Clarifying the Implied Bias Doctrine:
Bringing Greater Certainty to the *Voir Dire* Process in the Military Justice System

Major Philip Staten[*]

He may declare that notwithstanding these prejudices he is determined to listen to the evidence, and be governed by it; but the law will not trust him.[1]

I. Introduction

Assume the following facts: the accused is charged with one specification of burglary[2] for breaking and entering into a house on-post at night and stealing money and jewelry. The convening authority properly selects a qualified panel, and refers the case to a general court-martial. The panel members fill out standard detailed voir dire questionnaires in response to questions about themselves and their professional background. All of the panel members state in their questionnaires that they had served alongside Soldiers in the past who have been victims of burglary, but the burglaries occurred several years ago. The questionnaires are given to both government and defense counsel well in advance of trial.

At trial, during general voir dire, the military judge asks the members if they know anyone who has ever been a victim of a burglary, and all of the members respond in the affirmative. The military judge asks them how so, and the members inform the military judge about their respective fellow Soldiers. The military judge asks them if they feel they can be impartial in deciding the accused's innocence given they had served alongside other Soldiers who had been victims of a burglary, and each responds in the affirmative. Both trial and defense counsel further question each panel member during individual voir dire. In the end, the panel members unequivocally state they can sit impartially as a panel member and decide the case based solely on the evidence presented at trial.

Pursuant to Rule for Court-Martial (RCM) 912(f)(1)(N),[3] defense counsel challenges all of the members for cause on implied bias grounds, arguing a reasonable member of the public would have substantial doubt as to the legality, fairness, and impartiality of the proceeding considering every panel member served with a soldier who was a victim of the same crime the accused is charged with committing. The military judge denies defense counsel's implied bias challenges, but fails to articulate his findings on the record. The panel convicts the accused of burglary, and sentences him to confinement for three years and a dishonorable discharge. On appeal, appellate defense counsel asserts as an assignment of error that the military judge abused his discretion in denying defense counsel's request to excuse the members on implied bias grounds.

Recent decisions by the U.S. Court of Appeals for the Armed Forces (CAAF) have created a confusing and impractical standard of review concerning how military appellate courts should decide when the law *presumes* bias in factual situations like the one described above. This is problematic because of the multitude of varying factual scenarios which arise daily in voir dire in courts-martial throughout the world. This article proposes a more practical and comprehensive standard of review to implied bias challenges which military justice practitioners will better understand, and which will lead to greater certainty and uniformity of decision by military appellate courts. As a backdrop, the article first addresses whether the U.S. Constitution mandates application of an implied bias rule, focusing primarily on Supreme Court case law. Second, the article compares and contrasts federal and military appellate court decisions addressing the doctrine of implied bias, with a view towards the different considerations the courts have to consider as well as the scope of its application. Third, the article provides two counterarguments in the application of the implied bias doctrine in the military justice system. Finally, the article recommends the President amend RCM 912(f)(1)(N) to specifically state implied bias challenges must be granted by the military judge only if the average person in the challenged member's position would be biased against the accused based on all of the facts presented, and not on the public's "perception" of the military justice system were the challenged member allowed to sit on the

[*] Judge Advocate, U.S. Army. Presently assigned as Judicial Investigative Committee Team Leader, Law and Order Task Force (LAOTF), U.S. Forces-Iraq (USF-I), Baghdad, Iraq. The author thanks Lieutenant Colonel Jonathan Howard, Captain Evan Seamone, Mr. Chuck Strong, Major Frank Rosenblatt, Major Isaac Spragg, and Major Tonya Jankunis for helpful comments, advice, and assistance. The author also thanks Major Charles Neill for his invaluable guidance as paper advisor.

[1] United States v. Burr, 25 F. Cas. 49, 50 (D. Va. 1807) (Chief Justice John Marshall made this quote when presiding over Aaron Burr's trial for treason). Chief Justice Marshall wrote that an individual under the influence of personal prejudice is "presumed to have a bias on his mind which will prevent an impartial decision of the case according to the testimony." *Id.*

[2] The Uniform Code of Military Justice (UCMJ) defines the offense of burglary as "any person subject to this chapter who, with intent to commit an offense punishable under sections 918–928 of this title (articles 118–128) breaks and enters, in the nighttime, the dwelling house of another, is guilty of burglary and shall be punished as a court-martial may direct." UCMJ art. 129 (2008).

