification if the panel member acted as a legal officer in the case, the court, without addressing waiver or a plain error standard of review, applied an implied bias analysis).

[10] MCM, *supra* note 2, R.C.M. 912(f)(4).

[11] United States v. Leonard, 63 M.J. 398, 402 (2006) ("The two purposes of R.C.M. 912(f)(1)(N) are to protect the actual fairness of the court-martial and to bolster the appearance of fairness of the military justice system in the eyes of the public."); MCM, *supra* note 2, R.C.M. 912(f)(1)(N).

[12] United States v. Clay, 64 M.J. 274, 277 (2007).

selection and accounting for the limit of one peremptory challenge per side,[13] the court has established a "liberal grant mandate" that applies to defense challenges only.[14] Responsible for "preventing both the reality and the appearance of bias,"[15] the military judge advances the interests of justice and protects the accused's right to an impartial panel by addressing perceptions of unfairness early in the proceedings.[16] Thus, the military judge should err on the side of caution by liberally granting defense challenges against panel members during voir dire. Whether the challenge is for actual or implied bias, the burden of persuasion is placed on the party making the challenge and it is his responsibility to make the record to support the basis of the challenge.[17] However, even in absence of a challenge, if the perception of fairness would be jeopardized by the presence of a panel member, the military judge has a sua sponte duty to apply the implied bias analysis.

The finding of implied bias requires the court to look objectively and dispassionately at the record and ask whether there is too high a risk, based upon the reasons advanced by counsel, that the public will perceive something less than a court composed of fair and impartial panel members. "Implied bias is 'viewed through the eyes of the public, focusing on the appearance of fairness.'"[18] The "public" is imputed with the awareness of the provision of Article 25, Uniform Code of Military Justice (UCMJ),[19] and the military justice system. Implied bias will exist when most people in the same position as the panel member would be prejudiced or biased.[20]

Conversely, actual bias is any bias which will not yield to the military judge's instructions and the evidence presented at trial.[21] In determining whether actual bias exists, the appellate court will look through the eyes of the military judge or panel member.[22] Because the analysis is subjective, the question is "essentially one of credibility, and therefore largely one of demeanor."[23] While the appellate court will not overturn the trial judge's ruling unless he abuses his discretion, greater deference will be given to the military judge's rulings on actual bias.[24]

This is not true for implied bias. As the test is objective, that is through the eyes of the public, the appellate court will afford the military judge less deference when reviewing an implied bias issue and apply a "standard that is less deferential than abuse of discretion, but more deferential than de novo review."[25]

This "less-than-more-than" standard is further refined in "close cases," that is cases where the perception of legality, fairness, or impartiality is jeopardized by a panel member's participation in the court-martial proceedings.[26] As explained herein, what factors are necessary to constitute a close case is a matter of debate. However, whatever its meaning, when the court finds a close case the standard of review is even less deferential than the less-than-more-than standard if the military judge fails to address implied bias and does not articulate his rationale for denying the challenge in the context of the liberal grant mandate.[27] This even-less deferential option is an adaptation from CAAF's holding in *United States v. Rome* that

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[13] Unlike the Federal Rules of Criminal Procedure, which grant the defendant several peremptory challenges, Article 41, Uniform Code of Military Justice, affords an accused only one peremptory challenge. Thus, attempts to apply a rules-type analysis regarding peremptory challenges into the military justice system have been rejected. *See Armstrong*, 54 M.J. 51.

[14] United States v. James, 61 M.J. 132, 139 (2005) (finding no basis for the applying the liberal grant mandate to government challenges).

[15] *Clay*, 64 M.J at 277.

[16] *Id.*

[17] MCM, *supra* note 2, R.C.M. 912.

[18] United States v. Briggs, 64 M.J. 285, 286 (2007) (citation omitted).

[19] UCMJ art. 25 (2008).

[20] *See Briggs*, 64 M.J. at 286 ("Implied bias exists when, 'regardless of an individual member's disclaimer of bias, most people in the same position would be prejudiced [that is biased].'" (alteration in original) (citation omitted)); United States v. Leonard, 63 M.J. 398, 401 (2006); *see also Armstrong*, 54 M.J. at 53–54 (noting that the "most people in the same position" test infuses an element of actual bias into the implied bias analysis).

[21] United States v. Reynolds, 23 M.J. 292, 294 (C.M.A. 1987)

[22] United States v. Napoleon, 46 M.J. 279, 283 (1997); United States v. Daulton, 45 M.J. 212, 217 (1996).

[23] *Reynolds*, 23 M.J. at 294 (quoting Patton v. Yount, 467 U.S. 1025, 1038 (1984)).

[24] *Daulton*, 45 M.J. at 217.

[25] United States v. Moreno, 63 M.J. 129, 134 (2006).

[26] United States v. Clay, 64 M.J. 274, 277 (2007).

