There's More to the Game than Shooting: Appellate Court Coaching of Panel Selection, Voir Dire, and Challenges for Cause

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Introduction

In the movie *Hoosiers*, a former college basketball coach ends up at a small high school in Hickory, Indiana.[1] During his first practice, Coach Norm Dale is running drills with the five players on the team, ordering them to run back and forth across the court and dribble around folding chairs.[2] The players complain about the monotony and ask when they can play a scrimmage.[3] Coach Dale shoots back that they will play when he knows they are ready: "I've seen you guys can shoot but there's more to the game than shooting. There's fundamentals and defense."[4] Criminal law practitioners have similar dreams of sinking the big shot in the courtroom, from the brilliant opening statement to the carefully-crafted cross-examination and the game-changing closing argument. In preparing their cases, trial practitioners can easily lose sight of the fundamentals and defense that are so vital to court-martial practice.

In the last term, military courts highlighted both fundamentals and defense in pretrial procedures. Looking at fundamentals, the Court of Appeals for the Armed Forces (CAAF) issued *United States v. Bartlett*,[5] a case hinging on a strict reading of Article 25 of the Uniform Code of Military Justice (UCMJ). The CAAF similarly discussed the fundamentals of voir dire in *United States v. Nieto*.[6] In an on-going attempt to explain the fundamentals of implied bias in challenges for cause, the CAAF issued three inconsistent opinions.[7] As set forth below, the courts spent the last term coaching practitioners and military judges in the fundamentals, even when those fundamentals questioned long-held beliefs of the law.

Know the Fundamentals: Panel Selection After *Bartlett*

> *The general grant of authority to the Secretary to run the Army, broad and necessary as it is, cannot trump Article 25, UCMJ, which is narrowly tailored legislation dealing with the precise question in issue.*[8]

The CAAF returned to fundamentals of panel selection this term in two significant cases. In *United States v. Bartlett*[9] the court found the Secretary of the Army (SECARMY) exceeded his authority in issuing a service regulation that exempted chaplains; medical, dental, and veterinary officers; and inspectors general from serving on court-martial panels.[10] This case is notable for reversing a decades-long Army policy of exempting special branches from court-martial panels.[11] In *United States v. Townsend*[12] the court affirmed that law enforcement personnel and Judge Advocates (groups not addressed in *Bartlett*) are not per se disqualified from serving as panel members.

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[1] HOOSIERS (Metro Goldwyn Mayer 1986).

[2] *Id.*

[3] *Id.*

[4] *Id.* (quoting Gene Hackman as Coach Norm Dale).

[5] 66 M.J. 426 (C.A.A.F. 2008).

[6] 66 M.J. 146 (C.A.A.F. 2008).

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

[8] *Bartlett*, 66 M.J. at 429.

[9] 66 M.J. 426.

[10] *Id.*

[11] *See* United States v. Bartlett, 64 M.J. 641, 645 (A. Ct. Crim. App. 2007) ("[T]his court recognized more than fifty-five years ago that the Secretary of the Army has the authority to exempt persons assigned to a particular branch from court-martial service.") (citing United States v. Neville, 7 C.M.R. 180, 192 (A.B.R. 1952)), *rev'd*, 66 M.J. 426.

[12] 65 M.J. 460.

Article 25 of the UCMJ governs selection of panel members for courts-martial.[13] Article 25(d)(2) directs the convening authority to personally select members who are "best qualified" based on six criteria: "age, education, training, experience, length of service, and judicial temperament."[14] Given the broad power of the convening authority, courts have long ruled that the Article 25 criteria must be strictly applied.[15] The CAAF has provided three general principles for convening authorities selecting panels. First, a convening authority cannot have an "improper motive" to "stack" a panel to obtain a certain result.[16] Panel stacking normally involves a convening authority selecting members who are likely to give harsh sentences.[17] Second, "systematic exclusion of otherwise qualified potential members" because of an improper factor (like rank) is improper.[18] Finally, courts will be "deferential to good faith attempts" to select members who are representative of the military community.[19]

In *Bartlett*, an Army lieutenant colonel pled guilty to the unpremeditated murder of his wife.[20] An officer panel sentenced the accused to a dismissal and confinement for twenty-five years.[21] Before the guilty plea, the defense filed a motion for the convening authority to select a new panel, arguing that the SECARMY exceeded his authority by exempting certain groups of officers from court-martial service by Army regulation.[22] Chapter 7 of Army Regulation (AR) 27-10[23] expressly exempted the following special branches from serving on court-martial panels: chaplains; medical, dental, and veterinary officers; and inspectors general.[24] Mirroring the language of AR 27-10, the staff judge advocate's advice for panel selection read that the convening authority could not "detail officers assigned to the Medical Corps, Medical Specialist Corps, Army Nurse Corps, Dental Corps, Chaplain Corps, Veterinary Corps, [or] those detailed to Inspector General duties as courts-martial panel members."[25] On appeal, the defense argued the SECARMY exceeded his authority by exempting certain branches of officers in AR 27-10.[26]

The Army Court of Criminal Appeals (ACCA) affirmed the trial court's denial of the defense motion, reasoning that the SECARMY had appropriately exercised his authority under 10 U.S.C. § 3013 to "assign, detail, and prescribe duties of members of the Army."[27] For the ACCA, the SECARMY was deciding the "*feasibility* of their service under Army policy, not their *eligibility* for service under the law."[28] The court reasoned that Article 25, UCMJ does not expressly limit the power of the SECARMY to exempt personnel from serving as members, so a "gap" existed between the broad authority under 10 U.S.C. § 3013 and the binding guidance for selecting panels under a separate statute, Article 25.[29] When such a gap exists

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[13] UCMJ art. 25 (2008).

[14] *Id.* art. 25(d)(2).

[15] *See generally* United States v. Kirkland, 53 M.J. 22, 25 (C.A.A.F. 2000) (reversing case in which panel selection process limited enlisted nominees to the grade of E-7 and above); United States v. Daigle, 1 M.J. 139, 140–41 (C.M.A. 1975) (rejecting a convening authority's use of rank as a factor in selecting members and noting "[d]iscrimination in the selection of court members on the basis of improper criteria threatens the integrity of the military justice system and violates the Uniform Code").

[16] United States v. Dowty, 60 M.J. 163, 171 (C.A.A.F. 2004).

[17] United States v. McClain, 22 M.J. 124, 132 (C.M.A. 1986) (reversing sentence because convening authority selected members "less disposed to lenient sentences").

[18] *Dowty*, 60 M.J. at 171.

[19] *Id.*

[20] 66 M.J. 426, 427 (C.A.A.F. 2008).

[21] *Id.*

[22] *Id.*

[23] At the time of the accused's trial, the 1996 version of AR 27-10 was in effect. U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE (24 June 1996). United States v. Bartlett, 64 M.J. 641, 644 n.2 (A. Ct. Crim. App. 2007). The current version of AR 27-10 retained the same exemptions as the 1996 version. *Id.* n.3 (citing U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE (16 Nov. 2005).

[24] *Bartlett*, 66 M.J. at 427 (quoting Memorandum from Garrison Staff Judge Advocate to Garrison Commander, Fort Meade, Md. (18 July 2002)). The CAAF noted that AR 27-10, Chapter 7, "is a collection of substantive prohibitions applicable to particular branches and duties and contained in individual personnel management regulations." *Id.* at 428 n.1 (citing U.S. DEP'T OF ARMY, REG. 165-1, CHAPLAIN ACTIVITIES IN THE UNITED STATES ARMY para. 4-3e(2) (Mar. 25, 2004); U.S. DEP'T OF ARMY, REG. 40-1, COMPOSITION, MISSION, AND FUNCTIONS OF THE ARMY MEDICAL DEPARTMENT ch. 2 (July 1, 1983); U.S. DEP'T OF ARMY, REG. 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES para. 2-6 (Feb. 1, 2007)).

[25] *Id.* at 427. The advice cited AR 27-10, Chapter 7 as authority for this section. *Id.*

[26] *Id.*

[27] *Bartlett*, 64 M.J. at 644.

[28] *Id.* at 645.

[29] *Id.* at 646. Article 25, UCMJ, was passed by Congress as 10 U.S.C. § 825 (2000). *Bartlett*, 66 M.J. at 427.

between two statutes, the ACCA noted "the Supreme Court instructs that we are 'not [to] substitute [our] own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.'"[30] The ACCA then determined the SECARMY reasonably interpreted the statute.[31] On further appeal, the CAAF, while affirming the outcome of the lower court's decision, found the SECARMY had exceeded his authority.[32]

The CAAF held the SECARMY "impermissibly contravened the provisions of Article 25, UCMJ," by enacting the sections of AR 27-10 that exempt certain special branches from court-martial duty.[33] The CAAF held that convening authorities must consider officers in these special branches when applying Article 25 to select panel members.[34] The CAAF reasoned that Article 25 is a statute specifically addressing panel selection, while 10 U.S.C. § 3013 provides broad, general discretion to the SECARMY for personnel decisions.[35] The court noted, "Congress did not see fit to include in Article 25, UCMJ, any limitations on court-martial service by any branch, corps, or occupational specialty among commissioned officers of the armed forces."[36] To the contrary, Article 25(a) allows for any active duty commissioned officer to serve on any court-martial.[37] Along with the "broad and inclusive terms" of Article 25, Congress added specific limits in the statute by "prohibiting only certain members of the armed forces from acting as members of courts-martial."[38] Given the strict and comprehensive parameters of Article 25, the CAAF rejected the lower court's decision and its reliance on an inapposite Supreme Court case.[39]

Bartlett also focused on the President's "nonrestrictive view" for panel membership in the Rules for Courts-Martial (RCM).[40] Rule for Courts-Martial 502(a) provides "basic qualifications" (in the court's words) for panel members and does not modify the statutory language of Article 25.[41] Similarly, RCM 912(f) addresses the disqualification of potential members, and does not prohibit classes of personnel from duty but instead centers on challenges for cause.[42] The CAAF noted that Congress (in Article 25) and the President (in RCM 502(a) and RCM 912(f)) created only two "disqualifying factors."[43] First, a member is disqualified for "actual involvement in the case," like serving as an investigating officer.[44] Second, a member may be disqualified for "formal distinctions of grade or rank," like the prohibition that a warrant officer

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[30] *Bartlett*, 64 M.J. at 646 (quoting Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984)) (alterations in original).