[3] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 912(f)(1)(N) (2008) [hereinafter MCM] ("A member shall be excused for cause whenever it appears that the member should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality.").

panel. The article further recommends Congress amend Article 41(a), UCMJ, such that a military judge's denial of a challenge for cause on actual or implied bias grounds is reviewed for an abuse of discretion which will bring greater certainty and uniformity to the military justice system.

II. Constitutional Background Surrounding Implied Bias

In the military, the constitutional foundation upon which the doctrine of implied bias rests is the Fifth Amendment to the U.S. Constitution, which states that no person "shall be deprived of life, liberty, or property without due process of law."[4] While the Sixth Amendment requires that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury,"[5] unlike a civilian accused, a military accused has no Sixth Amendment right to a trial by jury.[6] However, it is well-settled law a military accused has a Fifth Amendment due process and equal protection right to a trial before impartial court members.[7] In fact, this right "is the cornerstone of the military justice system."[8] However, despite this well-settled law, there is considerable debate concerning whether the Constitution *requires* the implied bias rule as an established rule of constitutional procedure. As Judge Crawford noted in her dissent in *United States v. Wiesen*: "It is unclear whether the doctrine of implied bias even exists as a matter of law. The Supreme Court has neither embraced nor rejected the doctrine."[9]

A review of Supreme Court precedent supports the doctrine of implied bias as a rule of constitutional procedure to ensure an accused's right to a fair and impartial criminal trial, but only in extreme or exceptional circumstances. In *United States v. Wood*,[10] the Supreme Court held an accused has a Sixth Amendment right to challenge the partiality of a jury member on implied bias grounds.[11] The Court specifically stated that while the Sixth Amendment prescribes no specific tests, "the bias of a prospective juror may be actual *or implied*; that is, it may be bias in fact *or bias conclusively presumed as a matter of law*."[12] In *Wood*, the Court was confronted with the issue of whether a Washington D.C. statute allowing federal employees to sit as jury members violated Wood's Sixth Amendment right to a fair and impartial jury.[13] Twelve prospective jurors were called and several were federal employees.[14] Wood challenged the prospective jurors on implied bias grounds, arguing they were presumptively biased against him as a matter of law because they were federal government employees and the U.S. Government was the entity prosecuting him.[15] The trial court denied the challenges for cause.[16] Wood then exercised three peremptory challenges, but two jurors remained who were employed by the federal government, and a third was the holder of a "bonus certificate" from the federal government.[17] The jury ultimately convicted Wood of petit larceny.[18] On appeal, Wood argued the trial court erred in denying his implied bias claim.[19] Specifically, Wood argued his Fifth Amendment due process and Sixth Amendment rights to a fair and impartial trial mandated absolute disqualification in criminal cases of any potential juror employed by the government, a disqualification which Congress could not remove or modify.[20] The Supreme Court rejected Wood's argument, finding no such absolute disqualification requirement of government employees at either English common law or at

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[4] U.S. CONST. amend. V.

[5] *Id.* amend. XI. *See also* Weiss v. United States, 510 U.S. 163, 179 (1994).

[6] United States v. Kemp, 22 C.M.A. 152, 154 (1973) ("The Sixth Amendment right to trial by jury with accompanying considerations of constitutional means by which juries may be selected has no application to the appointment of members of courts-martial.") (citing *Ex parte* Quirin, 317 U.S. 1, 39–41 (1942); O'Callahan v. Parker, 395 U.S. 258 (1969); DeWar v. Hunter, 170 F.2d 993 (10th Cir. 1948), *cert. denied*, 337 U.S. 908 (1949)). *See also* United States v. Tulloch, 47 M.J. 283, 285 (C.A.A.F. 1997); United States v. Smith, 27 M.J. 242, 248 (C.M.A. 1988).

[7] Irvin v. Dowd, 366 U.S. 717, 722 (1973) ("In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process."); Frontiero v. Richardson, 411 U.S. 677, 680 (1973) (concept of equal protection of the laws applies to members of the Armed Forces through the Due Process Clause of the Fifth Amendment); United States v. Elfayoumi, 66 M.J. 354, 356 (C.A.A.F. 2008); United States v. Wiesen, 56 M.J. 172, 174 (C.A.A.F. 2001) (citations omitted).

