# More Than Just Implied Bias . . . : The Year in Pleas and Pretrial Agreements, Article 32, and Voir Dire and Challenges

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## Introduction

The 2007 term for the United States Court of Appeals for the Armed Forces (CAAF) and the service courts of criminal appeals yielded a bumper crop of cases in the area of pretrial procedures. As has been a recent trend, the courts continued to handle a steady volume of cases addressing all aspects of the guilty plea.[1] The CAAF decided two very significant cases this term involving guilty plea procedure—*United States v. Tippit*[2] and *United States v. Tate*.[3] In *Tippit*, the CAAF held that an Article 10, Uniform Code of Military Justice (UCMJ),[4] violation not litigated at the trial level is waived for appellate review, answering a question left open since the 2005 *Mizgala* case.[5] In *Tate*, the CAAF held that the accused may not waive consideration for clemency or parole as a pretrial agreement term.[6] Additionally, in *United States v. Shaw*, the CAAF clarified the quantum of evidence required for the accused to raise a lack of mental responsibility defense in the context of a guilty plea.[7] Aside from guilty pleas, the courts also reviewed a significant number of cases addressing the impartiality of the military judge.[8]

While these cases have continued to develop the law of military pretrial procedure, the focus of this article is on three areas of the pretrial procedure where the military courts offered specific and instructive guidance for military judges and trial practitioners during this term. First, the CAAF and the Army Court of Criminal Appeals (ACCA) each published an opinion addressing the improper use of the guilty plea inquiry during the contested portion of a mixed plea case.[9] The first section of this article discusses these two cases and the lessons these opinions offer for trial practitioners. Next, the CAAF provided critical guidance regarding procedural errors in Article 32 hearings.[10] The second section of this article discusses *United States v. Davis*, which clarifies, to some extent, the law involving the resolution of procedural errors in the Article 32 investigation at the trial level, and how appellate courts will review such issues.[11] Finally, using the implied bias theory, the CAAF overturned three cases for error in denying challenges for cause.[12] The third section of this article briefs the facts of those cases, describes CAAF's decision based on the facts, and outlines the lessons that these three cases offer to trial practitioners.

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[1] *See, e.g.*, United States v. Carr, 65 M.J. 39 (2007) (holding that the accused provided sufficient factual basis to affirm his guilty pleas); United States v. Pena, 64 M.J. 259 (2007) (holding that a plea is knowing and voluntary even if the military judge does not discuss terms of "mandatory supervised release" during the guilty plea inquiry); United States v. Caudill, 65 M.J. 756 (N-M. Ct. Crim. App. 2007) (addressing a situation where the military judge failed to advise the accused of the elements and definitions of the offenses in a guilty plea).

[2] 65 M.J. 69 (2007).

[3] 64 M.J. 269 (2007).

[4] UCMJ art. 10 (2008).

[5] *Tippit*, 65 M.J. at 69; *see also* United States v. Mizgala, 61 M.J. 122, 127 (2005) (holding that a litigated Article 10 motion is not waived by an unconditional guilty plea, but leaving open the issue of whether an Article 10 motion *that is not raised* at the trial level is waived). In the interim, the Navy-Marine Corps Court of Criminal Appeals answered the question in a manner consonant with *Tippit*. *See* United States v. Dubouchet, 63 M.J. 586 (N-M. Ct. Crim. App. 2006).

[6] *Tate*, 64 M.J. at 269 (holding that a term prohibiting the accused from requesting clemency or parole for a period of twenty years violated R.C.M. 705(c)); *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 705(c) (2008) [hereinafter MCM].

[7] *See* United States v. Shaw, 64 M.J. 460 (2007) (holding that, on the facts of the case, the accused's reference to his head injury and bi-polar disorder "at most raised only the mere possibility of a conflict with the plea.").

[8] *See* United States v. Foster, 64 M.J. 331 (2007); United States v. Green, 64 M.J. 289 (2007). There were also numerous unpublished cases this term on this issue. *See* CRIMINAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, 31ST CRIMINAL LAW NEW DEVELOPMENTS COURSE DESKBOOK H-32–34 (5–8 Nov. 2007).

[9] *See* United States v. Resch, 65 M.J. 233 (2007); United States v. Davis, 65 M.J. 766 (Army Ct. Crim. App. 2007).

[10] UCMJ art. 32 (2008).

[11] *See Davis II*, 64 M.J. 445 (2007).

[12] *See* United States v. Clay, 64 M.J. 274 (2007); United States v. Briggs, 64 M.J. 285 (2007); United States v. Terry, 64 M.J. 295 (2007).

The 2007 term of court addressed a number of issues in the area of pretrial procedures. However, in the three areas that this article covers, the courts identified significant problems in the resolution of certain issues at the trial level. As such, the courts seemed to make a deliberate effort to outline the correct methodology for handling the use of the providence inquiry during the contested portion of the trial, the motion alleging error in the Article 32 procedure, and the challenge for cause.

### Using the Providence Inquiry During Trial

If an accused elects to plead guilty to any offense, the military judge will conduct an inquiry to ensure that the accused has entered his plea providently.[13] The accused is placed under oath and must recite sufficient facts to convince the military judge that he is indeed guilty of the offense to which he has pled guilty.[14] Prior to conducting the inquiry, the military judge must advise the accused that he gives up certain rights by pleading guilty.[15] One of the rights that the accused sacrifices is the right against self-incrimination, but only with respect to the offense to which he has pled guilty.[16]

In cases where the accused has entered into a pretrial agreement with the Convening Authority, there is usually a stipulation of fact that is admitted as a prosecution exhibit during the providence inquiry.[17] The stipulation of fact, at a minimum, should outline the factual circumstances of the offense in sufficient detail to demonstrate that there is a factual basis for the plea. The extent to which a stipulation of fact may be used during the guilty plea inquiry, the contested portion of the trial, and the sentencing proceeding is subject to negotiation between the accused and the convening authority.[18] The actual use of the stipulation of fact may vary from jurisdiction to jurisdiction, and even from case to case.

Generally, admissions the accused makes during the guilty plea inquiry and as a part of the stipulation of fact are used in two ways. First, the military judge uses the admissions to ensure that there is a factual basis for the plea.[19] Second, these admissions are admissible during the sentencing portion of the case.[20] In addition to these two uses, the military judge also instructs the accused that if he says anything that is untrue during the inquiry, those statements may be used against him for charges of perjury or making false statements.[21]

In some circumstances, the accused's guilty pleas may be used during the contested portion of the trial.[22] If the accused pleads guilty to a lesser included offense, and the government elects to try to prove the greater offense, the elements of the greater offense that are common to the lesser-included offense are established by the guilty plea to the lesser included offense.[23] In this situation, the common elements are established by the guilty pleas, but the accused's admissions during the providence inquiry are not admissible to establish the contested elements of the greater offense.[24] To the extent that there was any question regarding the proper use of pleas, the stipulation of fact, or the guilty plea inquiry to establish contested elements during the merits portion of the trial, the CAAF answered them in *United States v. Resch*.[25]

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[13] UCMJ art. 45; MCM, *supra* note 6; United States v. Care, 40 C.M.R. 247, 253 (C.M.A. 1969).

[14] MCM, *supra* note 6, R.C.M. 910(e); *Care*, 40 C.M.R. at 253; U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 2-2-1 (1 July 2003) [hereinafter BENCHBOOK].

[15] MCM, *supra* note 6, R.C.M. 910(c); *Care*, 40 C.M.R. at 253.

[16] MCM, *supra* note 6, R.C.M. 910(c); BENCHBOOK, *supra* note 14, para. 2-2-1.

[17] MCM, *supra* note 6, R.C.M. 705(c)(2)(A); BENCHBOOK, *supra* note 14, para. 2-2-2.

[18] *See* MCM, *supra* note 6, R.C.M. 705(c)(2)(A) & R.C.M. 811; *see, e.g.*, United States v. Ramelb, 44 M.J. 625, 626 & n.6 (Army Ct. Crim. App. 1996).

[19] MCM, *supra* note 6, R.C.M. 910(e); BENCHBOOK, *supra* note 14, para. 2-2-1; *Care*, 40 C.M.R. at 253.

[20] United States v. Irwin, 42 M.J. 479, 481–82 (1995); United States v. Holt, 27 M.J. 57, 59 (1988); BENCHBOOK, *supra* note 14, para. 2-2-1.

[21] MCM, *supra* note 6, R.C.M. 910(c)(5); BENCHBOOK, *supra* note 14, para. 2-2-1.

[22] This would occur in a so-called "mixed plea" case where the accused has pled guilty to some offenses and not guilty, guilty by exceptions, guilty by exceptions and substitutions, or guilty of a lesser included offense to other offenses, requiring a contested portion of the trial.

[23] *See* MCM, *supra* note 6, R.C.M. 913(a) discussion, 920(e)(1); BENCHBOOK, *supra* note 14, para. 2-2-1.

[24] United States v. Grijalva, 55 M.J. 223, 228 (2001); United States v. Caszatt, 29 C.M.R. 521, 523 (C.M.A. 1960); United States v. Ramelb, 44, M.J. 625, 629 (Army Ct. Crim. App. 1996).

[25] 65 M.J. 233 (2007).