[31] *Id.* ("The question then becomes whether the Secretary of the Army's decision to exempt a grouping of Army personnel from service on court-martial panels due to the nature of their duties is a reasonable interpretation of the statute. We conclude that it is.").

[32] *Bartlett*, 66 M.J. at 431.

[33] *Id.* at 427. The standard of review for claims of error in panel selection is de novo, as questions of law. *Id.* (citing United States v. Dowty, 60 M.J. 163, 171 (C.A.A.F. 2004); United States v. Kirkland, 53 M.J. 22, 24 (C.A.A.F. 2000)).

[34] *Id.* at 428.

[35] *Id.* Later in the opinion, the court applied "the accepted principle of statutory construction" that a specific statute, like Article 25, will override a general statute, like 10 U.S.C. § 3013(g), when in "direct conflict." *Id.* at 429.

[36] *Id.* at 428.

[37] The CAAF emphasized the broad classes of personnel who were eligible for serving as panel members:

> Rather, it cast the eligibility of such officers to serve in broad and inclusive terms in Article 25(a), UCMJ (emphasis added): "*Any* commissioned officer on active duty is eligible to serve on *all* courts-martial for the trial of *any* person who may lawfully be brought before such courts for trial." Within that broad class, the convening authority of a court-martial is to detail those members who, "in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."

Id. at 428–29 (quoting UCMJ art. 25(d)(2)).

[38] The CAAF recited that a member may not sit on a case in which he is the accused or a prosecution witness, or acted as an investigating officer or counsel. *Id.* at 429 (citing UCMJ art. 25(d)(2)). Also, a panel hearing the case of a commissioned officer may not include a warrant officer or enlisted servicemember. *Id.* (citing UCMJ art. 25(b), (c)(1)). Finally, unless unavoidable, no member shall be junior in rank or grade to the accused. *Id.* (citing UCMJ art. 25(d)(1)).

[39] The CAAF noted that "*Chevron* is inapposite to this case." *Id.* at 427. *Chevron* addressed the "deference" afforded an administrative agency in interpreting "a regulatory statute, the administration of which has been committed to it by Congress." *Id.* at 427–28 (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 839 (1984)). By contrast, Congress passed Article 25 with specific guidance for selecting panel members, while also authorizing "broad general powers" for the Secretary of the Army in 10 U.S.C. § 3013. *Id.* at 428.

[40] *Id.* at 429. *See generally* UCMJ art. 36(a) (2008) (delegating to the President the authority to promulgate rules for "[p]retrial, trial, and post-trial procedures").

[41] *Bartlett*, 66 M.J. at 429.

[42] *Id.*

[43] *Id.*

[44] *Id.*

cannot sit on a commissioned officer's case.[45] From these rules, the CAAF concluded that the President and Congress intended that convening authorities exercise broad discretion in selecting members:

> The implication is clear: Congress and the President crafted few prohibitions on court-martial service to ensure maximum discretion to the convening authority in the selection process, while maintaining the basic fairness of the military justice system.[46]

With this reasoning, the CAAF held the portions of AR 27-10 limiting the assignment of commissioned officers to panels directly conflicted with Article 25.[47] As such, the regulation must yield to the statute.[48]

The opinion also explained how prejudice should be assessed. The court rejected the defense argument that this error was "structural" in nature, which would preclude the requirement of showing prejudice.[49] Noting the "strong presumption" that an error is not structural, the court found the panel selection error in this case was statutory as opposed to constitutional.[50] As such, the CAAF will not reverse unless there is a showing of material prejudice to a substantial right of the accused.[51] In this case, the court held the error "was not a simple administrative mistake" so the Government had the burden of showing harmless error.[52] The CAAF considered six factors and determined the error was harmless:

> (1) [T]here is no evidence that the Secretary of the Army enacted the regulation with an improper motive; (2) there is no evidence that the convening authority's motivation in detailing the members he assigned to Appellant's court-martial was anything but benign—the desire to comply with a facially valid Army regulation; (3) the convening authority who referred Appellant's case to trial was a person authorized to convene a general court-martial; (4) Appellant was sentenced by court members personally chosen by the convening authority from a pool of eligible officers; (5) the court members all met the criteria in Article 25, UCMJ; and, (6) as the military judge found, the panel was "well-balanced across gender, racial, staff, command, and branch lines."[53]

These six factors are important for practitioners. The first five factors should apply in every case pre-dating *Bartlett*. Put another way, if a convening authority has properly applied the Article 25, UCMJ criteria (even if officers in special branches were exempted), the first five factors will apply and appellate courts will likely find harmless error. Although it goes without saying, this analysis only applies to panels that announced a sentence before *Bartlett*. Any panel assembled after the decision was announced would run afoul of the second factor, as the convening authority would not be following a "facially valid" regulation. While the opinion was very instructive in terms of deciding prejudice, it was less helpful in determining if a convening authority could apply Article 25 and exclude other personnel from court-martial panels.

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[45] *Id.*

[46] *Id.*

[47] *Id.* ("Moreover, the Secretary's application of 10 U.S.C. § 3013(g) (2000) runs afoul of the accepted principle of statutory construction that in cases of direct conflict, a specific statute overrides a general one, regardless of their dates of enactment.") (citing 2B NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 51.02, at 187 (7th ed. 2000); Morton v. Mancari, 417 U.S. 535, 550–51 (1974); Bulova Watch Co. v. United States, 365 U.S. 753, 758 (1961); United States v. Mitchell, 44 C.M.R 649, 651 (A.C.M.R. 1971)).

[48] *Id.* ("As such, the Army regulations must yield to the clear language of Article 25, UCMJ.") (citing United States v. Simpson, 27 C.M.R. 303, 306 (C.M.A. 1959)).

[49] *Id.* at 430.

[50] *Id.* The court noted that one of the cases cited by the defense to argue structural error, *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991), found that exclusion of the defendant's race from a grand jury constituted structural error. *Id.* By contrast, the CAAF has a long history of using a "case-specific rather than a structural-error analysis" in reviewing challenges to panel selection. *Id.* Regarding this statement, Judge Erdmann wrote a separate concurring opinion and argued, "I do not believe that language should be read to foreclose the possible application of structural-error analysis to other member-selection cases." *Id.* at 431 (Erdmann, J., concurring).

Last term, the CAAF found structural error when a court-martial was improperly closed to the public while a child victim testified, triggering reversal even without showing prejudice to the accused. United States v. Ortiz, 66 M.J. 334, 342 (C.A.A.F. 2008) ("An erroneous deprivation of the right to a public trial is structural error, which requires this Court to overturn Appellant's conviction without a harmless error analysis.") (citing *Fulminante*, 499 U.S. at 310).

[51] *Bartlett*, 66 M.J. at 430. *See generally* UCMJ art. 59(a) ("A finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.").

[52] *Bartlett*, 66 M.J. at 430.

[53] *Id.* at 431. The court added, "Under these circumstances, we are convinced the error in this case was harmless." *Id.*

Bartlett did not address whether a convening authority could exclude officers branched in the Judge Advocate General's Corps or Military Police. Of note, the staff judge advocate's formal advice in *Bartlett* only stated "the GCMCA could not 'detail officers assigned to the Medical Corps, Medical Specialist Corps, Army Nurse Corps, Dental Corps, Chaplain Corps, Veterinary Corps, nor those detailed to Inspector General.'" [54] The advice makes no mention of judge advocates or military police. There is separate case law supporting exclusions of these groups.[55] Regarding Judge Advocates, there are two trends in appellate cases. First, as the CAAF held last term in *United States v. Townsend*, "Lawyers are not per se disqualified as court-martial members unless they have served in one of the capacities explicitly set forth as a disqualification in the Uniform Code of Military Justice (UCMJ)."[56] However, other cases warn against detailing Judge Advocates to panels.[57] The courts have two similar tracks for law enforcement. First, as the CAAF noted last term in *Townsend*, "Law enforcement personnel are not per se disqualified from service as court members."[58] However, appellate courts have discouraged convening authorities from detailing law enforcement personnel to panels.[59]

Practitioners should consider whether the experience criterion of Article 25, UCMJ could be used by the convening authority as a basis for excluding law enforcement personnel or Judge Advocates. In *United States v. Dale*, a 1995 CAAF case, the accused was charged with sexual offenses against a child.[60] One panel member, an Air Force captain, was Deputy Chief of Security Police and routinely sat in on criminal activity briefings with the base commander.[61] In reversing the military judge's denial of a challenge for cause, Judge Cox, writing for the majority, focused on the perception and appearance of fairness.[62] The challenged member was intimately involved day-to-day law enforcement on the base and was "'the embodiment of law enforcement and crime prevention'" at the Air Force base.[63] Judge Cox noted, however, "that peace officers are not disqualified from service as members of courts-martial as a matter of law."[64] By contrast, in *United States v. Fulton*, a 1996 CAAF case also authored by Chief Judge Cox, the court upheld the military judge's decision to deny a challenge for cause against member who was "Chief of Security Police Operations for Pacific Air Forces."[65] The CAAF noted that involvement "in security police work did not disqualify him from court-martial duty per se."[66] In a dissenting opinion in *Fulton*, Judge Sullivan correctly observed that the opinions in *Fulton* and *Dale* "are directly at odds."[67] Judge Sullivan further noted that in *Dale* the court decided the member should have been excused for cause as the "embodiment of law enforcement" for the base; the member in *Fulton* "stands in the same, if not larger, shoes as [the *Dale* member]."[68] It should also be noted that Judge Crawford dissented from *Dale*, arguing the opinion "may be read as establishing a *per se* rule against present law enforcement personnel serving as court members on the same installation where they perform law enforcement duties without regard for whether those duties have any connection with an accused's case," a change that "is

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[54] *Id.* at 427 (quoting Memorandum from Garrison Staff Judge Advocate to Garrison Commander, Fort Meade, Md. (18 July 2002)).