[27] *Id.* ("A military judge who addresses implied bias by applying the liberal grant mandate on the record will receive more deference on review than one that does not.").

absent actual bias "implied bias should be invoked rarely."[28] This phrase, seemingly simple and straight-forward and having nothing to do with the deference given to the military judge by the appellate courts during review, has been transformed into a standard of review by *United States v. Clay*.[29] *Clay* instructs that the phrase "implied bias . . . invoked rarely" does not mean that the implied bias doctrine should rarely be applied to overturn a military judge's ruling denying a defense challenge.[30] Rather, it means that when the military judge considers the challenge on the grounds of implied bias, "recognizes his duty to liberally grant defense challenges, and place[s] his reasoning on the record," it would be rare that the appellate court would overturn his decision under a standard that is less deferential abuse of discretion, but more deferential than de novo.[31] When, however, the military judge does not apply these three factors to a defense challenge in close cases, his decision is given even less deference than the less deferential than abuse of discretion, but more deferential than de novo standard.[32] How close *Clay's* new standard comes to a de novo review is uncertain, but even when the military judge fails to articulate the three *Clay* factors on the record he is still entitled to a modicum of discretion by the reviewing authorities.[33]

Clay also reminds military judges and practitioners that the findings of fact necessary to support denying a defense challenge against a panel member are different for implied bias. Unlike challenges involving actual bias, the military judge's finding that a panel member's assurances of impartiality and disclaimers of bias are credible will be less determinative during the appellate court's review for implied bias.[34] Because the implied bias test is objective, the appellate courts are more concerned about the public's perception, as it is reflected in the "cold appellate record," and less about the military judge's subjective conclusions about a panel member's creditability, which is based upon nuances not reflected on the written record of trial, when that member disclaims any bias.[35]

The Law

While the implied bias test is theoretically objective, its application is necessarily subjective.[36] Like beauty, implied bias is in the eye of the judicial beholder. Whether the public will perceive the presence of a certain member on the panel as jeopardizing the impartiality of the proceedings is inherently a subjective determination. This has led to an ad hoc analysis that depends on the particular view of the appellate court as to whether a case is "close" and how much discretion should be afforded the military judge's decision. In order to avoid this dilemma as well as the issue, the court seems to imply that when confronted with any defense challenge for cause, the military judge must recognize and apply the liberal grant mandate, even in absence of a specific implied bias challenge by the trial defense counsel. When the military judge recognizes his obligations under an implied bias analysis, the "less-than-more-than" review standard applies. When he does not, the less deferential *Clay* standard applies. Thus, it would seem that the military judge should reflexively apply the implied bias standard against any-and-all defense challenges.[37] This prophylactic approach, however, is indecisive and leads to a rote application of the law that does not truly identify when a case requires an implied bias analysis and the application of the liberal grant mandate.

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[28] 47 M.J. 467, 469 (1998). The "invoked rarely" concept relies upon the holding of *United States v. Lavender*, 46 M.J. 465, 489 (1997), which cites *Smith v. Phillips*, 455 U.S. 209, 222–23 (1982) (O'Conner, J., concurring), for the proposition that implied bias should be "applied only in 'extreme' or 'extraordinary' cases."

[29] *Clay*, 64 M.J. 274.

[30] The court in *Clay* turns the phrase "invoked rarely" into a standard of review. This is at odds with the original intent of the phrase. *See id*.; *Rome* 47 M.J. at 470 (questioning member's impartiality because of the member's relationship with a prosecution witness, the trial counsel, and the enlisted member of the panel, as well as his prior involvement in another court-martial that led to issues of unlawful command influence "created the rare occasion where the implied-bias doctrine should have been invoked . . . .").

[31] *Clay*, 64 M.J. at 277.

[32] *Id*.

[33] United States v. Hollings, 65 M.J. 116, 119 (2007).

[34] United States v. Strand, 59 M.J. 455, 460 (2004) (quoting United States v. Youngblood, 47 M.J. 338, 341 (1997)) ("[D]isclaimers of bias, . . . , are not dispositive with regard to implied bias . . . . Nonetheless, a 'member's unequivocal statement of a lack of bias can . . . carry weight' when considering the application of implied bias.").

[35] *Clay*, 64 M.J. at 277–78.

[36] *See* United States v. Rome, 47 M.J. 467, 472 (1998) (Crawford, J., dissenting) ("In reaching its conclusion in all these cases [on implied bias], the majority applied a subjective public perception rule.").

[37] United States v. Townsend, 65 M.J. 460 (2008) (Baker, J., dubitante) ("Why would a military judge take a chance, where, in fact, the accused has objected to the member sitting on his court and preserved the issue? Why take the chance that an appellate court will disagree and reset the clock after years of appellate litigation?").