[8] United States v. Hilow, 32 M.J. 439, 442 (C.M.A. 1991).

[9] *Wiesen*, 56 M.J. at 177 (Crawford, J., dissenting) (citing Andrews v. Collins, 21 F.3d 612, 620 (5th Cir. 1994); Tinsley v. Berg, 895 F.2d 520, 527 (9th Cir. 1990); Person v. Miller, 854 F.2d 656, 664 (4th Cir. 1988)).

[10] 299 U.S. 123 (1936).

[11] *Id*.

[12] *Id*. at 133 (emphasis added). *See also* Clark v. United States, 289 U.S. 1, 9 (1933) ("Just as we would presume bias if the brother of the prosecutor were on a jury, we presume bias where a juror lies in order to secure a seat on the jury."); Dyer v. Calderon, 151 F.3d 970, 984 (9th Cir.), *cert. denied*, 525 U.S. 1033 (1998) ("Implied bias may indeed be the single *oldest* rule in the history of judicial review.") (emphasis in original) (internal citation omitted).

[13] *Wood*, 299 U.S. at 133.

[14] *Id*. at 131.

[15] *Id*. at 149–50.

[16] *Id*. at 130–31.

[17] *Id*. at 131. A bonus certificate was a financial loan the federal government gave to returning veterans from World War I. *See* Editorial, *available at* http://www.u-s-history.com/pages/h1512.html (last visited Mar. 2, 2010).

[18] *Wood*, 299 U.S. at 130.

[19] *Id*. at 133.

[20] *Id*. at 134 ("The question here is as to implied bias, a bias attributable in law to the prospective juror regardless of actual partiality. The contention of the defendant is that there must be read into the constitutional requirement an absolute disqualification in criminal cases of a person employed by the government, a disqualification which Congress is powerless to remove or modify.").

the adoption of the Sixth Amendment.[21] The Court specifically recognized that at English common law, prospective jurors could be challenged on actual and implied bias grounds:

> Challenges at common law were to the array, that is, with respect to the constitution of the panel, or to the polls, for disqualification of a juror. Challenges to the polls were either "principal" or "to the favor," *the former being upon grounds of absolute disqualification*, the latter for actual bias.[22]

While the Court recognized the Constitution could require bias to be presumed as a matter of law in appropriate cases, it determined the facts in *Wood* did not rise to that level.[23] The Court held, "to impute bias as a matter of law to the jurors in question here would be no more sensible than to impute bias to all storeowners and householders in cases of larceny and burglary."[24]

The Supreme Court has reversed criminal convictions on implied bias grounds in only a handful of cases, and only when exceptional or unique factual circumstances justified its invocation. For example, in *Leonard v. United States*,[25] the Court held that prospective jurors who had heard the trial court announce the defendant's guilty verdict in the first trial should be automatically disqualified from sitting on a second trial on similar charges.[26] Defense counsel objected, but the trial judge overruled the objection.[27] Five jurors who had heard the verdict in the first case were allowed to sit as jurors in the second case, and Leonard was found guilty of transporting a forged instrument in interstate commerce.[28] Leonard's conviction was affirmed on initial appeal.[29] However, after the Supreme Court granted Leonard's petition for a writ of certiorari, the government reversed its position and conceded the jurors should have been absolutely disqualified from serving at the second trial.[30] The Supreme Court agreed, and found reversible error based on implied bias grounds.[31] The Court held that potential jurors who sit in the courtroom and hear a verdict returned against the defendant charged with a crime in a similar case immediately prior to the trial of another indictment against him should be automatically disqualified from serving at the second trial.[32] Thus, *Leonard* and *Wood* support the argument the Supreme Court has recognized the doctrine of implied bias as a constitutional procedural rule. However, while this debate continues, the Court has made clear that implied bias should only be used in extreme or exceptional factual circumstances to ensure a fair and impartial criminal trial.

The Supreme Court explicitly held implied bias should only be used in rare factual circumstances in the frequently cited case of *Smith v. Phillips*.[33] In *Smith*, the petitioner challenged his murder conviction after discovering that a juror had applied for a job at the prosecutor's office.[34] The district court found implied bias and granted the petitioner habeas relief.[35] However, the Supreme Court reversed, holding due process "does not require a new trial every time a juror has been placed in a potentially compromising

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[21] *Id*. at 137.