[55] United States v. Hedges, 29 C.M.R. 458, 459 (C.M.A. 1960) (selection of lawyers and military police personnel as panel members creates "the appearance of a hand-picked court"); *see also* United States v. McKinney, 61 M.J. 767, 769 (A.F. Ct. Crim. App. 2005) (citing *Hedges*, 29 C.M.R. 458 for similar proposition).

[56] 65 M.J. 460, 465 (C.A.A.F. 2008) (citations omitted).

[57] United States v. Sears, 20 C.M.R. 377, 381–82 (C.M.R. 1956) (cautioning against the "obvious dangers" in the use of a lawyer on a court-martial and noting that "any deviation from the limited role of member in the direction of the more stimulating position of untitled law officer" would result in disqualification and necessitate his removal); *Hedges*, 29 C.M.R. at 462 (Latimer, J., concurring) (reviewing case in which the panel president was an attorney and concluding, "In a court of that standing the law officer must be the judge, and when rank and legal knowledge in the form of a legally qualified president are superimposed over him, the probabilities are there will be encroachment into his domain.").

[58] *Townsend*, 65 M.J. at 464 (citing United States v. Dale, 42 M.J. 384, 386 (C.A.A.F. 1995)).

[59] United States v. Swagger, 16 M.J. 759, 760 (A.C.M.R. 1983) ("At the risk of being redundant—we say again—individuals assigned to military police duties should not be appointed as members of courts-martial. Those who are the principal law enforcement officers at an installation must not be.").

[60] 42 M.J. 384.

[61] *Id.* at 385.

[62] *Id.* at 386.

[63] *Id.*

[64] *Id.* (citing United States v. Berry, 34 M.J. 83, 88 (C.M.A. 1992) (Cox, J., concurring)).

[65] 44 M.J. 100, 100 (C.A.A.F. 1996).

[66] *Id.* at 101 (citing United States v. Berry, 34 M.J. 83, 88 (C.M.A. 1992) (Cox, J., concurring)); *see also* United States v. McDavid, 37 M.J. 861 (A.F.C.M.R. 1993) (no "per se" rule of exclusion for security policemen).

[67] *Fulton*, 44 M.J. at 102 (Sullivan, J., dissenting).

[68] *Id.* at 101–02 (Sullivan, J., dissenting).

the province of only the Executive or Legislative Branch."[69] She further argued it was not an abuse of discretion for the military judge to deny the challenge for cause in that case.[70]

There is scant case law considering the individual Article 25 criteria and how a convening authority may properly apply it to rule out certain nominees from serving, though two cases have discussed the experience criterion. In *United States v. Smith*, the Court of Military Appeals (COMA) set aside findings based on an installation policy of detailing "hardcore" female members to sex offense cases.[71] The COMA rejected the Government's argument that the convening authority was merely applying the experience criterion, reasoning that the females were selected "to help assure a particular outcome."[72] By contrast, in *United States v. Lynch*,[73] the Coast Guard appellate court affirmed a convening authority's selection of members who had substantial seagoing experience. In *Lynch*, the accused was a Coast Guard commanding officer convicted of negligently hazarding a vessel after his 180-foot buoy tender ran aground.[74] The defense claimed the convening authority violated Article 25 by excluding otherwise qualified nominees who did not have "buoy tender or other significant seagoing experience."[75] The court upheld the selection process, as the convening authority's decision to select only "among officers with significant seagoing experience" was consistent with the experience criterion of Article 25.[76] Given the offenses in the case, the convening authority was permitted to select members with seagoing experience to "sit in judgment."[77]

Smith and *Lynch*, when read together, suggest two potentially-conflicting standards in panel selection. First, the Article 25 criteria cannot be used to justify court stacking. Second, the convening authority is afforded great discretion in choosing what kind of experience is necessary for a panel member. Under these cases, would it be permissible for a convening authority to not select judge advocates because of their legal experience? Could a convening authority not select military police because of their law enforcement experience? On its face, Article 25 does not allow the convening authority to consider implied bias of potential members when selecting a panel. Arguably, a panel that included judge advocates and military police could give the appearance of an unfair proceeding. It does not seem to serve the interests of justice for the convening authority to select members who will likely be excused for cause based on their duties.[78]

Stick to the Fundamentals: Improper Commitment Questions during Voir Dire

For these reasons, military judges must have broad discretion in overseeing voir dire questioning. This discretion, however, should extend to looking behind the questions asked, especially where questions suggest an effort at securing commitments to case related "hypothetical" facts.[79]

This term, the CAAF cautioned practitioners to stick to fundamentals in voir dire, by steering clear of hypothetical questions that attempt to commit members to findings. In *United States v. Nieto*, the accused was charged with wrongful use of cocaine based "primarily" on a positive urinalysis result.[80] During voir dire, the trial counsel walked the panel through the

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[69] United States v. Dale, 42 M.J. 384, 386 (C.A.A.F. 1995) (Crawford, J., dissenting).

[70] *Id.* (Crawford, J., dissenting).

[71] 27 M.J. 242, 250 (C.M.A. 1988). The Government argued female members would have a "unique ability" to assess the victim's testimony, based on their personal experience. *Id*. The COMA quickly dismissed this argument: "For whatever reason, the unique 'experience' of females apparently was viewed at Fort Ord as being relevant *only* in cases involving sex offenses." *Id*.

[72] *Id.*

[73] 35 M.J. 579 (C.G.C.M.R. 1992), *rev'd on other grounds*, 39 M.J. 223 (C.M.A. 1994).

[74] *Id.* at 581–82.

[75] *Id.* at 586.

[76] *Id.* at 588.

[77] *Id.* at 587.

[78] *But see* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 505(c)(1)(A) (2008) [hereinafter MCM] ("Before the court-martial is assembled, the convening authority may change the members for the court-martial without showing cause."). Under this provision, the convening authority could select medical personnel or inspectors general, in accordance with *Bartlett*, and then excuse those members prior to trial. Rule for Courts-Martial 505(c)(1)(A) would allow the convening authority to consider implied bias issues or workload of members to issue excusals, even though *Bartlett* would prohibit the convening authority from systematically excluding such members from panel selection.

[79] United States v. Nieto, 66 M.J. 146, 152 (C.A.A.F. 2008) (Baker & Erdmann, JJ., concurring in the result).

[80] *Id.* at 147 ("The voir dire reflected the parties' anticipation that the prosecution would rely primarily on a positive urinalysis test . . . .").

Government's case, asking specific questions about the reliability of urinalysis results.[81] Some of the questions were confusing, including: "If the government proves to you beyond a reasonable doubt that drugs were present in the accused['s] urine[,] would you be capable of inferring that he knowingly used those drugs that were found there?" and "Do any members disagree with the use of a urinalysis to determine the presence of contraband substance in the body?"[82] The trial counsel then asked a question that mistakenly planted the seeds of reasonable doubt:

> [TC:] Does any member believe that *any* technical error in the collection process, *no matter how small*[,] means that the urinalysis is *per se invalid*?
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> Okay affirmative response from each of the members.[83]

While not a model of clarity, the question suggested that any error in a urinalysis, no matter how minor, would invalidate the test results. During individual voir dire, trial counsel tried to rehabilitate members from this answer, using fact-intensive hypothetical questions that mirrored the deficiencies in the accused's urinalysis.[84]

The trial counsel questioned six members individually. First, the trial counsel questioned Chief Warrant Officer 3 (CWO3) M, who said any "gap in the chain" in a urinalysis could cause him to question the validity of the test results.[85] The trial counsel then asked about "standard operating procedure" for a urinalysis, which led to this exchange:

> TC: You believe that *any type of deviation* from the SOP automatically invalidates that[,] there is no weight to be assigned to it, you didn't follow procedures so therefore you can't rely on it, it is unreliable evidence?
>
> MBR (CWO3 [M]): Any time you have a gap in the chain, sir[,] it makes it a weak link. So it is possible that any part of that gap could have been tampered with. *I would like to hear the evidence of why there is a gap there*, and *based off of that evidence I could make a better determination of whether it is valid or not valid*.[86]

Undeterred by the warrant officer's statement that he would rather wait to make a decision until he heard the evidence in the case, the trial counsel drove on with more specific "hypothetical" questions:

> TC: What if it was something else[?] What if there was a particular space where someone didn't initial, where other wise [sic] they would have? Is that the sort of procedural error that you think would invalidate a urinalysis test per se?
>
> MBR (CWO3 [M]): Only if it is a standard operating procedure for that point in time, yes, sir.
> TC: So if there were some body [sic] like the coordinator who was supposed to initial the bottle, and he didn't, that would necessarily mean that you couldn't rely on that sample that was collected because he didn't fulfill the duties he should have?
>
> MBR (CWO3 [M]): Yes, sir.[87]

Second, trial counsel engaged in the following colloquy with CWO2 C, who agreed that a specific minor defect in a hypothetical urinalysis would not cause him to acquit:

> TC: And so it wouldn't necessarily be per se invalid if the coordinator didn't put his initials on the bottle[,] let's say. If it came back to the coordinator [and] the accused brought it back to the table, but the

[81] *Id.* at 147–48.