**Using the Providence Inquiry to Establish or Refute Contested Elements**

United States v. Resch

In order to understand the court's resolution of *United States v. Resch*,[26] a rendition of the facts is essential. The accused in this case was an Army private, who was charged with, *inter alia*, desertion in violation of Article 85, UCMJ,[27] beginning in April 2002 and ending in March 2003.[28] He pled guilty to the lesser included offense of unauthorized absence in violation of Article 86, UCMJ,[29] for a shorter period of time—April 2002 until January 2003.[30]

As a part of his offer to plead guilty, the accused entered into a stipulation of fact that had two apparently conflicting paragraphs. The first paragraph of the stipulation stated that the facts in the stipulation "may be considered by the Military Judge in determining the providence of the accused's plea of guilty, and they may be considered by the sentencing authority . . . even if the evidence of such facts is deemed otherwise inadmissible."[31] The fourth paragraph, however, contained additional language regarding the use of the stipulation. That paragraph stated, "[T]he following evidence is admissible at trial, may be considered by the military judge in determining the providence of the accused's plea of guilty, and may be considered by the sentencing authority . . . ."[32] The paragraph then listed several prosecution exhibits, including the stipulation of fact itself.[33] The stipulation of fact was a central piece of evidence in the case because it described the date that the accused returned to his unit, the circumstances of two incidents where the accused had been arrested in Michigan during his absence, and the statements the accused made to a civilian detective, including that "he had fled the Army and that he had been working construction during the time of his absence."[34]

During the guilty plea inquiry, the military judge read the accused several instructions. First, as required by Rule for Courts-Martial (RCM) 910(c)(3), the military judge instructed the accused that by pleading guilty, he was giving up the right against self-incrimination, but only for the offense to which he pled guilty.[35] The military judge expressly stated that he retained the privilege against self-incrimination for the greater offense of desertion.[36] Additionally, in conducting the required inquiry into the stipulation of fact, the military judge apparently gave the accused the instruction contained in Paragraph 2-2-2 of the *Military Judge's Benchbook* (*Benchbook*), which basically informed the accused that the stipulation of fact would be used to determine whether he was guilty of the offenses to which he had pled guilty and would be used to determine an appropriate sentence.[37] However, in what the court's opinion describes as "possibly . . . an oversight," the military judge did not explain that the language in the first paragraph differed from that in the fourth paragraph regarding the use of the stipulation of fact and did not resolve the ambiguity on the record.[38]

During the providence inquiry, the accused provided sufficient facts to sustain his guilty plea to the unauthorized absence from April 2002 until January 2003.[39] In doing so, the accused provided several key facts that the trial counsel believed showed an intent to remain away permanently. The accused obtained a civilian job, lived with his girlfriend, and believed that, after his release from civilian confinement for an unrelated offense, "he had no more obligations to the Army."[40] After the military judge accepted the accused's plea, the trial counsel indicated that she intended to prove up the desertion offense

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[26] 65 M.J. at 233.

[27] UCMJ art. 85 (2008).

[28] *Resch*, 65 M.J. at 235.

[29] UCMJ art. 86 (Absence without leave).

[30] *Resch*, 65 M.J. at 235.

[31] *Id.*

[32] *Id.*

[33] *Id.* at 235–36.

[34] *Id.* at 235.

[35] *Id.* at 237; MCM, *supra* note 6, R.C.M. 910(c)(3); BENCHBOOK, *supra* note 14, para. 2-2-1.

[36] *Resch*, 65 M.J. at 237; MCM, *supra* note 6, R.C.M. 910(c)(3); BENCHBOOK, *supra* note 14, para. 2-2-1.

[37] *Resch*, 65 M.J. at 236; BENCHBOOK, *supra* note 14, para. 2-2-2; *see also* MCM, *supra* note 6, R.C.M. 811.

[38] *Resch*, 65 M.J. at 236.

[39] *Id.* at 235–36.

[40] *Id.* at 236.

terminating in March, as the offense was initially charged.[41] In an effort to prove the contested elements (the full time period and that, during his absence, the accused formed the intent to remain away permanently), the trial counsel called only one witness.[42] The accused's company commander testified that he saw the accused in formation for the first time on 17 March 2003, the alleged termination date of the desertion.[43] The defense rested without calling any witnesses or producing any documentary evidence.[44]

Prior to the closing arguments, the trial counsel sought to clarify a point with the military judge. The trial counsel wanted to ensure that nothing that the accused said in the providence inquiry could be considered by the military judge on the merits as a defense to the desertion offense.[45] In response, the defense counsel stated that his understanding was that the accused's statements in the providence inquiry *could* be used to prove the elements of the greater offense and therefore, the defense could argue anything exculpatory that was contained in the providence inquiry.[46] The military judge then ruled that he could consider the stipulation of fact as well as "everything [he had] heard up to now in determining the guilt or innocence of [the accused] on the greater offense."[47] Based on the military judge's ruling, both counsel argued facts contained in the stipulation of fact and the guilty plea inquiry during their closing arguments on the desertion offense.[48] After the arguments, the military judge convicted the accused of desertion terminating on 17 March 2003, and later sentenced him to confinement for 150 days and a bad-conduct discharge.[49] The ACCA affirmed.[50]

On appeal, the CAAF held that the military judge improperly considered the providence inquiry and the stipulation of fact for the guilty plea to the lesser unauthorized absence offense terminating in January 2003 in deciding guilt of the desertion offense terminating in March 2003.[51] In reaching this conclusion, the CAAF focused on the instructions that the military judge gave the accused. Under Article 45, UCMJ, and *Care*, in a guilty plea, the military judge must "address the accused personally and explain the rights he is giving up, and . . . obtain the accused's express waiver of these rights."[52] In describing the accused's rights, in accordance with RCM 910(c), the military judge explained to the accused that "his guilty plea waived his right against self-incrimination . . . . [But only] as to the offenses [he] pled guilty to."[53] The military judge's conclusion that he could use the accused's statements during the guilty plea inquiry in deciding the contested offense was in error because it was inconsistent with the advice he gave the accused and as a result, this use was beyond the accused's express waiver of his privilege against self-incrimination.[54]

Similarly, the military judge's advice to the accused regarding the stipulation of fact was that the stipulation would be "used for the limited purposes of determining the providence of [the accused's] guilty pleas and for determining the sentence."[55] The fourth paragraph of the stipulation, however, suggested that the stipulation and certain other prosecution exhibits could also be used on the merits of the contested case[56] This language was inconsistent with the advice that the military judge gave the accused, as well as the first paragraph of the stipulation.[57] Based on the military judge's failure to

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[41] *Id.* Although the opinion refers to the trial counsel as "he," it is the understanding of the author that the trial counsel at this court-martial was female. Interview with Major Scott Dunn, Student, 56th Judge Advocate Officer Graduate Course, in Charlottesville, Va. (Nov. 28, 2007).

[42] *Resch*, 65 M.J. at 236; *see also* MCM, *supra* note 6, pt. IV, ¶ 9b(1)(c) ("That the accused, at the time the absence began or at some point during the absence, intended to remain away from his or her unit, organization, or place of duty, permanently . . . .").

[43] *Resch*, 65 M.J. at 236.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.* at 234.

[51] *Id.* at 237.

[52] *Id.*; *see also* UCMJ art. 45 (2008); United States v. Care, 40 C.M.R. 247, 253 (C.M.A. 1969).

[53] *Resch*, 65 M.J. at 237; *see also* UCMJ art. 45; *Care*, 40 C.M.R. at 253 (C.M.A. 1969); MCM, *supra* note 6, R.C.M. 910(c).

[54] *Resch*, 65 M.J. at 237.

[55] *Id.*

[56] *Id.*

[57] *Id.*

"clarify the apparent inconsistency" between the first and fourth paragraphs, and his failure to advise the accused that the stipulation could be used on the merits of the desertion offense, the military judge erred in considering the stipulation of fact when deciding the contested offense.[58]

The court then concluded that the military judge's erroneous use of the providence inquiry and stipulation of fact prejudiced the material rights of the accused.[59] The government's sole evidence with respect to the desertion offense was the testimony of the company commander who stated that the first time he saw the accused was in formation on 17 March 2003, implying that this was the first time that the accused returned to military control. The court found that this evidence was insufficient to sustain a finding of guilt on the greater offense of desertion with the later termination date.[60] The court affirmed only a finding of guilty of unauthorized absence terminating on 22 January 2003 (based on the accused's provident guilty plea) and affirmed the sentence.[61]

Judge Stucky's opinion, concurring in part and dissenting in part, raises an interesting issue in this case—the doctrine of "invited error."[62] In an apparent effort to prevent the accused from raising a defense to the contested charge without being subject to cross-examination, the trial counsel sought to keep the providence inquiry out of the merits portion of the case.[63] Had the military judge agreed with the trial counsel, there would not have been any error with respect to the use of the providence inquiry. Instead, the defense counsel insisted that not only could the providence inquiry be used to establish a defense to the desertion charge, but that he intended to use the providence inquiry in this fashion.[64] In the end, the military judge agreed with the conclusion of the defense counsel, and erred as a result. As Judge Stucky observed, the court has frequently invoked the doctrine of invited error to deny relief in circumstances where the defense has "invited or provoked" error on the part of the trial court.[65] Judge Baker did not address this doctrine at all in his majority opinion, perhaps leading to the conclusion that the court is loathe to invoke the doctrine in cases like this one where the error is of a constitutional dimension.[66]

In sum, the root of the court's conclusion with respect to the use of the providence inquiry and the stipulation of fact is the accused's privilege against self-incrimination. As the court stated, "Military law imposes an independent obligation on the military judge to ensure that the accused understands what he gives up because of his plea and the accused's consent to do so must be ascertained."[67] Here, the military judge advised the accused that the statements he made during the guilty plea inquiry and the stipulation of fact would be only used to determine guilt of the offense he pled to and to determine an appropriate sentence. To use the providence inquiry and stipulation for any purpose outside of this advice without additional advice and the express waiver of the accused was error, even if it was the defense's idea.