[22] *Id*. at 134–35 (emphasis added). The Court noted Blackstone recognized the doctrine of implied bias should be applied to exclude a prospective juror when:

> He is of kin to either party within the ninth degree; that he has been arbitrator on either side; that he has an interest in the cause; that there is an action pending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counselor, steward, or attorney, or of the same society or corporation with him.

Id. at 138 (citing Sir William Blackstone, *Commentaries on the Laws of England* 363 (3d ed. 1999)).

[23] *Id.* at 149–50 ("We think that the imputation of bias simply by virtue of governmental employment, without regard to any actual partiality growing out of the nature and circumstances of particular cases, rests on an assumption without any rational foundation."). *See also* Dennis v. United States, 339 U.S. 162 (1950). Dennis was convicted of criminal contempt for failing to appear before the Committee on UnAmerican Activities of the House of Representatives. *Id*. at 164. On appeal, as in *Wood*, Dennis argued the jury was impliedly biased against him because it was comprised primarily of employees of the United States Government. *Id*. at 164–65. The Court rejected Dennis's argument. *Id*. at 171–72. However, the Court never held that implied bias could not be found in more serious situations involving federal government employees. In his concurring opinion, Justice Reed wrote he understood "the Court's decision to mean that Government employees may be barred for implied bias when circumstances are properly brought to the Court's attention which convince the court that Government employees would not be suitable jurors in a particular case." *Id*. at 172–73.

[24] *Wood*, 299 U.S. at 149–50.

[25] 378 U.S. 544 (1964) (per curiam).

[26] *Id*.

[27] *Id*.

[28] *Id*.

[29] *Id*.

[30] *Id*. at 544–45. The Solicitor General filed a brief with the Court in which the Government conceded the procedure followed by the district court in selecting the jury was "plainly erroneous." *Id*.

[31] *Id*.

[32] *Id*. *See also* Willie v. Maggio, 737 F.2d 1372, 1379 (5th Cir.), *cert. denied*, 469 U.S. 1002 (1984) ("A juror is presumed to be biased when he or she is apprised of such inherently prejudicial facts about the defendant that the court deems it highly unlikely that the juror can exercise independent judgment, even if the juror declares to the court that he or she will decide the case solely on the evidence presented.") (citing *Leonard*, 378 U.S. at 544, United States v. Brown, 699 F.2d 704, 708 (5th Cir. 1983), and United States v. Haynes, 398 F.2d 980, 984 (2d Cir. 1968), *cert. denied*, 393 U.S. 1120 (1969)).

[33] 455 U.S. 209 (1982).

[34] *Id*. at 212.

[35] *See* Phillips v. Smith, 485 F. Supp. 1365, 1372–73 (S.D.N.Y. 1980).

situation. Were that the rule, few trials would be constitutionally acceptable."[36] The Court concluded voir dire and curative instructions from the trial judge are not infallible, and that it is impossible to shield jurors from every contact or influence that might theoretically affect their vote.[37] The Court also concluded due process means "a jury capable and willing to decide the case solely on the evidence before it, and a trial judge watching to prevent prejudicial occurrences from occurring and to determine the effect of such occurrences when they happen."[38] In her concurring opinion cited frequently by federal and state appellate courts, Justice O'Connor wrote separately "to express my view that the opinion does not foreclose the use of 'implied bias' in appropriate circumstances."[39] Discussing juror bias, Justice O'Connor keenly observed that determining whether a juror is biased or has prejudged a case is difficult because the juror could have an interest in concealing his own bias or because the juror may be unaware of it.[40] Justice O'Connor correctly pointed out the problem could be compounded when a charge of bias arises from juror misconduct, and not simply from attempts of third parties to influence a juror.[41] While Justice O'Connor concluded a post-conviction hearing would in most cases be adequate to determine whether a juror is biased, she made clear there would be some instances in which it would not, and that a finding of implied bias would be necessary to uphold an accused's Sixth Amendment right to an impartial jury.[42] However, Justice O'Connor also made clear those factual circumstances mandating a finding of per se implied bias would be rare.[43] Citing *Leonard* and *Dennis v. United States*,[44] Justice O'Connor wrote, "while each case must turn on its own facts, there are some *extreme situations* that would justify a finding of implied bias."[45] In fact, Justice O'Connor provided the following examples of the sort of extreme situations which would be needed to justify a finding of implied bias: (1) the juror is an actual employee of the prosecuting agency; (2) the juror is a close relative of one of the participants in the trial or the criminal transaction; and (3) the juror was a witness or somehow involved in the criminal transaction.[46]