[82] *Id.* at 147 (alterations in original).

[83] *Id.* at 148 (alterations in original) (emphasis added).

[84] *Id.* at 148–49.

[85] *Id.* at 148.

[86] *Id.* (alterations in original) (emphasis added).

[87] *Id.* (alterations in original).

coordinator didn't put his initials on the bottle before it went back into the box. Would that be a violation that you couldn't over look [sic]? No matter what[,] that is an invalid test in your mind?

MBR (CWO2 [C]): In that case with the initials, no.[88]

The trial counsel then individually questioned a staff sergeant (SSgt) and a Corporal, who generally agreed with CWO2 C's responses.[89] The fifth member, Sergeant (Sgt) Z, suggested that he would possibly vote to acquit if there were minor deficiencies in the urinalysis collection procedure:

TC: [Is it] your opinion [that] any violation of the SOP regarding the collection process, no matter what it is[,] that automatically means that you can't rely on the results of that test?

MBR (Sgt [Z]): Yes, sir.

TC: Would it make any difference what sort of violation we are talking about?

MBR (Sgt [Z]): I believe that is something that seriously needs to be perfect, sir.

TC: All right. So if that included a coordinator, for instance, not initialing the bottle when he should have, that, in your mind, *is a deviation that seriously jeopardizes the reliability of the results?*

MBR (Sgt [Z]): *Yes, sir*.[90]

Finally, the trial counsel questioned the sixth member, Cpl L, who eventually agreed that minor deficiencies explained in a hypothetical scenario would not necessarily invalidate the results:

TC: If the evidence showed that the accused is the one who brought back a bottle and he put the label on the bottle himself, and verified it was his social security number, that sort of thing, and he put his initials on that label, and then he himself put the tape on the bottle and he initialed the top of the tape, and he put the sample into the box himself and took out his ID card. Would the fact that the coordinator in that process hadn't picked up the bottle himself and initial [sic] it . . . be enough to . . . throw out the results of that test, that couldn't support a conviction, you couldn't find the accused guilty if that was the error that occurred here? Is that true or not?

MBR (Cpl [L]): Not true because he signed for it.

TC: The accused?

MBR (Cpl [L]): The accused signed saying that it was his urine, sir.[91]

Throughout this questioning, the defense counsel did not object.[92]

Not surprisingly, the trial counsel challenged two of the members for cause. The trial counsel argued that CWO3 M and Sgt Z showed an "inflexible attitude with respect to processing errors."[93] The military judge granted the challenge for Sgt Z and the trial counsel used a peremptory challenge against CWO3 M.[94] On appeal, the defense argued that the trial counsel improperly committed panel members based on a series of hypothetical facts, which violated the accused's right to be tried by an impartial panel.[95] Because there was no objection at trial, appellate counsel argued the military judge committed plain

[88] *Id.* (alterations in original).

[89] *Id.* The court did not reprint the questions and responses for these two members. *Id.*

[90] *Id.* at 148–49 (alterations in original) (emphasis added).

[91] *Id.* at 149 (alterations in original).

[92] *Id.* at 147.

[93] *Id.* at 149. The CAAF noted there were other grounds for challenging these members, which were apparently not necessary for resolving the case. *Id.*

[94] *Id.*

[95] *Id.*

error by permitting trial counsel's questions.[96] Applying a plain error standard, the CAAF affirmed in a unanimous opinion.[97]

As a rule, hypothetical questions are "a permissible means of exploring grounds for challenge."[98] However, the CAAF acknowledged that it has never addressed the "scope of permissible questioning" for such hypothetical questions.[99] In fact, very few courts have discussed the limits of hypothetical questions during voir dire. The court's own research on the subject yielded six civilian cases: one from the Eighth Circuit Court of Appeals and five from state courts.[100] From these cases, two approaches emerged. First, a number of courts have ruled that hypothetical questions can be impermissible if used to obtain a commitment from jurors to decide the case a particular way based on a hypothetical set of facts.[101] Second, a number of courts have a "broader prohibition," barring questions that ask jurors to commit to resolution of an aspect of the case based upon a hypothetical set of facts.[102] The CAAF noted that the parties to the appeal did not cite to decisions "from the federal civilian courts that would indicate a generally applicable standard for considering the question in the trial of criminal cases in federal district courts."[103]

The CAAF relied on the sparse nature of case law in determining the military judge had not committed plain error, noting "at the time of trial, the case law from this Court did not preclude trial counsel's questions, generally applicable federal criminal law did not provide guidance on point, and only a handful of state cases addressed this matter."[104] Based on the uncertain state of the law, the court concluded that the military judge did not commit plain or obvious error in allowing the trial counsel to ask his hypothetical questions.[105] Despite the CAAF's conclusion that this was a "matter of first impression," one "on which there is little guidance from other federal courts," the court did not provide guidance for the permissible use of hypothetical questions.[106]

Given the gap in current case law, two concurring opinions, joined by three judges, tried to give guidance to the field regarding improper voir dire questions. In the first, Judge Stucky wrote to "emphasize that actions like those of the trial counsel are disfavored, if not necessarily outright error."[107] Interestingly, Judge Stucky compared this case to *United States v. Reynolds*, which held it was error to pose case-specific facts that ask members to commit to a punitive discharge: "Neither the Government nor the accused is entitled to a commitment from the triers of fact about what they will ultimately do."[108] Judge Stucky concluded that while the error was not sufficient to reverse under a plain error standard, "I would find the use of voir dire questions asking for a commitment using case-specific facts to formulate hypothetical questions was error in this

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[96] *Id.* at 149.

[97] *Id.* at 147, 150.

[98] *Id.* at 149.

[99] *Id*. at 150 ("Although this Court has addressed challenges for cause based upon answers provided by prospective members to hypothetical questions during voir dire, . . . we have not heretofore addressed the scope of permissible questioning in this regard." (citation omitted)).

[100] *Id.* (citing Hobbs v. Lockhart, 791 F.2d 125, 129–30 (8th Cir. 1986); Thompson v. State, 169 P.3d 1198, 1209 (Okla. 2007); State v. Ball, 824 So.2d 1089, 1110 (La. 2002); Hutcheson v. State, 213 S.W.3d 25, 32 (Ark. Ct. App. 2005); Burkett v. State, 179 S.W.3d 18, 31 (Tex. Ct. App. 2005); State v. Henderson, 574 S.E.2d 700, 705–06 (N.C. Ct. App. 2003)).

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.* This lack of guidance is troubling as practitioners seem inclined to use such hypothetical commitment questions. *See* United States v. Rood, No. 200700186, 2008 CCA LEXIS 96 (N-M. Ct. Crim. App. Mar. 20, 2008) (unpublished) (affirming military judge's denial of causal challenge of member who answered in the affirmative to two questions: "Does any member believe that a positive urinalysis alone proves a knowing use of a controlled substance?" and, following the member's statement that an accused is "personally responsible" for a substance found in the body, "This belief that you are responsible for everything that goes into your body is a firmly held belief?").

[107] *Nieto*, 66 M.J. at 150 (Stucky, J., concurring).

[108] 23 M.J. 292, 294 (C.M.A. 1987) (citing Unites States v. Small, 21 M.J. 218 (C.M.A. 1986)). *Reynolds* illustrates the problems with hypothetical voir dire questions. The accused was charged with larceny and wrongfully taking mail matter. *Id.* at 292. During voir dire, defense counsel asked a series of case-specific hypothetical questions to a lieutenant colonel member about adjudging a punitive discharge if the accused were found guilty of all offenses and the Government proved "the stolen property belonged to subordinates, . . .was taken from a unit safe, and that an abuse of a position of trust was involved." *Id.* at 293. The member refused to speculate about his sentence before hearing evidence in the case, noting he did not have all the information before him to make such a decision, though he admitted a mild predisposition in favor a discharging based on the limited hypothetical. *Id*. The defense counsel similarly asked a major if would be "compelled" to adjudge a discharge if the accused were found guilty of all offenses; the member said he would be mildly disposed to a discharge. *Id.* The COMA concluded that a member need not be disqualified for a mere "unfavorable inclination" against an offense, but only for a bias that would not yield to the evidence and the military judge's instructions. *Id.* at 294 (citations omitted).

case."[109]