### The Use of the Providence Inquiry in Deciding Motions under MRE 104

United States v. Davis

Later in the 2007 term, the ACCA further defined the limits of the use of the accused's admissions during a guilty plea inquiry. In *United States v. Davis*,[68] the ACCA explored whether Military Rule of Evidence (MRE) 104 is broad enough to

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[58] *Id.*

[59] *Id.*

[60] *Id.* at 238.

[61] *Id.*

[62] *Id.* at 239 (Stucky, J., concurring in part, dissenting in part). "Invited error" is a legal doctrine providing that "when the court acquiesces in [a] course of conduct urged by [an accused], [the accused] us estopped on appeal from raising as error that conduct or its result." BLACK'S LAW DICTIONARY 827 (6th ed. 1990).

[63] *Resch*, 65 M.J. at 239 (Stucky, J., concurring in part, dissenting in part).

[64] *Id.*

[65] *Id.* at 239–40.

[66] *See generally id.* at 234–38.

[67] *Id.* at 237.

[68] 65 M.J. 766 (Army Ct. Crim. App. 2007).

allow a military judge to consider the guilty plea inquiry in making rulings of admissibility during trial.[69] Once again, the facts of the case are critical to understanding the court's reasoning in the case.

Staff Sergeant Davis pled guilty to indecent acts with his stepdaughter, M.R., on numerous occasions over a two year period between 1998 and 2000.[70] At the time of the trial, M.R. was thirteen-years-old, but she was between seven and nine when the incidents occurred.[71] The accused, however, pled not guilty to an indecent acts charge with another stepdaughter, eleven-year-old L.M, in 2004.[72] During the trial for the charge relating to the acts with L.M., the trial counsel called the other stepdaughter, M.R., to testify to the abuse she suffered at the hands of the accused between 1998 and 2000—the crimes to which the accused had pled guilty.[73] Upon defense objection, the trial counsel stated that the testimony was admissible under MRE 414 to show that that accused had a propensity to commit crimes of sexual molestation against children.[74] In response, the defense counsel objected under MRE 403, arguing that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice.[75] The trial counsel responded that there were numerous similarities between the crimes the accused admitted to committing against M.R. and the crimes the accused was charged with committing against L.M.[76] These similarities included their age at the time of the abuse, the absence of the mother from the home, the location of the abuse, and the time of day that the incidents occurred.[77] Considering these similarities, the trial counsel argued that the probative value of M.R.'s testimony outweighed any prejudicial effect.[78] In ruling on the motion, the military judge expressly relied on the guilty plea inquiry for the offenses regarding M.R., stating:

> Well[,] *taking into account the evidence the court has previously heard with regard to the charged offense to which Staff Sergeant Davis has previously pled guilty*, I do find that there are significant similarities in the charged offense and the offense proffered by the government in this case which they seek to admit under [Mil. R. Evid.] 414 . . . .[79]

Based on this finding, the military judge admitted M.R.'s testimony.[80] During the case in chief, the trial counsel called L.M. herself, the victims' mother, and an emergency room physician who found evidence of a "straddle-type" injury on L.M.'s vaginal area.[81] The accused did not testify and the defense did not present any evidence.[82] The military judge accepted the accused's guilty pleas to the indecent acts with M.R, convicted the accused of the indecent acts with L.M., and sentenced him to be reduced to E-1, to be confined for five years, and to be discharged with a dishonorable discharge.[83]

On appeal, the ACCA held that it was error of a constitutional dimension to use the guilty plea inquiry to decide the admissibility of evidence under MRE 104.[84] As in *Resch*, the court looked at the instructions that the military judge gave the accused prior to the inquiry.[85] Those instructions appeared to be strictly in accordance with RCM 910(c) and Paragraph 2-2-1 of the *Benchbook*.[86] The military judge did not instruct the accused that the guilty plea, the stipulation of fact, or the

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[69] *Id.* at 767; *see* MCM, *supra* note 6, MIL. R. EVID. 104.

[70] *Davis*, 65 M.J. at 767.

[71] *Id.* at 767 n.9.

[72] *Id.* at 767.

[73] *Id.* at 767–69.

[74] *Id.* at 769; MCM, *supra* note 6, MIL. R. EVID. 414.

[75] *Davis*, 65 M.J. at 769; MCM, *supra* note 6, MIL. R. EVID. 403.

[76] *Davis*, 65 M.J. at 770.

[77] *Id.*

[78] *Id.*

[79] *Id.* (emphasis added by the court). From the ACCA opinion, it appears that the defense counsel did not specifically object to this use of the accused's statements during the providence inquiry. *See id.*

[80] *Id.*

[81] *Id.* at 768–69.

[82] *Id.* at 768.

[83] *Id.* at 766–67.

[84] *Id.* at 770–71; MCM, *supra* note 6, MIL. R. EVID. 104.

[85] *Davis*, 65 M.J. at 767; *see also* United States v. Resch, 65 M.J. 233 (2007).

[86] *Davis*, 65 M.J. at 767; *see also* MCM, *supra* note 6, R.C.M. 910(c); BENCHBOOK, *supra* note 14, para. 2-2-1.

statements he made in support of his guilty plea would be used as they were in this case—that is, to determine the admissibility of other evidence under MREs 403 and 414.[87]

In general, MRE 104 is broad and permissive, providing that the military judge is not bound by the rules of evidence when making rulings on the admissibility of evidence.[88] However, the ACCA concluded that there are still limits to MRE 104(a). The court began by stating, "The judicial policy limiting the use of judicial admissions made during a guilty plea inquiry is a long-standing tenet of military justice."[89] Citing prior cases, the ACCA reiterated that the providence inquiry is a "limited waiver of the right against self-incrimination."[90] Any use of the accused's admissions beyond this limited waiver is error of a constitutional dimension requiring relief unless the error was harmless beyond a reasonable doubt.[91] In this case, the ACCA concluded that the military judge erred in considering facts from the accused's guilty plea in his ruling on the admissibility of evidence under MREs 403 and 414.[92] The military judge erred because he did not advise the accused that his admissions would be used in this fashion and the accused did not consent to this use in his limited waiver of his privilege against self-incrimination.[93] Additionally, the court specifically held that "absent any affirmative waiver," MRE 104 does not allow the military judge to consider statements made during the providence inquiry when making evidentiary rulings.[94]

Despite the military judge's error, the ACCA found sufficient basis in the record to conclude that the evidence of the accused's crimes against the older stepdaughter was admissible under both MREs 403 and 414.[95] Next, the court found that the military judge's error was harmless beyond a reasonable doubt because, whether or not the propensity evidence was admissible, there was "ample additional evidence to convict [the accused] beyond a reasonable doubt of the indecent acts with LM."[96] As such, the court affirmed the findings and sentence.

### Takeaways for the Practitioner—Use of the Providence Inquiry

To the extent that the law was unclear before both *Resch* and *Davis*, the potential uses of the accused's admissions during the guilty plea inquiry, including the stipulation of fact, are very narrow. The accused's waiver of his privilege against self-incrimination for purposes of the providence inquiry is limited. Under current case law and the RCMs, the accused's guilty plea and the attendant providence inquiry may be used in three ways. First, the accused's admissions will be used to establish guilt of the offense to which a plea of guilty has been entered.[97] Second, the admissions may be used in determining an appropriate sentence.[98] Third, if the accused pleads guilty to a lesser included offense and the government elects to try to prove the greater offense, the accused's admissions "may be used to establish facts and elements common to both the greater and lesser offense within the same specification."[99] Any use of the accused's admissions beyond these three uses requires a knowing and voluntary waiver of the accused's privilege against self-incrimination, which generally involves an instruction to the accused on his Fifth Amendment rights, an instruction on the proposed use, and an affirmative waiver of rights from the accused himself.[100]

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[87] *Davis*, 65 M.J. at 767–68; MCM, *supra* note 6, MIL. R. EVID. 403, 414.

[88] *Davis*, 65 M.J. at 770; MCM, *supra* note 6, MIL. R. EVID. 104(a).

[89] *Davis*, 65 M.J. at 770 (quoting United States v. Ramelb, 44, M.J. 625, 628 (Army Ct. Crim. App. 1996)).

[90] *See Davis*, 65 M.J. at 770–71 (quoting United States v. Grijalva, 55 M.J. 223, 227 (2001); *see also* United States v. Gilchrist, 61 M.J. 785, 794–95, 795 n.17 (Army Ct. Crim. App. 2005)).

[91] *Davis*, 65 M.J. at 771.

[92] *Id.* at 770.

[93] *Id.* at 770–71.

[94] *Id.* at 770.

[95] *Id.* at 771–72.

[96] *Id.* at 773.

[97] MCM, *supra* note 6, R.C.M. 910(e).

[98] United States v. Holt, 27 M.J. 57 (C.M.A. 1988).

[99] United States v. Grijalva, 55 M.J. 223, 227 (2001) (citations and internal quotations omitted); MCM, *supra* note 6, R.C.M. 920(e)(1).

[100] United States v. Resch, 65 M.J. 233, 237 (2007); *Davis*, 65 M.J. at 771. Of course, statements made during the course of the guilty plea inquiry may also be used later as a basis for charges of perjury or making false statements. *See* BENCHBOOK, *supra* note 14, para. 2-2-1.