Justice O'Connor's reasoning in *Smith* that implied bias should only be invoked in extreme situations was validated by the Court two years later in *McDonough Power Equipment, Inc. v. Greenwood*.[47] In *McDonough*, a prospective juror failed to respond affirmatively to a question during voir dire seeking to elicit information about previous injuries to members of the juror's immediate family that resulted in disability or prolonged pain.[48] In fact, the juror's son had sustained a broken leg as a result of an exploding tire.[49] Following judgment in favor of McDonough, Greenwood sought a new trial on the grounds of juror bias.[50] The Court rejected Greenwood's argument, holding an accused is entitled to fair trial, not a perfect one, and that "to invalidate the result of a three-week trial because of a juror's mistaken, though honest response to a question, is to insist on something closer to perfection than our judicial system can be expected to give."[51] The Court emphasized a trial represents an important investment of private and social resources, and that "it ill serves the important end of finality to wipe the slate clean simply to recreate the peremptory challenge process because counsel lacked an item of information which objectively he should have obtained from a juror on voir dire examination."[52] Thus, the Court held in order to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then

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[36] *Smith*, 455 U.S. at 217.

[37] *Id.*

[38] *Id.*

[39] *Id*. at 221 (O'Connor, J., concurring); *see also infra* Part III.

[40] *Id*. at 221–22 (O'Connor, J., concurring).

[41] *Id*. at 222 (O'Connor, J., concurring). In *Crawford v. United States*, 212 U.S. 183, 196 (1909), the Court also held:

> Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence, and it might exist in the mind of one (on account of his relations with one of the parties) who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence.

Id. at 196.

[42] *Smith*, 455 U.S. at 222 (O'Connor, J., concurring) ("In certain instances a hearing may be inadequate for uncovering a juror's biases, leaving serious question whether the trial court had subjected the defendant to manifestly unjust procedures resulting in a miscarriage of justice.").

[43] *Id.* (O'Connor, J., concurring).

[44] 339 U.S. 162, 172 (1950) ("None of our previous cases preclude the use of the conclusive presumption of implied bias in appropriate circumstances."). *See also Smith*, 455 U.S. at 223.

[45] *Smith*, 455 U.S. at 222 (O'Connor, J., concurring) (emphasis added).

[46] *Id*. In his dissent, Justice Marshall, joined by Justices Brennan and Stevens, wrote:

> I believe that in cases like this one, where the probability of bias is very high, and where the evidence adduced at a hearing can offer little assurance that prejudice does not exist, the juror should be deemed bias as a matter of law…. The right to a trial by an impartial jury is too important, and the threat to that right too great, to justify rigid insistence on actual proof of bias. Such a requirement blinks reality.

Id. at 231–32 (Marshall, Brennan, and Stevens, JJ., dissenting).

[47] 464 U.S. 548 (1984).

[48] *Id*. at 550.

[49] *Id*.

[50] *Id*.

[51] *Id*. at 555.

[52] *Id*.

show that a correct response would have provided a valid basis for a challenge for cause.[53] Five justices made it clear, as Justice O'Connor did in her concurrence in *Smith*, that a court could still find a juror to be impliedly biased and unable to sit for jury service regardless of the validity of his or her responses during voir dire or at a post-trial hearing.[54] At the same time, three of those five justices also made clear that implied bias should only be used in exceptional circumstances "to preserve Sixth Amendment rights."[55] Citing Justice O'Connor's concurring opinion in *Smith*, Justice Blackmun, joined by Justices O'Connor and Stevens, wrote:

> Regardless of whether a juror's answer is honest or dishonest, it remains within a trial court's option, in determining whether a jury was biased, to order a post-trial hearing at which the movant has the opportunity to demonstrate . . . *in exceptional circumstances*, that the facts are such that bias is to be inferred.[56]

Thus, the Supreme Court made clear in *McDonough* and *Smith* that implied bias should only be used in exceptional factual circumstances to ensure a fair and impartial criminal trial. Unfortunately, the Court failed to provide a comprehensive test for trial and appellate courts to determine when and how implied bias should be constitutionally applied, or define what constitutes "extreme circumstances" which justifies a finding of implied bias.[57] As a result, as discussed in Part III of this article, this failure has led to conflicting and unpredictable outcomes in federal and military appellate courts applying the implied bias doctrine.