Appellate courts have long disfavored commitment questions, viewing them as artful or tricky queries proffered by defense counsel. The courts have considered questioning about whether members would automatically adjudge a punitive discharge if the accused were found guilty or if members would be willing to sentence the accused to no punishment. For example, in *United States v. Rolle*, an Army staff sergeant pled guilty to a single specification of wrongful use of cocaine.[110] During group voir dire, four members said they would have "a problem" with the accused staying in the Army.[111] Two members were then asked a series of questions by defense counsel and indicated they would not sentence the accused to "no punishment."[112] The military judge denied causal challenges and the CAAF upheld the judge's decision.[113] The CAAF reasoned: "It is not surprising that the notion of 'no punishment' has bedeviled this Court for most of its history. A punishment of no punishment appears to be an oxymoron, but it is a valid punishment."[114] More important, the CAAF sympathized with members who were asked questions "in a vacuum, before they heard any evidence or received instructions from the military judge."[115] As Judge Gierke noted in a majority opinion in another case:

> I would have substantial misgivings about holding that a military judge abused his discretion by refusing to excuse a court member who could not in good conscience consider a sentence to no punishment in a case where all parties agree that a sentence to no punishment would have been well outside the range of reasonable and even remotely probable sentences.[116]

The *Rolle* court relied in large part on the fact that defense counsel "virtually conceded" that no punishment was outside such a range.[117] Arguably, the CAAF would have come to a different result if a sentence of no punishment seemed remotely possible.[118]

The second concurring opinion in *Nieto* focused on improper "commitment" questions. Judge Baker, joined by Judge Erdmann, wrote separately because the court should "offer further guidance to the field distinguishing between proper and improper hypothetical and commitment questions during voir dire."[119] In discussing the two state court approaches noted in the opinion, this concurrence correctly observed that "under either track" the trial counsel was improperly previewing "the members' reaction to evidence yet to come."[120] For example, the trial counsel gave a "hypothetical" scenario about a urinalysis bottle that had not been initialed by the urinalysis observer; the trial counsel followed this scenario with, "Would that be a violation that you couldn't overlook?"[121] However, in the absence of a defense objection at trial, a military judge

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[109] *Nieto*, 66 M.J. at 151 (Stucky, J., concurring). Regarding the plain error analysis, Judge Stucky noted that an "[e]rror cannot be plain or obvious if the law is unsettled on the issue at the time of trial and remains so on appeal." *Id.* (Stucky, J., concurring) (citing United States v. Garcia-Rodriguez, 415 F.3d 452, 455–56 (5th Cir. 2005); United States v. Diaz, 285 F.3d 92, 96 (1st Cir. 2002)). Judge Stucky added, "Nor is an error 'plain' if Appellant's theory requires 'the extension of precedent.'" *Id.* (Stucky, J., concurring) (quoting United States v. Hull, 160 F.3d 265, 272 (5th Cir. 1998)).

[110] 53 M.J. 187 (C.A.A.F. 2000).

[111] *Id.* at 188.

[112] *Id.* at 189. The members' responses were unequivocal. The first member responded, "No, I can't sir" when asked if he could give "no punishment at all." *Id*. The second member responded, "Could I give him—no, sir" when asked if he could sentence the accused to "no punishment." *Id*.

[113] *Id.* at 193.

[114] *Id.* at 191.

[115] *Id.* The CAAF added, "[T]his Court stated that it was 'sympathetic with the plight of court-martial members who on *voir dire* are asked hypothetical questions about the sentence they would adjudge in the event of conviction.'" *Id.* (quoting United States v. Heriot, 21 M.J. 11, 13 (C.M.A. 1985)).

[116] United States v. McLaren, 38 M.J. 112, 119 n.* (C.M.A. 1993).

[117] *Rolle*, 53 M.J. at 193.

[118] *See* United States v. Giles, 48 M.J. 60 (C.A.A.F. 1998). In *Giles*, the accused was charged with attempting to possess LSD with intent to distribute and attempting to distribute LSD. *Id.* at 60. During individual voir dire, a member said, "But my personal opinion is anybody that is convicted of dealing drugs or trafficking drugs or things of that nature that I personally feel that they should be discharged from the Navy, dishonorably or through bad-conduct discharge." *Id.* at 61. In finding the military judge "clearly abused his discretion" in denying the defense challenge for cause, the CAAF reasoned the member showed an actual bias with an inelastic view toward sentencing. *Id.* at 63. The *Rolle* court attempted to distinguish its similar facts from *Giles*, arguing that the challenged member in its case did not have a predisposition regarding the "real" sentencing disputes (a punitive discharge and confinement) and that the defense had "virtually" conceded that "no punishment" was not a probable outcome. *Rolle*, 53 M.J. at 193; *cf. id.* (Sullivan, J., concurring) ("I concur with the majority opinion, except where it vainly attempts to square its opinion today with its opinion in [*Giles*].").

[119] United States v. Nieto, 66 M.J. 146, 151 (C.A.A.F. 2008) (Baker & Erdmann, JJ., concurring in the result).

[120] *Id.* at 152 (Baker & Erdmann, JJ., concurring in the result).

[121] *Id.* (Baker & Erdmann, JJ., concurring in the result).

does not have normally a sua sponte duty "to look behind the question asked."[122] Similar to the court's reasoning, this concurring opinion properly placed the burden on the defense to object at trial: "In the voir dire context, it is the counsel who will have the better feel for the coming evidence rather than the military judge."[123] However, Judges Baker and Erdmann would go so far as to impose a sua sponte duty on a military judge to halt improper commitment questions: "Thus, in instances where a military judge can reasonably foresee the direction of the case, hypothetical factual questions like those presented in this case might indeed present obvious attempts to commit the members. In such cases, *a military judge would err in not testing the basis for such questions*."[124]

For practitioners, *Nieto* directs defense counsel to object at trial to hypothetical questions when appropriate: "Particularly in light of the fact-intensive, case-specific nature of the issue raised by Appellant, it is an issue that would benefit from a well-articulated objection at trial, as well as findings of fact and conclusions of law by the military judge."[125] Despite the fuzzy limits, three of the five CAAF judges (based on the two concurring opinions) believe it is error for counsel to ask hypothetical questions that ultimately *commit* members to accept or reject certain evidence. However, if the defense counsel had objected to the trial counsel's questions about "hypothetical" problems with the urinalysis testing procedure, the military judge could have instructed the members on the law and asked them if they could follow his instructions, which would likely have resolved the issue for appeal.[126]

Defense counsel have two options when faced with hypothetical questioning by opposing counsel. First, the defense counsel can do nothing and hope the appellate courts find plain error in the questioning. Two of the CAAF judges suggested that such questioning could trigger a plain error finding.[127] However, in finding no plain error in *Nieto*, the CAAF relied largely on the lack of binding authority in this area, while also declining to fill the gap with any guidance of its own.[128] Because there is still a lack of authority regarding commitment question, defense counsel would be unwise to rely on an appellate court finding plain error.

The second option for defense counsel is to allow trial counsel to ask improper commitment questions and then challenge members for cause who agree with the Government's theory of the case. The *Nieto* court noted that the defense counsel made no such challenge at trial.[129] Appellate counsel did not argue that counsel erred by not challenging members at trial.[130] In *Nieto*, four members agreed they could "overlook" the deficiencies in the accused's urinalysis.[131] Even if the military judge had allowed the trial counsel to try to rehabilitate the members after such a challenge was lodged, implied bias and the liberal grant mandate could require the members be excused. However, as set forth in the next section, the implied bias standard can be difficult to apply.

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[122] *Id.* (Baker & Erdmann, JJ., concurring in the result).

[123] *Id.* (Baker & Erdmann, JJ., concurring in the result). Judges Baker and Erdmann added, "Counsel, rather than the military judge, will have a better feel during voir dire as to whether hypothetical questions are truly hypothetical and intended to test for bias, or whether they are in reality (and in disguise) commitment questions intended to preview attitudes toward specific evidence." *Id.* (Baker & Erdman, JJ., concurring in the result).

[124] *Id.* at 152–53 (Baker & Erdmann, JJ., concurring in the result) (emphasis added). This statement is odd considering the extensive hypothetical questions proffered by the trial counsel. The long and detailed individual voir dire (regarding missing initials and statements by the accused) seem to be the kind of "obvious attempts to commit the members" admonished by the concurring opinion. *Id*. at 153.

[125] *Id.* at 150.

[126] *See* United States v. Dorsey, 29 M.J. 761 (A.C.M.R. 1989). In *Dorsey*, defense counsel asked the members during group voir dire if they believed the accused needed to explain his positive cocaine result after a urinalysis; all members responded in the affirmative. *Id.* at 762. The defense counsel asked the members if they agreed that "the only person that has anything to fear from participating in the Army urinalysis program is an individual who uses drugs."; all members except for two agreed. *Id.* The military judge properly denied defense challenges for cause against the members after they agreed to follow instruction on the prosecution's burden of proof. *Id.* at 763.

[127] *See supra* note 124 and accompanying text.

[128] *Nieto*, 66 M.J. at 150 (noting the sparse case law an lack of "generally applicable federal criminal law" and concluding, "[i]n that context, we conclude that Appellant has not carried his burden of demonstrating that the military judge committed an error that was 'plain' or 'obvious' in permitting the trial counsel to ask the hypothetical questions at issue in the present case").

[129] *Id.* ("In the present case, however, defense counsel not only permitted the trial counsel's questions to proceed without objection, but also offered no challenge to any of the members who rendered the findings or sentence.").

[130] *Id.* ("On appeal, Appellant has not contended that trial defense counsel erred in not offering a challenge for cause or that the military judge erred in permitting any member to sit on the panel.").

[131] *See supra* notes 88–91 and accompanying text.