The use of the stipulation of fact, however, is a matter of agreement between the accused and the convening authority, and the parties may expand, or limit, the use of the stipulation of fact as desired for each case.[101] The intended uses should be clear from the plain language of the document and the military judge must ensure that any ambiguity in the language of the stipulation is resolved on the record.[102] As the *Resch* case demonstrates, any ambiguity that results in a use of the stipulation that contravenes the instructions provided to the accused will likely result in error.[103]

The *Resch* and *Davis* cases teach that it is critical for counsel to understand the permissible uses of the accused's guilty pleas and admissions made during the military judge's inquiry. Additionally, trial judges must be watchful to ensure that counsel use the providence inquiry within the accused's limited waiver of the privilege against self-incrimination. Should the parties seek to use the guilty plea inquiry beyond the uses contemplated by the instructions, the military judge should instruct the accused on his rights and the proposed use of his admissions, and then secure an affirmative waiver from the accused on the record. Otherwise, the use of the providence inquiry beyond the three permissible uses outlined above is prohibited.

### Closure of Article 32 Investigations to the Public

The closure of investigations under Article 32, UCMJ, has been an ongoing issue across the services, and the courts have had several opportunities to define the boundaries of the accused's right to a public Article 32 hearing.[104] *United States v. Davis*, a case decided in early 2008, provided CAAF an opportunity to clarify the rules related to the closure of the proceeding to the public, the standard of review when an Article 32 issue reaches an appellate court, and the proper method for handling Article 32 issues that arise at the trial level.[105]

In general, Article 32 affords an accused the right to a "thorough and impartial investigation" into any charges or specifications preferred against him before those charges or specifications can be referred to a general court-martial.[106] During the investigation, the accused is entitled to be advised of the charges against him, to be represented by counsel, to cross-examine witnesses, and to present "anything he may desire in his own behalf, either in defense or mitigation."[107] While the requirements of Article 32 are "binding . . . failure to follow them does not constitute jurisdictional error."[108]

Article 32 does not mandate that the proceedings be open.[109] However, RCM 405(h)(3) provides that "[a]ccess by spectators . . . may be restricted or foreclosed in the discretion of the commander who directed the investigation or the investigating officer."[110] In 1997, in *ABC, Inc. v. Powell*,[111] the CAAF established the bedrock principles for the current rule regarding the closure of Article 32 investigations to the public. This was a high-profile case involving allegations that then-Sergeant Major of the Army (SMA) Gene McKinney had sexually harassed several subordinates and obstructed justice.[112] In directing the Article 32 investigation, the Special Court-Martial Convening Authority ordered that the investigation be closed to the public for three reasons:

> (1) to maintain the integrity of the military justice system and ensure due process to SMA McKinney; (2) to prevent dissemination of evidence or testimony that would be admissible at an Article 32 investigation, but might not be admissible at trial, in order to prevent contamination of the "potential pool of panel members"; and (3) to protect the alleged victims who would be testifying as witnesses against SMA

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[101] *See* MCM, *supra* note 6, R.C.M. 705.

[102] *See id.* R.C.M. 811(b) discussion.

[103] *Resch*, 65 M.J. at 237.

[104] UCMJ art. 32 (2008). *See* ABC, Inc. v. Powell, 47 M.J. 363 (1997); United States v. Davis (*Davis I*), 62 M.J. 645 (A.F. Ct. Crim. App. 2006); Denver Post Corp. v. United States, No. 20041215 (Army Ct. Crim. App. Feb. 23, 2005).

[105] *Davis II*, 64 M.J. 445 (2007).

[106] UCMJ art. 32.

[107] *See id.* art. 32(b).

[108] *Id.* art. 32(e).

[109] *See generally id.*

[110] MCM, *supra* note 6, R.C.M. 405(h)(3).

[111] 47 M.J. 363 (1997).

[112] *Id.* at 364.

> McKinney, specifically to shield the alleged victims from possible news reports about anticipated attempts to delve into each woman's sexual history.[113]

As a result of the closure, SMA McKinney and several news agencies filed a petition for extraordinary relief with the CAAF seeking a writ of mandamus ordering that the Article 32 proceedings be opened to the press and the public.[114] In granting the writ, the CAAF articulated several fundamental principles regarding the closure of Article 32 investigations. First, "absent 'cause shown that outweighs the value of openness,' the military accused is . . . entitled to a public Article 32 investigative hearing."[115] Second, should an Article 32 investigation be closed, the closure "determination must be made on a case-by-case, witness-by-witness, and circumstance-by-circumstance basis."[116] Finally, "the scope of closure must be tailored to achieve the stated purpose and should also be 'reasoned' and not 'reflexive.'"[117]

In *United States v. Davis*,[118] the CAAF reviewed the rules regarding procedural errors in the Article 32 investigation. In this case, Airman First Class Davis was facing charges of rape, indecent assault, and assault consummated by battery for his conduct toward three separate women.[119] The Article 32 investigating officer in the case made the decision to close the hearings during the testimony of two of the three alleged victims.[120] He made the decision, apparently on his own motion, "due to the sensitive and embarrassing nature of the testimony and in order to encourage complete testimony about the alleged sexual offenses."[121] The investigating officer closed the proceedings so that that the "convening authority [would have] all the facts necessary to make a proper decision."[122] In his report, the investigating officer outlined in detail his reasons for the closure of the proceedings during the testimony of these two witnesses and his balancing of the "interests of justice" versus the "public's interest in access."[123]

Upon hearing that the proceedings would be closed, the defense counsel objected.[124] There was no evidence that the witnesses would not appear voluntarily or would not testify.[125] In fact, the investigating officer had not spoken with either witness prior to making his decision to close the proceeding during their testimony.[126] The investigating officer refused to open the hearings and, when the defense counsel objected to the Article 32 investigation at its conclusion, the investigating officer again refused to re-open the hearings so that the witnesses could testify in an open proceeding.[127]

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[113] *Id.*

[114] *Id.*

[115] *Id.* at 365 (quoting Press Enter. Co. v. Superior Court of Cal., 464 U.S. 501, 509 (1984)). The court also stated that if the accused's right to an public Article 32 investigation is denied, the press has standing to complain of the denial. *See id.*

[116] *Id.* (internal quotations and citations omitted).

[117] *Id.*

[118] *Davis II*, 64 M.J. 445 (2007).

[119] *Davis I*, 62 M.J. 645, 646 (A.F. Ct. Crim. App. 2006).

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.* The investigating officer's report stated:

> Ordinarily, Article 32 proceedings are open to spectators. However, due to the sensitive and potentially embarrassing nature of the testimony and in order to encourage complete testimony about the alleged sexual offenses, two limited portions of the hearing were closed. RCM 405(h)(3) and [Air Force Instruction] 51-201, paragraph 4.1.2, permits the investigating officer to restrict access by spectators to all or part of the proceeding when the interests of justice outweigh the public's interest in access. I believed that it was in the best interest of justice, and particularly in the best interest of [the appellant], that the convening authority had all the facts necessary to make a proper decision. I made every effort to close only those limited portions of the investigation necessary to encourage testimony by timid or embarrassed witnesses.

*Id.*

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.* at 647.

At trial, the defense moved for a new Article 32 investigation.[128] The trial judge found that there was no evidence to support the closure of the proceedings for these two witnesses, but did not grant relief.[129] The trial judge found that, although it was error to close the proceedings, there was no "articulable harm" in the case.[130] The accused was ultimately convicted of three specifications of assault consummated by battery, but was acquitted of two specifications of rape and one specification of indecent assault.[131]

On appeal to the Air Force Court of Criminal Appeals (AFCCA), the court held that the military judge erred in testing for prejudice at the trial level.[132] Citing a 1958 Court of Military Appeals (COMA) case where the accused's right to counsel was denied at an Article 32 hearing, the court stated that "[i]f an accused is deprived of a substantial pretrial right on timely objection, he is entitled to judicial enforcement of his right, without regard to whether such enforcement will benefit him at the trial."[133] Next, the court held that "[a]n accused's right to a public Article 32 investigative hearing is a 'substantial pretrial right' protected by the Sixth Amendment to the Constitution."[134] After the military judge found that the accused's substantial pretrial right was violated, he should have enforced the accused right to an open hearing "without a showing of prejudice or articulable harm."[135] The AFCCA held that the military judge abused his discretion by failing to dismiss the charges to allow for a new investigation under Article 32.[136]

Despite this error, the AFCCA affirmed the case. Even though the accused has a right to have a substantial pretrial right enforced at the trial level without a showing for prejudice, the rules differ at the appellate level. Under *United States v. Mickel*:

> Once the case comes to trial on the merits, the pretrial proceedings are superseded by the procedures at the trial; the rights accorded to the accused in the pretrial stage merge into his rights at trial. If there is no timely objection to the pretrial proceedings *or no indication that these proceedings adversely affected the accused's rights at the trial*, there is no good reason in law or logic to set aside the conviction.[137]

The court then found that the error was constitutional in nature and tested for "material prejudice using the harmless beyond a reasonable doubt standard."[138] The court observed that the witness accounts remained consistent, the defense counsel conducted an effective cross-examination of both witnesses at trial, the accused was acquitted of the most serious charges, and there was no reason to believe that the witness testimony would have been different had the proceedings been open.[139] As such, the court concluded that this error was indeed harmless beyond a reasonable doubt.[140]

On appeal, the CAAF also affirmed, but took the opportunity to clarify the rules governing the review of Article 32 issues.[141] First, the court noted that the AFCCA correctly held that the trial judge erred by requiring a showing of prejudice before providing a remedy for the violation of the appellant's right to an open Article 32 investigation.[142] The court went on to state that the "UCMJ and the *Manual for Courts-Martial* provide an accused with a substantial set of rights at an Article 32

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[128] *Id.*

[129] *Id.*

[130] *Id.* In ruling on the motion, the military judge stated, "Had there been any articulable harm, I would have sent these charges back and reopened the [Article] 32 again." *Id.* (alteration in original).