The subjectivity of the objective standard is best illustrated in the court's decision in *United States v. Townsend*, wherein the majority found that the challenged panel member, who was attending law school at night, did not raise the specter of implied bias.[38] The panel member's activities and associations raising the possible question of implied bias included: (1) taking a course in criminal law as part of his night law school curriculum; (2) wanting to become a criminal prosecutor in order to put "the bad guys in jail" and "keep the streets safe"; (3) having mixed views of defense counsel, with a high regard for military defense counsel but a "lesser respect for some of the ones you see on TV, out in the civilian world"; (4) having a close family member in law enforcement; and, (5) having a "healthy respect for law enforcement, and people in authority."[39] That same panel member, however, affirmed that he would follow the military judge's instructions, hold the government to its burden of proof, apply the presumption of innocence, put aside any outside legal notions he may harbor in favor of the evidence introduced at trial, and weigh a witness' credibility in accordance with the judge's instruction.[40] The defense counsel challenged the panel member for cause under RCM 912(f) citing the panel member's "hardened" view toward criminal cases based upon his legal training, his desire to become a prosecutor, and his familial relationship with members of the law enforcement community.[41] Furthermore, the panel member's impartiality was suspect when he implied that he would impute greater credibility to the testimony of law enforcement officials, expressed a desire to "put the bad guys away," and, stated that he had less respect for defense counsel than for prosecution counsel.[42] The military judge denied the challenge finding that the panel member was "extremely genuine and sincere," understood his role as court member, had neither a pro-government nor pro-defense slant, would follow the judge's instructions and would hold the government to its burden, making a decision solely on the evidence introduced at trial.[43] The majority held that the military judge did not abuse his discretion, even without a specific articulation of the liberal grant mandate, finding that these circumstances did not make this a close case.[44] Therefore, the military judge's failure to apply the implied bias-liberal grant mandate was not fatal.

The *dubitante* opinion starts with the phrase "[t]he liberal grant mandate exists for cases like these."[45] Given the tenor and nature of a *dubitante* opinion,[46] it is clear that a difference of opinion existed over the "close case" issue. While the failure to engage in the *Clay* analysis in a "close case" is not necessarily fatal,[47] it does invoke the less deferential *Clay* standard of review, thus jeopardizing the case on appeal.

Suggested Approach to Implied Bias

In order to depart from an *ad hoc* approach in "close cases" where the liberal grant mandate is necessarily invoked and the *Clay* factors become nearly determinative, a more disciplined view is suggested. A review of both federal and military precedent reveals five general situations giving rise to implied bias. While these categories are necessarily broad, they do allow both parties and judges to better articulate a cogent rationale for exercising a challenge on an implied bias standard rather than relying on how the appellate court will view the panel member's circumstances and responses during voir dire. The five categories break down as follows:

> 1. Where evidence exists on the record of some relationship between a panel member and some aspect of the litigation. This would include situations where the panel member: (a) evidences a potential for substantial emotional involvement or investment in the case that would adversely affect impartiality;[48] (b) had or has a close tie

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Dubitante*, "Doubting. This term was usually placed in a law report next to a judge's name, indicating the judge doubted a legal point but was unwilling to state it was wrong." BLACK'S LAW DICTIONARY 537 (8th ed. 2004).

[47] *See* United States v. Downing, 56 M.J. 419 (2002) (finding no abuse of discretion in denying accused's challenge despite absence on the record of the military judge's consideration of the liberal grant mandate).

[48] United States v. Napoleon, 46 M.J. 279, 285 (1997) (Crawford, J., concurring).

with someone who was a victim of the same or similar crime as that currently before the court; and, (c) has a close relationship, either personally or professionally, with one of the parties or witnesses to the litigation.[49]

2. The panel member conceals or misleads the court concerning important facts during voir dire in order to serve on the court and render judgment in the case.

3. There was extensive rehabilitation required or pursued by the trial counsel or military judge in order to "save" the panel member, which gives rise to a reasonable question of fairness.

4. The panel member has an extensive level of pretrial knowledge or involvement with the case.

5. Questions of command influence are raised.

Examples of each category of cases follow. It is beyond the scope of this article to provide an exhaustive or comprehensive list of cases to support each category and there are cases which defy neat classification but rather turn on an amalgamation of factors, each of which would otherwise be insignificant. However, in an attempt to build a "better mousetrap" one need not eschew the "new and improved" version merely because some mice slip through.

Relationship Between the Panel Member and Some Aspect of the Litigation

This category is the broadest and represents three different factual situations: (1) emotional involvement or investment; (2) similarity between the crimes before the court and prior victimization; and, (3) close ties with parties to the litigation. It is recognized that a case may be viewed as falling into one or more of these scenarios based upon one's view of facts. However, the exact subcategory is merely a means to describe the specific relationship within the broader relationship context.