Come on Ref!: Blowing the Whistle on Implied Bias

In *Hoosiers*, the team is playing the sectional finals in Deerlick, Indiana. Throughout the close game, the other team roughs up the Hickory players, while the referee calls fouls against Hickory. Coach Dale yells to the referee, "Hey, ref, call it both ways."[132] Unfortunately, military courts have called it both ways when evaluating implied bias challenges. Three cases this term show the difficulties in applying the implied bias doctrine.[133]

Under RCM 912(f)(1)(N), a panel member should be excused for cause "whenever it appears that the member . . . [s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to the legality, fairness, and impartiality."[134] A challenge for cause under RCM 912(f)(1)(N) encompasses both actual and implied bias.[135] Actual bias, as the name suggests, is a member's unwillingness to yield to the judge's instructions and the evidence. Implied bias is focused on the public's perception of the military justice system, specifically whether an impartial member of the public would have a substantial doubt regarding the fairness or impartiality of the proceedings.[136] The CAAF has held, "An accused 'has a constitutional right, as well as a regulatory right, to a fair and impartial panel.'"[137] Appellate courts give the military judge "great deference when deciding whether actual bias exists because it is a question of fact, and the judge has observed the demeanor of the challenged member."[138] A military judge will receive less deference on appeal for challenges based on implied bias because the standard is objective, based on the view through the eyes of the public.[139] The CAAF has noted, "Thus, '[i]ssues of implied bias are reviewed under a standard less deferential than abuse of discretion but more deferential than de novo.'"[140] Finally, "in close cases military judges are enjoined to liberally grant challenges for cause."[141] A military judge who addresses the liberal grant mandate when evaluating an implied bias challenge will receive more deference on appeal.[142]

In *United States v. Bragg*, a Marine recruiter was charged with rape and other offenses involving two female high school students.[143] During voir dire, one member stated that he learned information about the case before trial.[144] While he could not recall how he obtained this information, he knew the "general identity" of the victim, the general nature of the offense, and the investigatory measures taken by law enforcement.[145] The member had been the deputy chief of staff for recruiting and, in that capacity, he normally read relief for cause (RFC) packets of recruiters.[146] The member could not recall if he had reviewed the accused's RFC packet, though he said that if he had, he "probably would have" recommended relief.[147] Despite his prior knowledge of the case, the member said he could be impartial.[148] The defense challenged the member for cause and the military judge denied the challenge.[149] Surprisingly, the CAAF reversed in a unanimous decision.[150]

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[132] HOOSIERS (Metro Goldwyn Mayer 1986) (quoting Gene Hackman as Coach Norm Dale).

[133] United States v. Elfayoumi, 66 M.J. 354 (C.A.A.F. 2008); United States v. Bragg, 66 M.J. 325 (C.A.A.F. 2008); United States v. Townsend, 65 M.J. 460 (C.A.A.F. 2008).

[134] MCM, *supra* note 78, R.C.M. 912(f)(1)(N).

[135] *Elfayoumi*, 66 M.J. at 356; *Bragg*, 66 M.J. at 327; *Townsend*, 65 M.J. at 463.

[136] *Elfayoumi*, 66 M.J. at 356.

[137] *Bragg*, 66 M.J. at 326 (quoting United States v. Wiesen, 56 M.J. 172, 174 (C.A.A.F. 2001)).

[138] *Id.* (quoting United States v. Napolitano, 53 M.J. 162, 166 (C.A.A.F. 2000)).

[139] *Id.* (citing United States v. Rome, 47 M.J. 467, 469 (C.A.A.F. 1998)).

[140] *Id.* (alteration in original) (quoting United States v. Miles, 58 M.J. 192, 195 (C.A.A.F. 2003)).

[141] United States v. Clay, 64 M.J. 274, 277 (C.A.A.F. 2007).

[142] *Bragg*, 66 M.J. at 326 (citing *Clay*, 64 M.J. at 277).

[143] 66 M.J. 325.

[144] *Id.* at 326.

[145] *Id.*

[146] *Id.*

[147] *Id.* The CAAF noted the member likely read the investigation in this case: "However, after recalling what he knew of the case, he later stated, '[s]o, based off that, I believe I read the investigation as opposed to reading the newspaper accounts and all that kind of stuff.'" *Id.* (alteration in original).

[148] *Id.*

[149] *Id.* ("The military judge denied defense counsel's challenge of LtCol W for cause, finding that LtCol W's 'answers and candor . . . and body language' suggested that he would be impartial, and decide the case solely on the evidence presented in court.").

[150] *Id.* at 325–26.

The *Bragg* court began by emphasizing the importance of voir dire in selecting fair and impartial members:

> The purpose of voir dire and challenges is, in part, to ferret out facts, to make conclusions about the members' sincerity, and to adjudicate the members' ability to sit as part of a fair and impartial panel. However, the text of R.C.M. 912 is not framed in the absolutes of actual bias, but rather addresses the appearance of fairness as well, dictating the avoidance of situations where there will be substantial doubt as to fairness or impartiality. Thus, implied bias picks up where actual bias drops off because the facts are unknown, unreachable, or principles of fairness nonetheless warrant excusal.[151]

The CAAF noted the military judge's duty to note the legal standards on the record: "We do not expect record dissertations but, rather, a clear signal that the military judge applied the right law. 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."[152] The court added that implied bias is gauged from the totality of circumstances.[153]

In an opinion written by Judge Baker, the CAAF concluded, "The liberal grant mandate exists for cases like this."[154] Specifically, the member had knowledge of the case not available to other members, was a "senior member on the panel," and may have recommended adverse administrative action against the accused.[155] The CAAF noted that the liberal grant mandate serves to "remove the necessity of reaching conclusions of fact that are beyond the capacity of the member to recall."[156] In this case, the member could not remember if he actually recommended relief, but he believed he may have, so "a substantial doubt is nonetheless raised as to fairness and impartiality."[157] Simply stated, "Viewed objectively, we conclude that a member of the public would have substantial doubt that it was fair for this member to sit on a panel where that member had likely already reached a judgment as to whether the charged misconduct occurred."[158]

In *United States v. Townsend*, the accused was charged with attempted unpremeditated murder and reckless endangerment for shooting at an occupied vehicle.[159] On appeal, the defense argued the military judge should have granted a challenge for cause for implied bias against a member who planned to become a prosecutor.[160] In a unanimous decision written by Judge Erdmann, the CAAF held the military judge did not abuse his discretion in denying the defense challenge for cause.[161] The challenged member, a Navy lieutenant, made several relevant comments during individual voir dire.[162] At the time of trial, he was taking law school classes at night.[163] He said he wanted to be a prosecutor, noting his interests in "public service," "putting the bad guys in jail," and "keeping the streets safe."[164] When asked his "opinions of defense counsels," the member said he had a "mixed view."[165] While he respected military defense counsel as military officers with high ethical and moral standards, he had a "lesser respect for some of the ones you see on TV, out in the civilian world," an

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[151] *Id.* at 327.

[152] *Id.* at 326–27 (quoting United States v. Clay, 64 M.J. 274, 277 (C.A.A.F. 2007)).

[153] *Id.* at 327 ("In making judgments regarding implied bias, this Court looks at the totality of the factual circumstances." (citing United States v. Strand, 59 M.J. 455, 459 (C.A.A.F. 2004)).

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] 65 M.J. 460 (C.A.A.F. 2008).

[160] *Id.* at 462.

[161] *Id.*

[162] In addition to the relevant comments discussed in the text, the court mentioned the member had taken the "Non-Lawyer Legal Officer Course" at the Naval Justice School during which he learned "just basics" of legal defenses, including self-defense. *Id.* The court did not analyze whether this experience should have impacted a challenge for cause. *Id.*

[163] *Id.*

[164] *Id.*

[165] *Id.*

apparent reference to the member's regular viewing of the television show *Law and Order*.[166] His father was in law enforcement and, as a result, the member had (in his words) a "healthy respect for law enforcement and people in authority."[167] In a lengthy exchange, the member suggested a "well respected" law enforcement officer would be more credible, though he responded "yes" to a leading question that he would weigh the testimony of law enforcement personnel in the same way as other witnesses.[168] Based on these statements, the defense counsel challenged the lieutenant for cause.[169] In finding no implied bias, the unanimous court quickly dismissed the proffered bases for challenge.[170]

Regarding the member's father-son relationship with a law enforcement officer, the court held that law enforcement personnel are not per se disqualified for service, so a "mere familial relationship" would similarly not be disqualifying.[171] The court noted that the member respected law enforcement, but his respect did not "translate into any objectively discernable bias."[172] The court further noted that the member said he would consider the favorable service record of a law enforcement officer, as such a factor could be used by any member "along with his or her personal observation of the witness and all other evidence of record in determining credibility."[173] Regarding the member's status as a law school student and intent to become a prosecutor, the court noted that attorneys are not per se disqualified from serving as members.[174] Similarly, a member "who only aspires to become a lawyer" need not be excused.[175] The court quickly dismissed the claim that the member disliked defense attorneys, noting the member actually had a "high regard" for military counsel.[176] In conclusion, "The record reflects that the factors asserted as a basis for implied bias are not disqualifying or egregious and would not, *individually or cumulatively*, result in the public perception that Townsend received something less than a court-martial of fair and impartial members."[177]

Despite the straightforward facts of *Townsend*, the case shows some cracks in the implied bias standard. In a dubitante opinion,[178] Judge Baker argued the military judge should have granted the challenge for cause, though it was not required as a matter of law: "I think it was an easy call at the trial level to dismiss [the member] from the member pool, but a harder call to do so on appeal as a matter of law."[179] Mirroring his majority opinion in *Bragg*, Judge Baker started his doubting opinion

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[166] *Id. Law and Order* has aired on NBC for the last eighteen years. *See Law and Order* Webpage, http://www.nbc.com/Law_and_Order/about/ (last visited Mar. 4, 2009). Each hour-long episode is split in two parts; in the first half hour, detectives investigate a crime and, in the second half hour, the district attorney's office prosecutes the crime. *Id.*

[167] *Townsend*, 65 M.J. at 462.