III. Federal and Military Appellate Court Decisions Addressing Implied Bias

Since *Smith* and *McDonough*, federal circuit courts have "split on this issue"[58] as to whether implied bias even exists as a matter of law.[59] Regardless, following Justice O'Connor's concurrence in *Smith*, the circuit courts have found implied bias only in extreme or exceptional circumstances. For example, in *United States v. Scott*,[60] the Fifth Circuit, quoting Justice O'Connor's concurrence in *Smith*, presumed bias where the juror had failed to disclose during voir dire that his brother was a deputy in the sheriff's office that had investigated the case.[61] Similarly, in *Dyer v. Calderon*,[62] the Ninth Circuit found implied bias in a juror in a death penalty case who failed to disclose during voir dire that her brother was the victim of a murder performed in a manner similar to the defendant's alleged crime.[63] Further, the prosecutor in the case had previously prosecuted the person who murdered the juror's brother.[64] The court held,

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[53] *Id*. at 556.

[54] Citing Justice O'Connor's concurring opinion in *Smith*, Justice Blackmun, joined by Justices O'Connor and Stevens, wrote:

> I agree with the Court that the proper inquiry in this case is whether the defendant had the benefit of an impartial trier of fact. I also agree that, in most instances, the honesty or dishonesty of a juror's response is the best initial indicator of whether the juror in fact was impartial. I therefore join the Court's opinion, but I write separately to state that I understand the Court's holding not to foreclose the normal avenue of relief available to a party who is asserting that he did not have the benefit of an impartial jury. Thus, regardless of whether a juror's answer is honest or dishonest, it remains within a trial court's option, in determining whether a jury was biased, to order a post-trial hearing at which the movant has the opportunity to demonstrate . . . in exceptional circumstances, that the facts are such that bias is to be inferred.

Id. (Blackmun, J., concurring) (citing United States v. Smith, 455 U.S. 209, 221–24 (1982) (O'Connor, J., concurring)).

Justice Brennan, joined by Justice Marshall, concurred in the judgment, but wrote:

> For a court to determine properly whether bias exists, it must consider at least two questions: are there any facts in the case suggesting that bias should be conclusively presumed; and, if not, is it more probable than not that the juror was actually biased against the litigant. Whether the juror answered a particular question on *voir dire* honestly or dishonestly, or whether an inaccurate answer was inadvertent or intention, are simply factors to be considered in this latter determination of actual bias.

Id. at 558–59 (Brennan, J., dissenting).

[55] *Smith*, 522 U.S. at 224. Justice O'Connor added, "I read the Court's opinion as not foreclosing the use of implied bias in appropriate situations, and, therefore, I concur." *Id*. (O'Connor, J., concurring).

[56] *McDonough*, 464 U.S. at 556 (Blackmun, J., concurring) (citing *Smith*, 455 U.S. at 221–24 (O'Connor, J., concurring)).

[57] In his dissent in *Smith*, Justice Marshall applied a two-part test to determine implied bias: (1) the probability of bias is very high; and (2) the evidence adduced at a hearing will do little to assure the bias does not exist. *Id*. at 231 (Marshall, J., dissenting).

[58] Dyer v. Calderon, 151 F.3d 970, 995 (9th Cir. 1998) (O'Scannlain, J., dissenting).

[59] *See* Tinsley v. Borg, 895 F.2d 520, 527 (9th Cir. 1990) ("The Supreme Court has never explicitly adopted or rejected the doctrine of implied bias."); Andrews v. Collins, 21 F.3d 612, 620 (5th Cir. 1994) ("As an initial matter, we note that the Supreme Court has never explicitly adopted or rejected the doctrine of implied bias."). *See also* United States v. Wiesen, 56 M.J. 172, 177 (C.A.A.F. 2001) ("It is unclear whether the doctrine of implied bias even exists as a matter of law.") (Crawford, J., dissenting).