[131] *Id.* at 646.

[132] *Id.* at 648.

[133] *Id.* (citing United States v. Mickel, 26 C.M.R. 104, 107 (C.M.A. 1958)).

[134] *Id.* (quoting ABC, Inc. v. Powell, 47 M.J. 363, 365 (1997); United States v. Chuculate, 5 M.J. 143, 144–45 (C.M.A. 1978)).

[135] *Id.*

[136] *Id.*

[137] *Id.* (quoting *Mickel*, 26 C.M.R. at 107).

[138] *Id.* (citing United States v. Kreutzer, 61 M.J. 293, 298 (2005)).

[139] *Id.* at 648–49.

[140] *Id.*

[141] *Davis II*, 64 M.J. 445 (2007).

[142] *Id.* at 448.

proceeding."[143] Should any of these rights be denied, the "accused is required to identify and object to any errors in the Article 32 proceeding at the outset of the court-martial."[144] While the "impact" of an Article 32 error "is likely to be speculative at best . . . . The time for correction of such an error is when the military judge can fashion an appropriate remedy under R.C.M. 906(b)(3) before it infects the trial."[145] Additionally, the court confirmed that, should an accused disagree "with the military judge's ruling, the accused may file a petition for extraordinary relief to address immediately the Article 32 error."[146]

Next, the court recognized that the case law has not been consistent regarding the appellate approach to Article 32 issues.[147] In an effort to resolve the inconsistency, the CAAF held that Article 59(a), UCMJ,[148] is the appellate standard of review for all Article 32 errors.[149] However, as the AFFCCA conducted a detailed analysis and held that the error was harmless beyond a reasonable doubt, the court declined the opportunity to definitively categorize errors involving the closure of Article 32 investigations as errors of constitutional dimension requiring the Government to prove that the error is harmless beyond a reasonable doubt.[150]

For practitioners, several key points emerge from this case. First, *Davis* confirmed once again that Article 32 investigations are closed at some peril.[151] If there is not "cause that outweighs the value of openness," the proceedings should remain open to the public.[152] If there is such cause justifying closure, the closure should be only for the particular portion of the witness testimony that justifies such closure.[153] In addition, the Article 32 IO should place the reasons for closure on the record to ensure that the reviewing courts have the facts necessary to determine whether the IO appropriately balanced the value of openness against the need for closure. Upon a finding that the closure was improper, the military judge should order that the Article 32 investigation be re-opened to accommodate the accused's and the public's right to an open Article 32 investigation.[154] A ruling adverse to the accused is grounds for an extraordinary writ and a reviewing court may order that the proceedings be opened to the public.[155] If, however, the case reaches the appellate courts for post-trial review, the error is reviewed under Article 59(a) and the courts will test for prejudice.[156] This could be difficult for the accused to demonstrate on appeal, and as such, the CAAF observed that Article 32 errors are best resolved at the trial level.[157]

But *Davis* did not answer all of the questions pertaining to Article 32s. One remains particularly pressing. The court specifically declined to clarify whether denial of the right to a public Article 32 investigation is error of a constitutional dimension requiring that the government show that the error was harmless beyond a reasonable doubt.[158] Although the AFCCA held that the Article 32 closure was indeed error of constitutional dimension, the fact that the CAAF specifically declined to address this issue shows that there may be room to argue that improper closure is not error of a constitutional dimension. This would be a lower standard, requiring the Government to show that the error was harmless, rather than harmless beyond a reasonable doubt.[159] In her concurring opinion, Judge Ryan adds fuel to the fire by questioning whether it

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[143] *Id.* at 449.

[144] *Id.*

[145] *Id.*

[146] *Id.* For examples of cases where a party filed an extraordinary writ, see *ABC, Inc. v. Powell*, 47 M.J. 363 (1997) (petition for extraordinary relief in the form of a writ of mandamus) and *Denver Post Corp. v. United States*, No. 20041215 (Army Ct. Crim. App. Feb. 23, 2005) (petition for extraordinary relief to the ACCA in the form of a writ of mandamus and a writ of prohibition).

[147] *Id.*

[148] UCMJ art. 59(a) (2008).

[149] *Davis II*, 64 M.J. at 449.

[150] *Id.*

[151] *Accord ABC, Inc*., 47 M.J. 363; *Denver Post Corp*., No. 20041215.

[152] *See ABC, Inc.*, 47 M.J. at 365 (quoting Press Enter. Co. v. Superior Court of Cal., 464 U.S. 501, 509 (1984)).

[153] *See id.*; *Denver Post Corp.*, No. 20041215.

[154] *See Davis II*, 64 M.J. at 449.

[155] *Id.*; *see also ABC, Inc*., 47 M.J. at 366; *Denver Post Corp.*, No. 20041215.

[156] *See Davis II*, 64 M.J. at 449.

[157] *Id.*

[158] *Id.*

[159] *Id.*

is actually the Sixth Amendment that confers the right to a public Article 32 hearing.[160] As she indicates, this issue may be ripe for future appellate litigation.

Finally, practitioners should note that the discussion to RCM 405(h)(3) was amended in the 2008 edition of the *Manual for Courts-Martial* (*MCM*), reflecting the recent appellate court holdings regarding closure of Article 32 hearings.[161] The discussion to RCM 405(h)(3) in previous versions of the *MCM* was somewhat short, suggesting only that "[c]losure may encourage complete testimony by an embarrassed or timid witness" and stating that "[o]rdinarily [Article 32s] . . . should be open to spectators."[162] The discussion to RCM 405(h)(3) had not been changed since the since the 1984 edition.[163]

The discussion to RCM 405(h)(3) now provides significant guidance to commanders, investigating officers, and Judge Advocates. First, the discussion articulates the policy that "Article 32 investigations are public hearings and should remain open to the public whenever possible.[164] Next, the discussion reiterates the current standard for the closure of Article 32 investigations from *ABC, Inc v. Powell*.[165] After stating the current standard for closure, the discussion then mandates that an Article 32 officer closing an investigation "make specific findings of fact in writing that support the closure" and include those findings in the investigating officer's report to the appointing authority.[166] The discussion concludes with several examples of cases where closure might be warranted.[167] This important change incorporates the holdings from recent cases governing closure of Article 32 investigations and provides a very useful tool for investigating officers and practitioners when faced with the decision whether to close an Article 32 hearing.

In sum, while *Davis* did not answer all of the questions related to the closure of Article 32 hearings, *Davis* and the updated discussion to RCM 405(h)(3) provide key guidance to practitioners. As *Davis* has confirmed, the accused's right to a public Article 32 is an enforceable right, but a right best enforced at the trial level. Similarly, during the 2007 term, the courts identified another issue best resolved at the trial level: challenges for cause.

### Voir Dire and Challenges

Over a period of four days in late January 2007, the CAAF published three opinions that set aside the findings and sentences based on erroneous denials of defense challenges for cause—*United States v. Clay*,[168] *United States v. Briggs*[169] and *United States v. Terry*[170] All three opinions were unanimous, all three opinions were written by Judge Baker, and all three opinions were absent any participation from Judges Stucky and Ryan. In these three opinions, the CAAF has sent a strong message to the trial courts regarding challenges for cause.

In order to put *Clay*, *Briggs*, and *Terry* in context, an overview of the law regarding challenges for cause is in order. Under Article 41, UCMJ, and RCM 912(f), trial counsel and defense counsel have an unlimited number of challenges for

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[160] *Id.* at 450 (Ryan, J., concurring). Commentators appear to differ on this issue. *See* Major Gregory B. Coe, "*Something Old, Something New, Something Borrowed, Something Blue": Recent Developments in Pretrial and Trial Procedure*, ARMY LAW., Apr. 1998, at 44, 49 ("[W]hile not specifically making the Article 32 investigation a trial proceeding under the Sixth Amendment, the CAAF [in *ABC, Inc. v. Powell*] did reason by analogy that an accused has a qualified right to a public Article 32 investigation similar to the right to a public trial."); cf. Major Mark A. Kulish, *The Public's Right of Access to Pretrial Proceedings Versus the Accused's Right to a Fair Trial*, ARMY LAW., Sept. 1998, at 1, 11 n.126 ("Although the court did not cite *Waller v. Georgia*, [467 U.S. 39 (1984), in *ABC, Inc.*,] it . . . most directly supports the proposition that when a criminal accused opposes closure of a *pretrial* proceeding, the accused is invoking his Sixth Amendment right to a public trial . . . .").

[161] MCM, *supra* note 6, R.C.M. 405(h)(3) discussion.

[162] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 405(h)(3) discussion (2005) [hereinafter 2005 MCM].

[163] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 405(h)(3) discussion (1984).

[164] MCM, *supra* note 6, R.C.M. 405(h)(3) discussion.

[165] *Id.*; *see also* ABC, Inc. v. Powell, 47 M.J. 363, 365 (1997).

[166] MCM, *supra* note 6, R.C.M. 405(h)(3) discussion.

[167] *Id.*

[168] 64 M.J. 274 (2007).