Evidence of a Substantial Emotional Involvement or Investment with the Case

United States v. Clay[50] represents this type of implied bias. In *Clay* the challenged panel member was Colonel (Col) J who, during voir dire, expressed the view that if a person was convicted of raping a young female, a crime he considered "as serious [an] offense as I can think of," "[he] would be merciless within the limits of the law."[51] The accused was facing one specification of rape and two specifications of indecent assault. Colonel J had two young daughters, ages fifteen and seven. Upon further questioning Col J admitted he could follow the military judge's instructions and consider the full range of punishment despite his earlier statement. He added, "I just wanted to be candid about my own moral convictions with regard to [the crime of rape]."[52]

The court found that "[o]n paper, Col J's reference to his young daughters might suggest an emotive content to his answers that may have been less apparent in person,"[53] but went on to balance other factors such as his reference to his moral conviction concerning the crime of rape.[54] Thus, Col J's answers, taken together, would create a perception of someone who might be seen as having an inelastic attitude during sentencing.[55] However, it was his statement regarding his "moral conviction" about the charge of rape, when viewed in the context of his family situation, that gave rise to a disqualifying relationship between the panel member and the offenses charge—a relationship based upon an emotional involvement, or as the court states, reveals an "emotive content."[56]

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[49] Smith v. Phillips, 455 U.S. 209, 222 (1982) (O'Connor, J., concurring) (setting out situations under which implied bias would exist including: (1) when the juror is an employee of the prosecuting agency, (2) when the juror was a close relative to a trial participant or involved in the charged offenses, or (3) when the juror was a witness in the trial).

[50] 64 M.J. 274 (2007).

[51] *Id.* at 275.

[52] *Id.* at 276.

[53] *Id.* at 278.

[54] *Id.*

[55] *Id.* ("His answers, taken together, create the perception that if Col J, the senior member of the panel, were convinced of Appellant's guilt he would favor the harshest sentence available, without regard to the other evidence.").

[56] *Id.*

In *United States v. Miles*,[57] the court found that the military judge abused his discretion when he failed to grant the defense's challenge to a panel member whose "personal experience with the effects of drug abuse" gave rise to implied bias.[58] The panel member's emotional experience arising from the death of his ten-year-old nephew, as a result of the mother's prenatal use of cocaine, raised some "serious doubts in the minds of a reasonable observer about the fairness of [a] trial" involving the wrongful use of cocaine.[59] The court found that when a "particularly traumatic similar crime was involved . . . denial of a challenge for cause violated the liberal-grant mandate."[60]

Either the Panel Member or a Close Relation was a Victim of a Crime Similar to the Crime Charged

In *United States v. Terry*, a case involving rape, the court found that the military judge abused his discretion in denying a challenge against a panel member whose former girlfriend, whom he intended to marry, was the victim of a rape six years prior.[61] Finding that the challenged panel member's "pronounced and distinct" relationship with his former girlfriend, who became pregnant as a result of the rape and who named the child after the panel member, created, through the eyes of an objective observer, doubts about the fairness of the accused's trial.[62]

While *Terry* is an appropriate example of the implied bias that may arise from a panel member's close relationship with a victim of a crime similar to that charged, it is also an example of the court's ad hoc subjective analysis that can lead to different conclusions based upon the court's point of view. In *Terry*, the military judge's denial of defense's challenge against two panel members was, inter alia, the basis for appeal. Major (Maj) H's wife was raped by her stepfather when she was a teenager, and Captain (Capt) A had two previous girlfriends who were the victims of rape and, as indicated above, at one point he had intended to marry the second girlfriend. In Maj H's case the court found that the military judge did not abuse his discretion by denying the defense's challenge, under an implied bias analysis, because: (1) of the amount of time that transpired between the rape and the court-martial (ten to twelve years); (2) the event was never reported to authorities and the wife never received counseling; (3) there appeared to be some sort of acceptance within the family over the event; (4) Maj H spoke only infrequently about the incident with his wife and had not mentioned the incident during the last five years; and (5) Maj H's reluctance to speak about the issue during voir dire was due, in the court's opinion, to his desire to protect his wife's reputation rather than as a source of personal distress.[63]

Captain A's circumstances, from the court's view, presented two different and distinct scenarios. The crime against one of his former girlfriends offered no implied bias concerns because the rape occurred prior to their dating relationship and because Capt A described her as "more of an acquaintance." The second girlfriend who had been raped and with whom Capt A had a closer relationship and had intended to wed, presented a different matter. Although the rape had happened more than seven years prior to trial, Capt A had not spoken with the woman for over six years, and Capt A had since married another woman, the court still surmised that "it is likely that given the strength of his relationship with the victim he may well have maintained this resentment [that his close friend had been hurt]."[64]

Both Maj H and Capt A stated under oath that they were able to put these matters aside and judge the case solely on the evidence presented, thus justifying the military judge's finding of no actual bias.[65] However, as stated previously, such disclaimers do not provide sufficient grounds to dispel an implied bias.[66] Thus, the court applied its own implied bias analysis to each panel member. The court found that the circumstances surrounding Maj H's exposure to a crime similar to that facing the accused did not objectively jeopardize the perception of fairness or impartiality of the accused's court-

[57] 58 M.J. 192 (2003).