[60] 854 F.2d 697 (5th Cir. 1988).

[61] *Id*. at 699–700 ("This case presents us with a combination of the two means of proving juror bias, a juror (1) with connection to the circumstances in the case (2) whose express explanation of his failure to disclose that connection creates a legal presumption of bias or an "implied bias.").

[62] 151 F.3d 970 (9th Cir. 1998).

[63] *Id*. at 976–77.

[64] *Id*. *See also* Hunley v. Godinez, 975 F.2d 316 (7th Cir. 1992) (sustaining an implied bias claim after the jurors, who were in a burglary/murder case, had been deadlocked but then voted to convict after several of their rooms had been burglarized during the night at the hotel at which they were

"the facts here add up to that rare case where we must presume juror bias."[65] Additionally, in *Burton v. Johnson*,[66] the Tenth Circuit presumed bias where the juror, who was a victim of domestic abuse, sat in a murder trial in which the defense was battered-wife syndrome.[67]

At the same time, several federal circuits have refused to presume bias in a number of cases. For example, in *United States v. Haynes*,[68] the Second Circuit, citing *Wood*, refused to presume bias where seven jurors sat in appellant's trial and had been jurors in previous narcotics cases where the same government witnesses had testified.[69] In *Person v. Miller*,[70] the Fourth Circuit, quoting Justice O'Connor in *Smith*, refused to impute bias to prospective black jurors based on the fact the defendant was a white supremacist.[71] Thus, while circuit courts differ as to whether the Constitution or Supreme Court case law requires an implied bias procedural rule, they all agree it should be limited to rare or extreme circumstances. At one time, the same held true in military appellate courts, when the CAAF made clear to military judges that "challenges for implied bias should be invoked sparingly."[72] However, a critical distinction is that, unlike circuit courts, military courts have had to interpret and apply RCM 912(f)(1)(N).[73] In doing so, the CAAF has inexplicably parted ways with both its own precedent as well as that of its federal counterparts. As Judge Crawford correctly pointed out in her dissent in *United States v. Wiesen*,[74] "That implied bias be reserved for only the most exceptional circumstances seems to have been forgotten, or like some unfortunate aspects of our society, what used to be the exception has now become the rule."[75] In order to properly determine why the exception has now become the rule, it is necessary to re-trace the roots of the doctrine of implied bias in the military justice system.

The doctrine of implied bias first found its way into the military justice system in the 1917 *Manual for Court-Martial* (*MCM*).[76] Article of War 18 of the 1917 MCM stated members of a general or special court-martial could be challenged by the accused for cause stated to the court.[77] Additionally, chapter VIII, section I, paragraph 120, referred to Article of War 18 and noted, just as the Supreme Court did in *Wood* discussed *supra*, that at English common law prospective jurors could be challenged on actual and implied bias grounds.[78] It states "the various classes of challenges recognized at common law have been practically reduced in courts-martial practice to two, viz, (1) *principal* challenges, or those where the member must be excused upon proof of the ground for challenges as alleged; (2) *for favor*, where the court must decide whether the facts proved constitute cause to excuse the member."[79] As the Supreme Court recognized in *Wood*, "principal" challenges were based on grounds of implied bias or absolute disqualification, while "for favor" challenges were based on actual bias.[80] Further, in the 1917 MCM, chapter VIII, section I, paragraph 121(a), specifically lists grounds for principal or implied bias challenges, the majority of which can now be found in RCM 912(f)(1).[81] However, for unexplained reasons, the implied bias grounds

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sequestered); United States v. Gonzalez, 214 F.3d 1109 (9th Cir. 2000) (finding implied bias when a juror gave equivocal answers about whether her recent divorce and family breakup-occasioned by her ex-husband's use of cocaine, the same drug involved in the trial-would affect her judgment adversely).

[65] *Dyer*, 151 F.3d at 984.

[66] 948 F.2d 1150 (10th Cir. 1991).

[67] *Id*. at 1159 ("We find that the record establishes that Mrs. G's silence and the inherently prejudicial nature of her own family situation deprived Mrs. Burton of her right to a fair trial by an impartial jury.").