[169] 64 M.J. 285 (2007).

[170] 64 M.J. 295 (2007).

cause.[171] There are two broad categories of challenges for cause. Rule for Court-Martial 912(f)(1)(A)–(M) contains thirteen nondiscretionary bases for challenges for cause, mostly covering circumstances where the member is somehow involved in the case.[172] However, RCM 912(f)(1)(N) provides a basis for challenge where the military judge has some discretion.[173] Under RCM 912(f)(1)(N), challenges for cause should be granted whenever an individual "[s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality."[174] Challenges for cause under this provision fall into two further categories: (1) challenges involving actual bias, and (2) challenges involving implied bias.[175] Actual bias is bias that will not yield to the evidence presented or the military judge's instructions.[176] As challenges for cause for actual bias are "based on the military judge's subjective determination of the member's credibility," the appellate courts grant the military judge great deference when deciding whether actual bias exists.[177]

Implied bias, however, is more difficult. Military judges should grant challenges for cause under the doctrine of implied bias "when most people in the same position would be prejudiced."[178] The standard is an objective one, "viewed through the eyes of the public, focusing on the appearance of fairness" of the military justice system.[179] Accordingly, the courts grant military judges less deference when reviewing issues of implied bias. The standard of review is "less deferential than abuse of discretion but more deferential than *de novo*."[180]

The last fundamental concept regarding challenges for cause is the "liberal grant mandate."[181] The courts have directed military judges to liberally grant challenges for cause in order to ensure that "members of the military have their guilt or innocence determined 'by a jury composed of individuals with a fair and open mind.'"[182] This policy, however, applies only to defense challenges for cause.[183] As the government has a number of opportunities in the panel selection process to shape the composition of the panel, the government does not need the benefit of the liberal grant mandate.[184] Aside from the limitation of the liberal grant mandate to defense challenges, these fundamental principles are not new. However, in *Clay*, *Briggs*, and *Terry*, the CAAF applied these basic principles with renewed vigor.

## Responses from the Senior Panel Member

### United States v. Clay

*United States v. Clay*[185] is the first case this term addressing a military judge's denial of a defense challenge for cause. The accused in this case, Marine Private First Class Clay, was tried by a general court-martial for one specification of rape and two specifications of indecent assault.[186] The president of the panel was a Marine colonel named "Col J."[187] During voir

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[171] UCMJ art. 41 (2008); MCM, *supra* note 6, R.C.M. 912(f).

[172] MCM, *supra* note 6, R.C.M. 912(f)(1)(A)–(M).

[173] *Id.* R.C.M. 912(f)(1)(N).

[174] *Id.*

[175] United States v. Armstrong, 54 M.J. 51 (2000); Major Deidra J. Fleming, *Out, Damned Error Out, I Say! The Year in Court-Martial Personnel, Voir Dire and Challenges, and Pleas and Pretrial Agreements*, ARMY LAW., May 2005, at 45 [hereinafter Fleming, *Out, Damned Error Out, I Say!]*.

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

[177] *See* Fleming, *Out, Damned Error Out, I Say!*, *supra* note 170, at 52.

[178] United States v. Daulton, 45 M.J. 212, 217 (1996) (quoting United States v. Smart, 21 M.J. 15, 20 (C.M.A. 1985)).

[179] *See* Fleming *Out, Damned Error Out, I Say!*, *supra* note 175, at 52 (quoting United States v. Rome, 47 M.J. 467, 469 (1998)).

[180] *Id.* (quoting United States v. Downing, 56 M.J. 419, 422 (2002)).

[181] Major Deidra J. Fleming, *Another Broken Record—The Year in Court-Martial Personnel, Voir Dire and Challenges, and Pleas and Pretrial Agreements*, ARMY LAW., Apr. 2006, at 36 [hereinafter Fleming, *Another Broken Record*].

[182] United States v. James, 61 M.J. 132, 138 (2005) (quoting *Smart*, 21 M.J. at 18).

[183] *Id.*

[184] *Id.*; Fleming, *Another Broken Record*, *supra* note 181, at 42.

[185] 64 M.J. 274 (2007).

[186] *Id.* at 275.

[187] *Id.*

dire, in response to a question about whether his ability to judge the case would be influenced by the fact that he had two daughters, Col J stated:

> I will objectively view the case; but let me be very candid. I have a 15-year[-]old daughter and a 7-year[-]old daughter who I would protect with my life; and *if I believed beyond a reasonable doubt that an individual were guilty of raping a young female, I would be merciless within the limit of the law.*[188]

In an effort to rehabilitate the member, the trial counsel asked a series of questions in order to get the officer to disclaim any belief that he had prejudged the case or had an inelastic view as to sentence.[189] As the court described it, Col J "returned to his earlier theme" of favoring harsh punishment for those convicted of sexually assaulting young females.[190]

The defense counsel challenged Col J for cause and, without making any findings of fact or conclusions of law regarding actual bias, implied bias, or the liberal grant mandate, the military judge denied the challenge.[191] Applying the now-superseded "But For Rule," the defense counsel then exercised his sole peremptory challenge against Col J.[192] Colonel J did not sit on the panel that ultimately convicted Private First Class Clay.[193] The Navy-Marine Court of Criminal Appeals affirmed the case.[194]

In reviewing the military judge's denial of the challenge for cause against Col J, the CAAF admits that this is a "close case."[195] However, in making the decision to deny the challenge, the military judge did not address either the implied bias doctrine or the liberal grant mandate on the record.[196] As such, the court relied on the statements of the member in making its own assessment of whether Col J's responses raised a question of implied bias.[197] In weighing Col J's responses, the court concluded that "[h]is 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."[198] The court then concluded that the military judge erred in denying the challenge for cause against the member and also in failing to apply the liberal grant mandate.[199] The court set aside the findings of guilt regarding rape and indecent assault, as well as a sentence that included ten years of confinement and a dishonorable discharge.[200]

There are three important points that emerge from this case and inform Judge Baker's later opinions in *Briggs* and *Terry*. The first is the court's interpretation of a principle contained in several cases that provides, "[I]n the absence of actual bias,

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[188] *Id.* (emphasis in opinion).

[189] *Id.* at 275–76.

[190] *Id.* at 278.

[191] *Id.* at 276.

[192] *Id.* Prior to Executive Order 13,387, dated 13 October 2005, RCM 912(f)(4) required the use of the "but for" rule to preserve a denied challenge for cause for appellate review. 2005 MCM, *supra* note 162, R.C.M. 912(f)(4). If a challenge for cause was denied and the challenging party used their peremptory challenge against the individual, that party must have stated that "but for" the denied challenge for cause, the challenging party would have used their peremptory challenge against another member. *Id.* Executive Order 13,387 changed R.C.M. 912(f)(4) and now, if the challenging party uses their peremptory challenge to remove a member who was challenged for cause, any appellate issue surrounding the denial of the challenge for cause against that member is waived. *See* Exec. Order No. 13, 387, 70 Fed. Reg. 60,697 (Oct. 18, 2005); *see also* Fleming, *Out, Damned Error Out, I Say!*, *supra* note 175, at 45–46.

[193] *Clay*, 64 M.J. at 275–76.

[194] *Id.* at 275.

[195] *Id.* at 278. "Close case" is a term of art that describes those cases where the facts make it very difficult to decide whether bias should be implied and, perhaps, where reasonable minds may differ as to whether a challenge should be, or should not have been, granted. *See id.* at 277 ("As a result, in close cases military judges are enjoined to liberally grant challenges for cause."); United States v, Townsend, 65 M.J. 460, 467 (2008) (Baker, J., *dubitante)* ("[T]his was a close case as a matter of law (as opposed to practice), and I was not present to evaluate the tone, content, and sincerity of the member's responses, all of which inform an implied as well as actual bias challenge."); Colonel Louis J. Puleo, *Implied Bias: A Suggested Disciplined Methodology*, ARMY LAW., Mar. 2008, at 34, 35 ("[W[hat factors are necessary to constitute a close case is a matter of debate.").

[196] *Id.*

[197] *Id.* at 275–78.

[198] *Id.* at 278.

[199] *Id.*

[200] *Id.*

'implied bias should be invoked rarely.'"[201] A plain reading of this principle suggests that courts should rarely find implied bias where actual bias is lacking. Judge Baker, however, provides more insight into this principle, explaining that, "[W]here actual bias is found, a finding of implied bias would not be unusual, but where there is no finding of actual bias, implied bias must be independently established."[202]

Next, Judge Baker offers a key policy explanation for the liberal grant mandate and the importance of resolving actual and implied bias issues at trial through the application of the liberal grant mandate. He observed:

> The [liberal grant] mandate recognizes that the trial judiciary has the primary responsibility of preventing both the reality and the appearance of bias involving potential court members. To start, military judges are in the best position to address issues of actual bias, as well as the appearance of bias of court members. Guided by their knowledge of the law, military judges observe the demeanor of the members and are better situated to make credibility judgments. However, implied bias and the liberal grant mandate also recognize that the interests of justice are best served by addressing potential member issues at the outset of judicial proceedings, before a full trial and possibly years of appellate litigation. The prompt resolution of member challenges spares the victim the potential of testifying anew, the government the expense of retrial, as well as society the risk that evidence (in particular witness recollection) may be lost or degraded over time. As a result, in close cases military judges are enjoined to liberally grant challenges for cause. It is at the preliminary stage of the proceedings that questions involving member selection are relatively easy to rapidly address and remedy.[203]

In short, issues of implied bias are best resolved at the trial level and the liberal grant mandate gives military judges a tool to apply in close cases.