[58] *Id*. at 195.

[59] *Id*.

[60] *Id*.

[61] 64 M.J. 295 (2007).

[62] *Id*. at 297.

[63] *Id*. at 304.

[64] *Id*. at 304–05.

[65] *Id.* at 303–04.

[66] United States v. Strand, 59 M.J. 455, 460 (2004).

martial.[67] The circumstances surrounding Capt A's exposure and close relationship to a rape victim, however, raised the specter of implied bias and should have been subject to the court's liberal grant mandate. Absent the military judge's "clear signal" that she applied the "right law," that is the implied bias analysis and liberal grant mandate, the court found that the military judge abused her discretion by not granting the challenge for cause against Capt A.[68]

Terry leaves one with the sense of uncertainty. While the court distinguished the circumstances between Maj H and Capt A to justify its decision, an objective observer would be hard pressed to rationalize such neat distinctions. Is it not more likely that Maj H would harbor a greater sense of resentment and his presence as a panel member would be more likely to jeopardize the perception of fairness and impartiality because of his current family situation, than would Capt A because of circumstances in his distant past? The answer begs the question. Despite assertions to the contrary, the court will invoke a de novo review, when the military judge does not articulate the implied bias analysis and apply the liberal grant mandate on the record. Whether the court would have looked differently at the facts of the case had the military judge applied the *Clay* factors, is speculative. What is not speculative is the long line of cases declaring that "[m]ilitary judges are presumed to know and follow the law absent clear evidence to the contrary."[69] Yet, despite this presumption, in *Terry* the court was quick to note that there was no "clear signal" on the record that the military judge applied the "right law."[70] Thus, when confronted with a challenge for cause to a panel member, unless there is specific evidence to the contrary, the military judge is presumed not to know or follow the law regarding implied bias.

Panel Member's Close Relationship to One of the Parties or Witnesses to the Litigation or an Associational Link Between the Panel Member and One of the Parties to the Litigation

In *United States v. Armstrong*, the challenged panel member, Lieutenant Commander (LCDR) T, disclosed that he worked in the same office with the lead investigator in the accused's case.[71] The agent involved was not only a witness but also a member of the prosecution team who was present at the counsel table during the trial.[72] Further, LCDR T attended daily meetings during which the accused's case was discussed and, at times, disparaging comments were made about the accused.[73] Lieutenant Commander T was also "involved in the law enforcement mission of the Coast Guard," being a member of the intelligence community.[74] Despite his assurances of impartiality and the military judge's finding that LCDR T's disclaimer of bias was credible, the Coast Guard Court of Criminal Appeals reversed, holding that it was unable to ascertain whether or not the military judge considered implied bias in her decision to deny the defense's challenge for cause.[75] The court found that the associational link between the panel member and the investigative agent created a perception of "unfairness and prejudice" not assuaged by the claims of impartiality.[76]

In *United States v. Harris*,[77] a case involving larceny, the court found implied bias stemming, in part, from the panel member's association with two of the victims who worked with the panel member and had previously discussed the thefts with him.[78] This professional relationship with the victims[79] and the position he held as the chairman of the resources

[67] *Terry*, 64 M.J. at 304 ("There are a number of factor in Maj H's situation that tend to ameliorate his exposure to the crime, dispelling the appearance of implied bias.").

[68] *Id.* at 305.

[69] United States v. Erickson, 65 M.J. 221, 225 (2007).

[70] *Terry*, 64 M.J. at 305.

[71] 54 M.J. 51, 52 (2000)

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.* at 53.

[76] *Id.*

[77] 13 M.J. 288 (C.M.A. 1982) (finding the military judge's decision denying the challenge to be erroneous as a matter of law under implied bias grounds but affirmed the conviction, finding no prejudice to the accused).

[78] The court found that the information conveyed to the member was "little more than what was conveyed to the other members by the allegations in the specifications." *Id*. at 289 n.2.

protection committee responsible for base anti-theft measures were sufficient to raise "'an appearance of evil' in the eye of disinterested observers."[80]

In *United States v. Leonard*, a case involving rape, the court found implied bias on the part of a panel member who relied on the victim of the rape to service his flight helmet and pack his parachute.[81] This "significant relationship of trust" gave rise to a perception of unfairness when the linchpin of the government's case relied upon the credibility of the victim.[82] Notably, a second panel member, Lieutenant Colonel (LTC) D, who was subject to the defense's unsuccessful challenge for cause, had a daughter who was the victim of rape. However, the defense had failed to preserve its challenge against LTC D thus the court did not rule on the merits of that challenge.[83]