[168] The CAAF summarized the exchange:

> Asked if he would hold the testimony of law enforcement personnel in higher esteem than other witnesses, LT B responded that he would try to be objective about everything. If he had a "gut decision" to make, he stated that: "a good cop, [if] he's had a good record, you know, [was] well respected, that—that would definitely give some credibility to their testimony." Asked if he could follow the military judge's instructions with respect to weighing the credibility of law enforcement as he would any other witness, LT B responded, "Yes." LT B stated that a witness's status as a law enforcement officer would not automatically cause him to believe or disbelieve that individual.

Id. (alterations in original).

[169] *Id.* at 463.

[170] *Id.* at 461–62.

[171] *Id.* at 464.

[172] *Id.*

[173] *Id.*

[174] *Id.*

[175] *Id.* at 465.

[176] *Id.* ("The record reflects that LT B expressed high regard for military defense counsel as officers and persons of high integrity.").

[177] *Id.* (emphasis added).

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

[179] *Townsend*, 65 M.J. at 467 (Baker, J., dubitante). Contrary to the majority, Judge Baker found there were ten different subjects relevant in the implied bias analysis:

> Extrajudicial knowledge of the law, law school attendance, desire to be a prosecutor, knowledge of forensic science, participation in a previous judicial proceeding, relationship to a law enforcement officer causing bias in favor of prosecution, gun ownership, views of criminal defense attorneys, willingness to give sentence accused to life imprisonment, and perception of witnesses testifying in exchange for a lower sentence.

Id. at 467 n.2 (Baker, J., dubitante).

with, "The liberal grant mandate exists for cases like this."[180] Judge Baker offered three considerations that support excusal of members in close cases, the most compelling of which was the conclusion that "appellate review of member challenges is an ungainly, if not impractical, tool to uphold and reinforce the importance" of RCM 912.[181] However, he was unwilling to vote for the case to be reversed.

For practitioners, *Townsend* is a good case for rehabilitating members. The challenged member had several discreet bases for challenge: he had a close relationship with a law enforcement officer, he was attending night classes to become a prosecutor, and he evidenced a disdain for defense counsel. Each of these issues, both individually and in the aggregate, was explained away during questioning. For military judges, *Townsend* suggests that the liberal grant mandate (despite its name) is less-than mandatory. As the dubitante opinion suggests, the appellate courts agree the liberal grant mandate should be used more often but are not likely to reverse when a judge fails excuse a member under the doctrine.[182]

The CAAF also noted that rehabilitative questions could trigger an implied bias excusal: "[T]here is a point at which numerous efforts to rehabilitate a member will themselves create a perception of unfairness in the mind of a reasonable observer."[183] Put another way, a reasonable member of the public might question a member's impartiality if extensive questioning was necessary to resolve biases mentioned during voir dire. Despite the CAAF's warning about extensive rehabilitative questioning, the court surprisingly rejected an implied bias challenge in another case that seemed to illustrate the rule.

In *United States v. Elfayoumi*, a male accused was charged, among other things, with forcible sodomy and three specifications of indecent assault against other men.[184] The indecent assault specifications were based on touching other men while watching pornography.[185] During voir dire, the panel member stated that homosexuality and pornography were "morally wrong."[186] Consider this exchange with the military judge:

> MJ: Earlier you indicated you had some strong objections to homosexuality?
>
> MEM: That is correct, sir.
>
> MJ: Could you explain a little bit about that.
>
> MEM: *I feel that it is morally wrong. It is against what I believe as a Christian and I do have some strong opinions against it.*
>
> MJ: You notice[] on the [charge sheet] that the word "homosexual" is not there?
>
> MEM: Yes, sir.
>
> MJ: But there are male on male sexual touchings alleged.
>
> MEM: Yes, sir.
>
> MJ: Do you think, with your moral beliefs that you can fairly evaluate the evidence of this case given the nature of the allegations?
>
> MEM: Yes, sir.[187]

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[180] *Id.* at 466 (Baker, J., dubitante); *cf.* United States v. Bragg, 66 M.J. 325, 327 (C.A.A.F. 2008) ("The liberal grant mandate exists for cases like this.").

[181] *Townsend*, 65 M.J. at 467 (Baker, J., dubitante). Judge Baker offered two other considerations: (1) the liberal grant mandate assuages public concerns about bias in court-martial proceedings, which may be triggered by rules that allow the convening authority to select members and that authorize only one peremptory challenge per side; and (2) based the record, there was no suggestion that the pool of potential members was small. *Id.*

[182] The military judge did not state on the record that he considered "implied bias or the liberal grant rule." *Id.* at 464. As a result, the CAAF "accord[ed] less deference to his ruling than we would to one which reflected consideration of implied bias in the context of the liberal grant mandate." *Id.* (citing United States v. Clay, 64 M.J. 274, 277 (C.A.A.F. 2007)). However, the court concluded, "[T]his is not a close case where failure to apply the liberal grant mandate is fatal." *Id.* at 466. Applying an abuse of discretion standard, the CAAF upheld the military judge's decision to deny the challenge for cause. *Id.*

[183] *Id.* at 465.

[184] 66 M.J. 354, 355 (C.A.A.F. 2008).

[185] *Id.*

[186] *Id.*

[187] *Id.* (alterations in original) (emphasis added).

The member also seemed predisposed to punitively discharge the accused if he were found guilty:

> MJ: Do you think you could honestly consider not discharging the accused even with that kind of conviction?
>
> MEM: I would have a hard time with that, sir.
>
> MJ: Could you consider it though?
>
> MEM: Yes, sir.
>
> MJ: After hearing the entire case, you wouldn't [categorically] exclude that?
>
> MEM: No, sir.[188]

Finally, the panel member evinced similar opposition to pornography:

> [DC:] In response to one of the questions, you stated that you had a moral aversion to pornography.
>
> [MEM:] Yes, I believe it is wrong also.
>
> [DC:] Would you consider someone who possessed or used pornography more likely to commit an immoral act . . . just because they have possessed that?
>
> [MEM:] No.
>
> [DC:] What about an act that you might perceive to be sexually immoral?
>
> [MEM:] If I knew someone who watched pornography, are they more apt to do a sexual act that I consider to be immoral?
>
> [DC:] Yes, sir.
>
> [MEM:] Does that make them immoral, no.[189]

At trial, the military judge denied the defense challenge for cause of this member.[190] In a 3–2 opinion, the CAAF upheld the military judge's decision to deny the challenge for cause.[191]

After reciting the standards regarding implied bias under RCM 912(f)(1)(N), the court acknowledged the defense argument that "the question of homosexuality and military service may evoke strongly held moral, legal, and religious views."[192] The court discussed the judge's duty to ensure the accused receives a fair trial: "To accomplish this end, *the military judge has a number of tools*, including the authority to oversee and conduct voir dire and to instruct members on the law and their deliberations."[193]

In a muddled opinion, the court concluded with limited analysis that "the military judge used these tools."[194] Unlike other opinions addressing challenges for cause, the court did not differentiate between actual and implied bias, or discuss the liberal grant mandate.[195] The court considered two points that seem to relate to actual bias, though the court did not identify them as such.[196] First, the court cited with approval the military judge's questions about "personal bias that might manifest

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

[189] *Id.* at 356.

[190] *Id.*

[191] *Id.* at 354.

[192] *Id.* at 356. The CAAF added, "The range and depth of these views is reflected in debate over those personnel policies identified by the rubric 'Don't Ask, Don't Tell.'" *Id.*

[193] *Id.* (emphasis added).

[194] *Id.* at 357.

[195] *Id.*

[196] *Id.*

itself" during deliberations.[197] Specifically, "the military judge disaggregated the question of homosexuality from the charged criminal conduct at issue."[198] Second, the court noted with approval the military judge's remedy of allowing defense counsel to question the member without restriction.[199] The CAAF found the member's answers "revealed" he could distinguish between immoral acts and criminal offenses.[200]

Turning to implied bias, the court noted that moral or religious views are not per se disqualifying, provided the member shows a "capacity to hear a case based on the four corners of the law and as instructed by the military judge."[201] The law recognizes the "human condition" and "gives a military judge the added flexibility, *and duty*, to err on the side of caution where there is a substantial doubt as to the fairness of having a member sit."[202] The court explained that a military judge "need not impugn the integrity or values of a member in finding actual bias, but can in context rely on the implied bias/liberal grant doctrine."[203] In this case, the court summarily concluded that it "would not be unusual" for members to have strong views about "lawful conduct involving sex or pornography."[204] The court, in less clear reasoning, noted, "So too, a member might have a strongly held view about unlawful conduct—murder, shoplifting, forcible, sodomy, etc."[205] Against this backdrop, the majority found the "natural propensity of members" to have strong views on these subjects is anticipated in the law and not necessarily a basis for challenge:

> Thus, the question is not whether they have views about certain kinds of conduct and inclinations regarding punishment, but whether they can put their views aside and judge each particular case on its own merits and the law, such that appellate courts, in applying R.C.M. 912, are not left in substantial doubt as to the fairness or impartiality of the members.[206]

In this case, the member stated he could separate his personal views from the facts of the case, so the military judge did "not abuse his discretion in denying the challenge for cause."[207]

In a well-reasoned dissenting opinion, Judge Erdmann (joined by Judge Ryan) found that a reasonable member of the public would have serious doubts about the fairness of the accused's trial with this member sitting in judgment.[208] Relying on cases from the Supreme Court and three circuit courts, the dissent noted that "[r]eligious, moral, and personal believes are relevant in determining whether an individual should serve as juror."[209] Because such beliefs can disqualify a member, the traits could also create a "perception of unfairness" requiring excusal for implied bias under the liberal grant mandate.[210] In this case, the facts are in favor of the dissent. All parties acknowledge that "homosexual conduct and pornography were at the core of the case."[211] The challenged member, in his own words, believed homosexuality was "morally wrong" and that he would have a "hard time" considering whether the accused should not be discharged.[212] The dissent notes that these "unwavering responses" would cause a reasonable person to believe the member's personal beliefs would influence his

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[197] *Id.*

[198] *Id.*

[199] *Id.*

[200] *Id.*

[201] *Id.*

[202] *Id.* (emphasis added).