The third important principle is the amount of deference that a trial court receives when it fails to address either implied bias or the liberal grant mandate on the record when denying a challenge for cause. Judge Baker states that "[w]here a military judge considers a challenge based on implied bias, recognizes his duty to liberally grant defense challenges, and places his reasoning on the record, instances in which the military judge's exercise of discretion will be reversed will indeed be rare."[204] This echoes statements made by the Judge Baker in the past. In *United States v. Downing*,[205] Judge Baker instructed that, with respect to findings regarding implied bias, "We do not expect record dissertations but, rather, a clear signal that the military judge applied the right law."[206] He stated further, "While not required, where the military judge places on the record his analysis and application of the law to the facts, deference is surely warranted."[207] In denying challenges for cause, military judges who fail to address implied bias or the liberal grant mandate in denying challenges for cause by the defense risk little, if any, deference from the appellate courts in reviewing their rulings.[208] The next case provided another opportunity for Judge Baker to expand upon this principle.

### When a Member Is Married to the Accused's Commander

United States v. Briggs

The next case where the court addressed challenges for cause and implied bias is *United States v. Briggs.*[209] In this case, Air Force Technical Sergeant Briggs was convicted of stealing and then re-selling survival vests from the C-5 aircraft he was

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[201] *Id.* at 277 (citing United States v. Leonard, 63 M.J. 398, 402 (2006); United States v. Strand, 59 M.J. 455, 458 (2004); United States v. Rome, 47 M.J. 467, 469 (1998); United States v. Lavender, 46 M.J. 485, 488 (1997)).

[202] *Id.*

[203] *Id.* at 277.

[204] *Id.*

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

[206] *Id.* at 422.

[207] *Id.*

[208] *See Clay*, 64 M.J. at 277.

[209] 64 M.J. 285 (2007).

responsible for maintaining.[210] One of the members on his officer panel was Captain (Capt) H, the wife of the accused's flight commander.[211] During voir dire, Capt H revealed that she knew about the case because her husband had told her that several "vests went missing and that the person . . . was put on desk duty."[212] When questioned further during voir dire, she stated that she did not know anything more about the case and also explained that her husband was currently deployed to Kuwait.[213] The defense challenged Capt H for cause because "there would be an appearance of unfairness if the wife of [the accused's] commanding officer were allowed to sit on [the] court-martial."[214] In denying the defense challenge for cause, the military judge made several findings on the record. First, he noted that Capt H did not know exactly what unit the accused was in and, as Capt H's husband was deployed to Kuwait, they would be unable to discuss the case.[215] The military judge also observed that "Capt H 'appeared to be quite sincere and listened quite attentively as [he] instructed her on what she could consider.'"[216] Finally, the military judge stated that the evidence at trial would reveal that "vests were missing from one of the flights on the base."[217] The military judge did not make any specific findings regarding the application of the implied bias theory or the liberal grant mandate.

The defense preserved the issue under the amended RCM 705(f)(4) by using his peremptory challenge against another member.[218] Captain H, the wife of the accused's commander, sat on the case and the accused was convicted of four specifications of selling military property and one specification of larceny on divers occasions.[219] He was sentenced to total forfeitures, reduction to E-1, confinement for five years, and a dishonorable discharge.[220] The AFCCA affirmed.[221]

On appeal, the CAAF concluded that the military judge erred in denying the challenge for cause against Capt H.[222] The court agreed that Capt H did not demonstrate any actual bias, but found that several factors warranted her excusal under an implied bias theory.[223] First, her spouse's safety and that of his unit were put at risk by this theft of security vests.[224] Second, her husband's "performance evaluation could be affected by criminal conduct regarding critical squadron equipment that was supposed to be safeguarded in a secure area."[225] Third, her husband was the accused's immediate commander, and immediate commanders are usually responsible for the initial investigation into potential misconduct and the "initial decision as to disposition."[226] As such "the decision to retain Capt H, the spouse of [the Accused's] immediate commander, unnecessarily raised the perception of improper command bias."[227]

In evaluating implied bias cases, the courts have consistently stated that "a military judge's ruling on implied bias, while not reviewed de novo, is afforded less deference than a ruling on actual bias."[228] In *Downing*, Judge Baker noted that "where the military judge places on the record his analysis and application of the law to the facts, deference is surely warranted."[229]

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[210] *Id.* at 286.

[211] *Id.*

[212] *Id.*

[213] *Id.*

[214] *Id.*

[215] *Id.*

[216] *Id.*

[217] *Id.*

[218] *Id.*

[219] *Id.*

[220] *Id.*

[221] *Id.*

[222] *Id.* at 287.

[223] *Id.*

[224] *Id.*

[225] *Id.*

[226] *Id.*

[227] *Id.*

[228] *Id.* at 286–87 (citing United States v. Strand, 59 M.J. 455, 458 (2004)).

[229] United States v. Downing, 56 M.J. 419, 422 (2002).

He quoted this standard again in *Clay*.[230] In *Briggs*, however, Judge Baker expands this principle, concluding, "[D]eference is warranted *only* when the military judge indicates on the record an accurate understanding of the law and its application to the relevant facts."[231] In *Briggs*, just as in *Clay*, the military judge did not address either implied bias or the liberal grant mandate when making his ruling on the defense challenge for cause. He only addressed "factors relating to Capt H's demeanor, her professed lack of knowledge, and her husband's absence."[232] As such, the CAAF had nothing in the record to evaluate whether or how the military judge considered issues relating to implied bias and the liberal grant mandate. In conducting its own analysis, the court concluded that the military judge erred and set aside the findings and sentence in this larceny case. Judge Baker further refined his implied bias analysis in a third case during the 2007 term.

### When a Member Has Experience with the Charged Offense

United States v. Terry

The third case that the CAAF reviewed this term with issues involving implied bias is *United States v. Terry*.[233] Air Force Staff Sergeant Terry was charged with the rape of a female airman and disobeying a lawful no-contact order.[234] Staff Sergeant Terry selected a panel of officer members to hear his case.[235] Two of the members had distinct experiences with rape. First, Major (Maj) H's wife was sexually assaulted by a family member between ten and twenty years before the court-martial.[236] Second, Captain (Capt) A's longtime girlfriend was raped by a family friend about seven years before the court-martial.[237] The defense challenged both of these members for cause and the military judge denied both challenges.[238]

In denying both challenges, the military judge placed her findings on the record based on the members' responses during voir dire. With respect to Maj H, the military judge noted that while he "was [initially] uncomfortable when answering the questions [about his wife's experiences with sexual abuse] . . . as the questioning went on he was [more] forthright in answering."[239] Also, Maj H stated that he "had no predisposition . . . [and] could be fair and impartial."[240] In Capt A's case, the military judge found from his voir dire responses that he had no "feelings about rape '[that could not be] put aside' so that he could be impartial."[241] In addressing both members, the military judge based her rulings on her observations of their demeanor and the tenor of their responses during voir dire. After the challenges were denied, the defense preserved the issue for appeal by exercising their peremptory challenge against another member.[242]

On appeal, the CAAF cited several guiding principles in reviewing cases involving a "member's exposure to a crime similar to the one to be litigated before them."[243] First, the fact that a member was close to someone who was a victim of a similar crime is not a per se basis for disqualification.[244] Second, even if a member has been exposed to a similar crime, they may rehabilitate themselves by "honestly claiming that [they] would not be biased."[245] Third, the courts have found that

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[230] United States v. Clay, 64 M.J. 274, 277 (2007) (quoting *Downing*, 56 M.J. at 422).

[231] *Briggs*, 64 M.J. at 287 (citing *Downing*, 56 M.J. at 422) (emphasis added).

[232] *Id.*

[233] 64 M.J. 295 (2007).

[234] *Id.* at 296.

[235] *Id.*

[236] *Id.* at 297.

[237] *Id.* Captain A actually had two prior girlfriends who had been the victims of sexual assault. *Id.* at 300. However, the first girlfriend that the court addresses was a relatively clear case and the court did not find any actual or implied bias. *Id.* at 304. As such, the member's relationship with that victim is not addressed here.

[238] *Id.*

[239] *Id.* at 301 (alteration in original).

[240] *Id.*

[241] *Id.* (alteration in original).

[242] *Id.*

[243] *Id.* at 303.

[244] *Id.*

[245] *Id.*

there is actual bias in cases "when members have been victims of similar, *particularly* violent or traumatic crimes, or if other unique circumstances pertained."[246]

As in the previous two cases, the military judge did not consider implied bias or the liberal grant mandate on the record. While the military judge put her findings on the record regarding the statements of the members' and their demeanor during voir dire, the CAAF observed that "the record does not reflect the application of an objective implied bias test."[247] As such, the court granted deference to her findings and conclusions regarding actual bias, but conducted an independent analysis of implied bias.