In *United States v Minyard*,[84] the challenged panel member was the wife of the law enforcement agent responsible for investigating the accused's crimes.[85] Although the agent never discussed the case with his wife, the wife admitted that she had overheard portions of a phone conversation during which her husband stated "more money?"[86] When she later asked him about the conversation he merely stated it was related to a case he was working and the suspect "took more money."[87] Upon the defense counsel's challenge, the trial counsel indicated that the agent would not be called as a witness and did not anticipate the agent being referred to during the course of the trial.[88] Denying the challenge, the military judge found the panel member sincere in her statements that she knew nothing about the case and had not formed an opinion as to the accused's guilt.[89] Upon review, the court found the judge abused his discretion in not granting the defense's challenge on the grounds of implied bias.[90] Specifically, the court stated, the panel members "participation in a case investigated by her husband does not pass the test of public confidence contemplated by RCM 912(f)(1)(N)."[91]

Panel Member Misleads or Conceals Important Facts from the Court

Misleading statements to the military judge or omissions of certain matters during voir dire do not necessarily lead to an implied bias challenge.[92] Often it is not because the panel member omitted or misstated a detail or some relevany information that gives rise to a challenge; rather, it is the implication of the omitted or misstated fact itself that gives rise to implied bias concerns.[93]

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[79] *Id*. at 291; *id*. at 293 (Cook, J., concurring) ("By far the most significant of the allegedly disqualifying factors cited was [the member's] professional relationship with two of the seven theft victims.").

[80] *Id*. at 292. The other basis upon which appellant relied in his implied bias challenge was the fact that the challenged member wrote or endorsed the officer efficiency reports of three of the other members of the panel.

[81] 63 M.J. 398 (2006).

[82] *Id*. at 403.

[83] MCM, *supra* note 2, R.C.M. 912(f)(4), in order to preserve the challenge for cause, a counsel must exercise his preemptory against any member, "provided that when the member who was unsuccessfully challenged for cause is peremptorily challenged by the same party, that party must state that it would have exercised its peremptory challenge against another member if the challenge for cause had been granted." In this case the defense waived review of the challenge related to LTC D by exercising its peremptory challenge against LTC D, but failed to state that he would have used the peremptory challenge against another member if the challenge for cause against LTC D had been granted.

[84] 46 M.J. 229 (1997).

[85] *Id*. at 230.

[86] *Id*.

[87] *Id*.

[88] *Id*.

[89] *Id*. at 230–31.

[90] *Id*. at 231–32.

[91] *Id*. at 231.

[92] *See* Gutierrez v. Dretke, 392 F.Supp.2d 802 (D.C.W.D. Tex. 2005) (finding that bias cannot be presumed because of juror's failure to disclose a prior felony during voir dire). The issue of omissions or misstatements by the member leads to the question of whether the member's misconduct jeopardized the accused's right to a fair and impartial trial. *See* United States v. Mack, 41 M.J. 51, 54 (C.M.A. 1994) (citing McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 556 (1984)) (requiring a new trial when the omission or misstatement was related to a material question and when the honest answer would have given rise to valid basis for challenge for cause).

[93] United States v. Albaaj, 65 M.J. 167 (2007).

For example in *United States v. Albaaj*, the panel member, who was not challenged, did not disclose that he knew and had harbored ill-feelings toward the accused's brother, a defense witness.[94] Despite being asked by the military judge to disclose any grounds that may impact a panel member's impartiality, and being specifically asked if any of the panel members knew a person named "Emad," the name of the accused's brother, the panel member gave negative answers.[95] Further, when Emad was called to testify, the panel member did not inform the judge of his acquaintance with the witness.[96] As later discovered, the panel member previously worked with Emad and had sent various e-mails which were critical of Emad's work and questioned his honesty.[97]

During a post-trial *DuBay* hearing,[98] ordered by the Court of Criminal Appeals on the issue of panel member misconduct, the *DuBay* judge found that the panel member did not fail to honestly answer the questions during voir dire and his later failure to disclose his knowledge was not done in bad faith.[99] The CAAF was skeptical of these findings. In setting aside the findings and sentence, the court relied on implied bias grounds that would have formed the basis of a challenge had the defense been aware of the association between the panel member and the witness.[100] It was not, however, the fact that the panel member failed to disclose his relationship with Emad; rather, it was that he had a relationship with a defense witness and had formed an opinion about the credibility of that witness that led to a finding of implied bias.[101]

Unlike *Albaaj*, the implied bias under this subcategory is one that exists because the panel member misstates or omits facts in order to sit on that particular court-martial and render judgment. As such, the misstatement or omission itself is the underlying basis for the finding of implied bias. For example, in *Dyer v. Calderon*,[102] a murder case, a juror stated "no" when asked whether anyone close to the juror had ever been a victim of a crime or had a close relative or friend accused of a crime.[103] As discovered after findings, the juror's brother had been the victim of murder, her estranged husband was then in jail, and numerous relatives had been accused of various criminal activities.[104] She also lied when she claimed that she was never the victim of a crime.[105] When confronted with the obvious inconsistency concerning her brother's death, the juror explained that she thought her brother's death was an accident.[106] A review of the court records, however, disclosed that the juror's brother had been pistol-whipped and then shot in the back of the head, hardly the circumstances of an accident.[107] The Ninth Circuit found, based upon the juror's repeated lies, implied bias drawing the inference that her lies were designed to secure a seat on the jury and allow her to pass judgment on the sentence.[108] It is the pervasiveness of the omissions or misstatements that leads one to objectively question the juror's motivation for concealing matters that would otherwise disqualify him:

> The individual who lies in order to improve his chances of serving has too much of a stake in the matter to be considered indifferent. Whether the desire to serve is motivated by an overactive sense of civic duty, by

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[94] *Id*. at 168.

[95] *Id*.

[96] *Id*. at 169.

[97] *Id*.

[98] United States v. DuBay, 37 C.M.R. 147 (C.M.A. 1967); United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993) ("The purpose of such a 'DuBay hearing' is to enable a military judge at the trial level to make the findings of fact and conclusion of law on collateral matters when the record is incomplete or 'resort to affidavits [is] unsatisfactory.'").

[99] *Albaaj*, 65 M.J at 169.

[100] *Id*. at 171.

[101] *Id*.

[102] Dyer v. Calderon, 151 F.3d 970 (9th Cir. 1998).

[103] *Id*. at 972.

[104] *Id*. at 972–73, 980–81.

[105] *Id*. at 980.

[106] *Id*. at 972.

[107] *Id*. at 973.

[108] *Id*. at 982.

> a desire to avenge past wrongs, . . . or by some other unknown motive, this excess of zeal introduces the kind of unpredictable factor into the jury room that the doctrine of implied bias is meant to keep out.[109]

Panel Member Undergoes Extensive Questioning in Order to Rehabilitate the Panel Member during Voir Dire

In *United States v. Townsend*,[110] the court recognized that

> [i]t might be possible that a particular member of a court-martial would require rehabilitation to such an extent that the rehabilitation itself would give rise to reasonable questions about the fairness of the proceeding . . . . The need to engage in extensive rehabilitation . . . may present the very type of "close" situation that supports application of the liberal grant mandate.[111]

While there is no military precedent dealing directly with this particular category, there certainly comes a point during voir dire when objectively one would question whether the public's perception of fairness and impartiality is jeopardized by allowing a panel member, who was subject to extensive rehabilitation by the trial counsel or military judge, to serve on the panel. It is likely, however, that this category does not stand alone; rather, the need to engage in extensive rehabilitation will arise because the member's circumstances fall into one or more of the other categories of implied bias.

Panel Member Has an Extensive Level of Pretrial Knowledge or Involvement with the Case

United States v. Moreno[112] represents the type of extensive pretrial knowledge and involvement that will give rise to an implied bias concern. The accused, who worked in the disbursing office of the base comptroller, was charged with rape.[113] The challenged panel member, Lieutenant Colonel (LtCol) F, was the deputy comptroller and, upon being advised that a rape had occurred, decided to personally investigate the matter in order to brief the comptroller.[114] To gather the facts, LtCol F reviewed certain logbooks with entries related to the rape, spoke with some of the duty officers who had knowledge of the incident, and read various articles in the newspaper.[115] It also appears that LtCol F made specific recommendations when he briefed the comptroller about the case.[116] Lieutenant Colonel F's interest in the case continued as he gathered facts about the accused's case and also tracked the case of Moreno's co-accused through newspaper accounts.[117] The court described LtCol F's involvement as "an active interest," stressing that his personal investigation of the facts in order to brief the comptroller and his continued interest in both Moreno and his co-accused's cases led one to conclude that he had "an excessive level of pretrial knowledge about the incident," which jeopardized the perception of fairness and impartiality.[118]

United States v. Napoleon, offers an example at the other end of the spectrum.[119] In *Napoleon*, the challenged panel member had heard about the accused's case through a staff briefing and through newspaper accounts.[120] From these he learned a limited number of details including that the crime had occurred at the Noncommissioned Officer's Club, the victim worked in the commissary, and the event involved a stabbing.[121] Describing the panel member's pretrial knowledge as

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[109] *Id*.

[110] 65 M.J. 460 (2008).

[111] *Id*.

[112] 63 M.J. 129 (2006).

[113] *Id*. at 132.

[114] *Id*. at 132–33.

[115] *Id*. at 133.

[116] *Id*. at 134–35.

[117] *Id*. at 134.

[118] *Id*.

[119] 46 M.J. 279 (1997).

[120] *Id*. at 282.

[121] *Id*.