[203] *Id.*

[204] *Id.*

[205] *Id.*

[206] *Id.*

[207] *Id.*

[208] *Id.* (Erdmann & Ryan, JJ., dissenting).

[209] *Id.* at 357–58 (Erdmann & Ryan, JJ., dissenting) (citing Aldridge v. United States, 283 U.S. 308, 313 (1931)). Further, "If moral or religious principles are so strong that they will not yield and permit a potential member to adjudicate the case without violating those principles, there is cause to excuse that member." *Id.* at 358 (Erdmann & Ryan, JJ., dissenting) (citing United States v. Decoud, 456 F.3d 996, 1017 (9th Cir. 2006); United States v. Geffrard, 87 F.3d 448, 451–52 (11th Cir. 1996); United States v. Hoffman, 806 F.2d 703, 705 (7th Cir. 1986)).

[210] *Id.* (Erdmann & Ryan, JJ., dissenting)

[211] *Id.* (Erdmann & Ryan, JJ., dissenting).

[212] *Id.* (Erdmann & Ryan, JJ., dissenting); *see also supra* notes 176–77 and accompanying text.

adjudication of the accused, who "inferentially was homosexual," viewed pornography, touched another male while watching pornography, touched three males on three separate occasions, and committed forcible sodomy on another male who refused his advances.[213] Citing *Townsend*, the dissent correctly notes that implied bias is reviewed "despite a disclaimer."[214] The member's claim that he would set aside his "strong" personal beliefs is not sufficient to end the implied bias inquiry. The dissenting opinion concludes there was a "substantial risk" that members of the public would believe this court-martial was "not conducted with a fair and impartial panel."[215] The dissent then parroted back the majority's statement that the liberal grant mandate provides a military judge the "added flexibility, and duty, to err on the side of caution where there is substantial doubt as to the fairness of having [the member] sit."[216]

Looking at all three implied cases from the CAAF's last term, it is difficult to read the cases in concert. In *Bragg* (in which the member may have reviewed the accused's relief for cause packet), the challenge seems like a close call.[217] The court's opinion is predicated on the mistaken belief that the member had already decided the accused was guilty. The CAAF does not give the facts that support this conclusion. Presumably, a Marine recruiter would be relieved for cause simply for having sexual relationships with two high school students, even if the students had not alleged rape. Equally important, the standard of proof required for a relief for cause is significantly lower than the "beyond a reasonable doubt" standard at a court-martial.[218] Despite these facts that favored upholding the military judge's denial of the causal challenge, the CAAF unanimously reversed.[219] By contrast, the member in *Townsend*—with his predisposition towards law enforcement witnesses, his plans to become a prosecutor, and his law school education—would seem like a much closer call, though the CAAF unanimously upheld the military judge's denial of the causal challenge.[220] Finally, in *Elfayoumi*, the CAAF allowed a member who had strong moral opposition to homosexuality and pornography to sit on a case in which both issues were front and center, even after he admitted a predisposition to punitively discharge the accused.[221]

These cases suggest a change regarding implied bias and the liberal grant mandate. In 2007, the CAAF considered a series of implied bias cases and determined that a military judge who fails to address implied bias or the liberal grant mandate is entitled to little or no deference in denying challenges for cause.[222] Against these cases, the military judges in *Townsend* and *Elfayoumi* did not discuss the liberal grant mandate when denying the causal challenges at issue.[223] The *Townsend* opinion concluded that the facts did not constitute a "close case," so the liberal grant mandate did not apply.[224] By contrast, *Elfayoumi* did not decide whether its facts constituted a "close case" or even discuss the liberal grant mandate.[225] While military judges would be wise to discuss actual bias, implied bias, and the liberal grant mandate when denying a defense challenge for cause, the CAAF has suggested that sloppy analysis (or no analysis at all) is not necessarily fatal on appeal.

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[213] *Id.* (Erdmann & Ryan, JJ., dissenting).

[214] *Id.* (Erdmann & Ryan, JJ., dissenting) (citing United States v. Townsend, 65 M.J. 460, 463 (C.A.A.F. 2008)).

[215] *Id.* (Erdmann & Ryan, JJ., dissenting).

[216] *Id.* (Erdmann & Ryan, JJ., dissenting) (quoting *id.* at 357).

[217] United States v. Bragg, 66 M.J. 325 (C.A.A.F. 2008).

[218] The CAAF found this distinction to be irrelevant to the implied bias analysis: "In the present case, for example, the military judge was not ultimately compelled to explore the capacity of [the member] to recommend administrative relief in one context, yet keep an open mind about Appellant's conduct when applying a criminal standard of review as a court-martial member." *Id.* at 327.

[219] *Id.* at 328.

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

[221] *Elfayoumi*, 66 M.J. 354.

[222] *See generally* Major Patrick D. Pflaum, *More Than Just Implied Bias . . . : The Year in Pleas and Pretrial Agreements, Article 32, and Voir Dire and Challenges*, ARMY LAW., June 2008, at 50, 69 ("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.") (discussing United States v. Terry, 64 M.J. 295 (C.A.A.F. 2007); United States v. Clay, 64 M.J. 274 (C.A.A.F. 2007); United States v. Briggs, 64 M.J. 28 (C.A.A.F. 2008)).

[223] *See Elfayoumi*, 66 M.J. at 358 (Erdmann & Ryan, JJ., dissenting) ("[T]he military judge's ruling does not reflect that he considered the liberal grant mandate."); United States v. Townsend, 65 M.J. 460, 464 (C.A.A.F. 2008) ("[T]he ruling denying the challenge of [member] did not reflect whether he considered either implied bias or the liberal grant rule.").

[224] *Townsend*, 65 M.J. at 466 ("[T]his is not a close case where failure to apply the liberal grant mandate is fatal."). Judge Baker's separate opinion in *Townsend* suggests he disagreed with the majority's conclusion that this was not a close case: "At the same time, this 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." *Id.* at 467 (Baker, J., dubitante).

[225] The CAAF wrote in broad terms regarding the "substantial doubt" provision of RCM 912(f)(1)(N), without separating actual and implied bias: *See supra* note 206 and accompanying text.

Conclusion

At the end of *Hoosiers*, before playing the state championship game, Coach Dale takes his player to the empty, big city gym. [226] For the players from Hickory, Indiana, the shiny floor and endless rows of seats are overwhelming. To put his players at ease, Coach Dale pulls out a tape measure and has the boys check the height of the rim and the length from the free throw line.[227] The players realize the measurements are the same as the small gym back home.[228] The players and crowd might change, but the court stays the same. Unfortunately, military courts are not as consistent.

This was a year of fundamentals for pretrial procedures. The CAAF struck down a regulation that exempted officers in special branches from serving on courts-martial. The court admonished counsel to avoid elaborate hypothetical questions during voir dire. Perhaps most important, the CAAF suggested that implied bias is a fluid concept that may yield disparate results.

Next year's terms will likely continue this theme. Following *Bartlett*, cases should be percolating through appellate channels and challenging the methods by which convening authorities are applying the new rule. Following *Nieto*, counsel should be war-gaming responses to hypothetical voir dire questions. Military judges may try to reign in counsel during voir dire, which could trigger separate challenges. Following the string of implied bias cases, the courts will hopefully return to fundamentals and reverse cases in which the military judge fails to properly consider implied bias and the liberal grant mandate when ruling on challenges for cause. The CAAF's trend has been to chastise military judges who do not discuss these principles on the record, while affirming the decisions. Such a practice only serves to perpetuate the slipshod analysis of lower courts.

For practitioners, the CAAF called for vigilant trial practice. Defense counsel in particular should be challenging panel selection, combating improper trial counsel questioning during voir dire, and aggressively arguing implied bias challenges. Defense counsel who fail to lodge timely objections risk waiver on appeal. In a pivotal scene in *Hoosiers*, the assistant coach is left in charge during a close game.[229] During a timeout, the agitated coach tells the team: "Alright, boys, this is the last shot we got. Boys, we're gonna run the picket fence at 'em. . . . . Now, don't get caught watching the paint dry."[230] Trial practitioners should follow the same advice.

[226] HOOSIERS (Metro Goldwyn Mayer 1986).

[227] *Id.*

[228] *Id.*

[229] *Id.*

[230] *Id.* (quoting Gene Hackman as Coach Norm Dale)