The court first looked at the issue of actual bias and determined that the members effectively "disclaimed any bias or partiality."[248] The court also found that Maj H's circumstances did not yield any basis for finding implied bias and held that the military judge did not err in denying the challenge for cause against Maj H.[249] In addressing Maj H's responses during voir dire, the court observed that the sexual assault involving Maj H's wife had happened at least ten, if not twenty, years before the court-martial, even before Maj H met her.[250] Additionally, the incident was not reported to the police, Maj H's wife never sought counseling, and the two only spoke of the event a "couple of times."[251] The court noted that Maj H's mother-in-law stayed married to the man and his wife had apparently reconciled with her assailant.[252] Finally, the record revealed that Maj H's reluctance to discuss the incident during voir dire was related more to "his concern for his wife's reputation in the community, rather than any distress he personally suffered due to his wife's experiences."[253] As such, there was nothing that would create "the appearance of implied bias" in this case.[254]

On the other hand, the court held that the military judge erred in denying the challenge for cause against Capt A.[255] The court noted several factors that should have caused the military judge to "squarely address the essential question of an implied bias analysis[, that is,] was she satisfied that an objective public observer would find Capt A's service on the panel notwithstanding his acute involvement with the crime of rape as consonant with a fair and impartial system of military justice?"[256]

First, the court noted several factors that favored a finding that implied bias did not exist in the case, including the fact that the incident happened several years before, that the member had not been in contact with the victim for several years out of respect for his current wife, and that the relationship with the victim was "on and off" and at the time of the incident the relationship was "off."[257] However, the court quickly turned to a list of factors favoring a challenge for cause against Capt A based on implied bias. Captain A was familiar with the details of his friend's rape as well as the "specific aggravating circumstances of the attack," which included "the fact that the rape was the victim's first sexual experience, that the victim had wished to save herself for marriage, . . . that the rape resulted in a pregnancy and a child," and that the child was named after Capt A.[258] Additionally, when asked during voir dire, Capt A stated that he was "incensed" by the incident and "he was angry that his 'very close friend' had been hurt."[259] Finally, the court noted that he intended to marry the victim, that he was in the victim's sister's wedding party, and that "the rape was the reason that the victim broke up with him." [260]

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[246] *Id.*

[247] *Id.* at 305.

[248] *Id.* at 304.

[249] *Id.*

[250] *Id.*

[251] *Id.*

[252] *Id.*

[253] *Id.*

[254] *Id.*

[255] *Id.* at 305.

[256] *Id*. (internal brackets omitted).

[257] *Id.* at 304.

[258] *Id.*

[259] *Id.* The court notes that it is unclear whether Capt A was referring to his current feelings or his feelings at the time of the incident. *Id.*

[260] *Id.* at 305.

Considering these facts, the court concluded that "most people in Capt A's circumstance would be hard pressed . . . to sit impartially in a rape case."[261] Considering the "totality of the circumstances," the court found that "it was asking too much of him and the system for Capt A to sit."[262] As such, applying the liberal grant mandate and the "case law finding implied bias when most people in the same position would be prejudiced, " the court held that the military judge erred in denying the challenge for cause against Capt A.[263] The findings and sentence in this rape case were set aside.[264]

**2007's Lessons in Implied Bias**

*Clay*, *Briggs*, and *Terry* were not the only implied bias cases in 2007. The AFCCA overturned a case where the military judge denied a defense challenge for cause against a senior member who could have been viewed as "the alter ego" of the Special Court-Martial Convening Authority.[265] The senior member had directed the Article 32 investigation, appointed the Article 32 officer, forwarded the case to the General Court-Martial Convening Authority, and nominated members in the case.[266] Additionally, the CAAF affirmed a case where the facts on the record simply did not support a finding of actual or implied bias.[267] Finally, in July, the CAAF overturned a case using an implied bias theory where a member failed to indicate that he knew, and had a hostile view toward, a defense witness.[268] Although these three cases were decided in 2007, they do not add anything more to the implied bias analysis that Judge Baker articulated in *Clay*, *Briggs*, and *Terry*.

These three cases offer several critical points for practitioners at the trial level. First, in deciding whether to grant a challenge for cause, military judges must consider actual bias, implied bias, and the liberal grant mandate. The military judge should first assess whether the member has actual bias. Actual bias is a subjective test that looks at whether the member's bias will yield to the military judge's instructions and the evidence presented.[269] The courts give "great deference" to the military judge's rulings on actual bias, especially findings with respect to the answers given and the demeanor of the member.[270] The military judge should then conduct an analysis to determine whether implied bias exists. Implied bias is an objective standard, viewed from the perspective of a member of the public, focusing on the appearance of fairness.[271] The military judge must ask whether "most people in the same position would be prejudiced[, that is, biased]."[272] Additionally, the military judge should weigh whether an "objective public observer would find [that the member's service on the panel is] consonant with a fair and impartial system of military justice."[273] "[W]hile not reviewed de novo, [the military judge's findings on implied bias are] afforded less deference than a ruling on actual bias."[274] Lastly, the military judge must apply the liberal grant mandate for defense challenges, meaning that, in close cases, the military judge should favor granting the defense challenge for cause. Using this methodology, the military judge can ensure that he receives the maximum amount of deference from the appellate courts.

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[261] *Id.*

[262] *Id.* (internal quotations omitted).

[263] *Id.* (quoting United States v. Weisen, 57 M.J. 172, 174 (2001)).

[264] *Id.*

[265] *See* United States v. Bryant, 65 M.J. 746, 746–48 (A.F. Ct. Crim. App. 2007). The senior member was a Reserve Component Individual Mobilized Augmentee (IMA) to the 45th Space Wing and was "'used in capacity almost like a second vice commander,' and would 'substitute in meetings for either the commander or the vice commander.'" *Id.* at 747.

[266] *Id.*

[267] *See* United States v. Hollings, 65 M.J. 116, 118 (2007) (concluding that although a member had been "'career legal officer,' . . . was familiar with [the accused's] case as a result of his duties, and at least some of those duties were legal in nature," the record of trial did not support a finding of actual or implied bias, even applying the liberal grant mandate); *see also* United States v. Townsend, No. 200501197, 2007 CCA LEXIS 23 (N-M. Ct. Crim. App. Jan. 12, 2007), *aff'd*, 65 M.J. 460 (2008) (finding no actual or implied bias where a member, among other things, was in law school studying criminal law and hoped to be a prosecutor).

[268] *See* United States v. Albaaj, 65 M.J. 167 (2007). As this member failed to disclose the basis for challenge, the CAAF reviewed the case based on the members' duty of candor. *Id.*

[269] United States v. Terry, 64 M.J. 295, 302 (2007) (citing United States v. Napoleon, 46 M.J. 279, 283 (1997)).

[270] United States v. Clay, 64 M.J. 274, 276 (2007).

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

[272] *Id.* (alteration in original).

[273] *Terry*, 64 M.J. at 305 (quoting United States v. Downing, 56 M.J. 419, 422 (2002)).

[274] *Id.* (citing United States v. Strand, 59 M.J. 455, 458 (2004)).

In addition, the military judge must place on the record his observations of the members' demeanor, his understanding of the members' responses, and his assessment of the credibility of the members' responses. As the court stated in *Briggs*, "[D]eference [in implied bias rulings] is warranted only where the military judge indicates on the record an accurate understanding of the law and its application to the relevant facts."[275] As *Briggs*, *Terry*, and *Clay* demonstrate, when a military judge fails to consider implied bias and the liberal grant mandate on the record, the CAAF will grant what is tantamount to no deference to the military judge's opinion on appellate review.

As a final note, these cases offer an important caution to the trial counsel. The CAAF has shown an appropriate willingness to overturn serious cases based on implied bias and the failure of the military judge to consider implied bias and the liberal grant mandate in denying defense challenges for cause. This is not a new trend.[276] Trial counsel must ensure that the military judge addresses actual bias, implied bias, and the liberal grant mandate when denying challenges for cause. More importantly, though, trial counsel must realize that a denial of a challenge for cause in a close case creates an appellate issue that is not only subject to review, but could result in the court setting aside findings and sentence. Joining defense challenges for cause in close circumstances, like those of Col J in *Clay*, Capt H in *Briggs*, Capt A in *Terry*, may end up being the strategy that protects the conviction in a serious case from appellate reversal.

The 2007 term had five published cases addressing challenges for cause and a sixth involving implied bias coupled with a member's failure to reveal grounds for potential challenge. This trend seems to be continuing into the 2008 term with CAAF reviewing three cases with issues involving challenges for cause.[277] While the facts vary with each case and the personal circumstances of each member, the CAAF has made a deliberate effort to ensure military judges understand and apply the black letter law regarding challenges for cause

## Conclusion

If there is a singular message from the cases this term involving the use of the guilty plea inquiry, the denial of the challenge for cause, and the closure of the Article 32 investigation, it is that these particular areas are fraught with peril. Military judges and counsel must know the standards that apply to these areas of criminal procedure and apply them correctly. During this term, the courts made a deliberate effort to clarify the rules applicable to these three different areas of the law to ensure that trial practitioners know the standards and the military judges apply the correct rules. The 2007 term of court proved extraordinarily fruitful in terms of law regarding pretrial procedures. If the cases that have come out thus far in the 2008 term are any indication, court-martial procedure at the pretrial stage will continue to provide plenty of work for the appellate level for the CAAF as well as the service courts.

[275] *Id.* at 287 (citing *Downing*, 56 M.J. at 422).

[276] *See, e.g.*, United States v. Leonard, 63 M.J. 398, 402 (2006) (setting aside findings and sentence on a rape case); United States v. Wiesen, 56 M.J. 172 (2001) (setting aside findings and sentence on a child sexual abuse case); United States v. Rome, 47 M.J. 467, 469 (1998) (setting aside findings and sentence on an attempted robbery case); United States v. Daulton, 45 M.J. 212 (1996) (setting aside findings and sentence on a child sexual abuse case).

[277] *See* United States v. Townsend, 65 M.J. 460 (2008); United States v. Elfayoumi, 66 M.J. 354 (2008); United States v. Bragg, 66 M.J. 325 (2008).