"limited and general,"[122] the court found that the military judge did not abuse his discretion by denying the challenge, even under an implied bias analysis.[123]

Aspects of Command Influence

In *United States v. Youngblood*,[124] the challenged panel members attended a staff meeting during which the wing commander and his staff judge advocate (SJA) discussed military standards, command responsibility, and discipline. During the meeting examples of offenses and the punishments awarded were discussed, including a case involving child abuse where, in the opinion of the SJA, the commander in question "underreacted," "had shirked his or her leadership responsibilities," and should have been disciplined for his handling of the case.[125] Following the SJA's remarks, the wing commander added that he had forwarded "a letter to that commander's new duty location expressing the opinion that 'that officer had peaked.'"[126]

Of the three panel members who attended the staff meeting, one was excused based upon the defense's challenge and the other two remained despite the challenge.[127] Focusing on the perceived message conveyed during the staff meeting, rather than the actual remarks, the court found that the "subtle pressure exerted by the members' perceptions of what they heard" raised the specter of implied bias.[128] In failing to grant the defense's challenge to the other two panel members, the military judge failed to "appreciate that the same sword of Damocles was hanging over the heads [of the other two panel members]."[129] Thus, it was "asking too much" of the panel members' to render an impartial judgment against the possible career consequences alluded to by the wing commander.[130]

In *United States v. Wiesen*,[131] the court found the military judge abused his discretion when he failed to grant the defense challenge to a panel member who was the supervisor and performance evaluation rater for six of the other panel members.[132] Despite assurances from each of the six panel members that they would not be influenced by the senior rater, and the fact that a superior-subordinate relationship is not a per se disqualification, the court still found the numbers in the case placed "an intolerable strain on public perception of the military justice system."[133] The holding relies on the courts finding that "in this case the President of the panel and his subordinates comprised the two-thirds majority sufficient to convict, a factual scenario outside the margin of tolerance reflected in our case law."[134] This "margin" of disqualifying implied bias exists somewhere between three panel members[135] who share a performance rating relationship and six panel members, as in this case.

Conclusion

These categories are an attempt to infuse some order into the implied bias analysis and do not necessarily dictate a finding of reversible error if a case falls within one of the categories. These are not *per se* implied bias disqualifiers, but

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[122] *Id*. at 283.

[123] Implied bias was also raised because the member knew one of the law enforcement agents involved in the case who was called as a prosecution witness. *Id*. at 282.

[124] 47 M.J. 338 (1997).

[125] *Id*. at 340.

[126] *Id*.

[127] *Id*. at 341.

[128] *Id*. at 342.

[129] *Id*.

[130] *Id*.

[131] 56 M.J. 172 (2001).

[132] *Id*. at 173–74, 177.

[133] *Id*. at 175.

[134] *Id*.

[135] *See* United States v. Murphy, 26 M.J. 454 (C.M.A. 1988), and United States v. Harris, 13 M.J. 288 (C.M.A. 1982) (implying that two, as in *Murphy*, and possibly three, as in *Harris*, members of the panel having a senior-subordinate, performance rating relationship may not raise implied bias concerns).

factual scenarios that make a case "close," as was the concern in *Clay*.[136] The burden still rests upon the challenging party to make the appropriate record and develop facts that convince the military judge, and later an appellate court, that a substantial doubt as to the fairness, integrity, or impartiality of the proceeding exists when viewed objectively through the eyes of the public. Admittedly, in the end it is still a matter of subjective evaluation by both the trial and appellate judges. However, the categories suggest some structure to the implied bias analysis rather than the "we'll know it when we see it" approach.

In making a challenge for cause the defense should specifically state that the challenge is based upon the implied bias grounds under RCM 912(f)(1)(N); rather than allowing the appellate court to divine his intentions. The defense counsel should use the categories presented as a basis upon which to develop the factual predicate for a finding of implied bias. Identifying specific categories of implied bias, placing the burden on the challenging party to develop the facts during voir dire, and tying a particular panel member's circumstances to the question of whether the public would view those facts adversely to the fairness and impartiality of the court-martial, would remove the ad hoc analysis currently employed by the appellate courts. It would also sharpen the military judge's focus to the central issue: "was [she] satisfied that an objective public observer would find [the panel member's involvement] consonant with a fair and impartial system of military justice?"[137]

In the case of *United States v. Bragg*,[138] an implied bias case currently before the CAAF, the Government, during oral argument, asked the court to adopt these categories. It remains to be seen whether the court will do so and bring some structure into the implied bias arena.

[136] These categories serve to assist both the military judge and counsel in applying an implied bias standard. It may also solve the appellate court's struggle "to define the scope of implied bias," and resolve "what that scope should be." *Wiesen*, 56 M.J. at 175.

[137] United States v. Terry, 64 M.J. 295, 303 (2007) (quoting United States v. Downing, 56 M.J. 419, 422 (2002)).

[138] 2007 CCA LEXIS 44 (N-M.C. Ct. Crim. App. Feb. 21, 2007), *review granted*, No. 07-0382/MC, 2007 CAAF LEXIS 1526 (Nov. 16, 2007).