[68] 398 F.2d 980 (2d Cir. 1968), *cert. denied*, 393 U.S. 1120 (1969).

[69] *Id*. at 985–86 ("We agree that there is an opportunity for a juror to be prejudiced when he hears the same witness in two different cases, but if the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day.") (internal citation omitted).

[70] 854 F.2d 656 (4th Cir. 1988).

[71] *Id*. at 664. The Court stated:

> Miller is suggesting that no black citizen could ever serve as an impartial juror in an action involving a white supremacist, group or individual, as a party. But this suggestion extends beyond the boundaries of class membership and proffers the imputation of bias to all those groups or individuals offended by the white supremacy movement. The appropriate way to raise such a wide ranging and generalized claim of bias is by showing actual bias, not by invoking the doctrine of implied bias.

Id.

[72] United States v. Strand, 59 M.J. 455, 458 (C.A.A.F. 2004).

[73] *See supra* note 3.

[74] 56 M.J. 172 (C.A.A.F. 2001).

[75] *Id*. at 179 (Crawford, J., dissenting).

[76] A MANUAL FOR COURTS-MARTIAL COURTS OF INQUIRY AND OTHER PROCEDURE UNDER MILITARY LAW, UNITED STATES ARMY (1917) [hereinafter 1917 MCM].

[77] *Id*. Art. of War 18.

[78] *Id*. ch. VIII, § I, para. 120.

[79] *Id*. (emphasis in original).

[80] 299 U.S. 123, 134–35 (1936).

[81] 1917 MCM, *supra* note 76, ch. VIII, § I, para. 120(a). It states:

> In the following cases a member will be excused when challenged upon proof of the fact as alleged: 1) that he sat as a member of a court of inquiry which investigated the charges; 2) that he has personally investigated the charges and expressed an opinion thereon, or that he has formed a positive and definite opinion as to the guilt or innocence of the accused; 3) that he is the accuser; 4) that he will be a witness for the prosecution; 5) that upon a rehearing of the case he sat as a member on the former trial; 6) that, in the case of the trial of an officer, the member will be promoted by the dismissal of the accused; 7) that he is related by blood or marriage to the accused; and 8) that he has a declared enmity against the accused.

for challenge were amended in the 1928 MCM to include "any other facts indicating that he should not sit as a member in the interest of having the trial and subsequent proceedings free from substantial doubt as to legality, fairness, and impartiality."[82] The lack of knowledge for the reasons behind the change is unfortunate because this language is practically verbatim to RCM 912(f)(1)(N), which states "a member shall be excused for cause whenever it appears that the member should not sit in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality."[83] Further, some of the other implied bias grounds for challenge contained in the 1928 MCM still exist and are contained in RCM 912(f) and its discussion.[84] With so little guidance as to the reasons behind why RCM 912(f)(1)(N) was created, it was left up to the appellate courts to decide what it would truly mean.

The CAAF first recognized the doctrine of implied bias in *United States v. Deain*.[85] In *Deain*, the president of the panel was assigned the duty of preparing and submitting to the convening authority fitness or efficiency reports on the other permanent members of the court.[86] He also made it a practice to show the reports to the members involved.[87] During voir dire, these members asserted their promotion status was so hopeless that an unfavorable report could not materially affect them.[88] The president of the panel also stated that he was familiar with the presumption of innocence, but that he did not recognize it as a constitutional right because he believed that persons in the military services had no constitutional rights.[89] Rather, he believed the presumption existed in military law because Congress had chosen to grant it to an accused.[90] Further, he was also heard to have stated "the accused must be guilty of something" because charges were referred for trial.[91] Defense counsel challenged the member for cause under chapter XI, paragraph 62f(1) of the 1951 MCM which stated "the challenged law officer or member is not eligible to serve as law officer or member, respectively, on courts-martial."[92] Defense counsel's challenge for cause was denied.[93] The Court of Military Appeals (CMA) reversed appellant's conviction and dismissed the charges.[94] First, the CMA held the panel member's eligibility to serve was not the issue because the president of the court was an officer on active duty and had been duly appointed as a member of the court by competent authority; he was not the accuser or a witness for the prosecution; and he had not acted as investigating officer or counsel in the same case.[95] However, while defense counsel referred to the wrong subdivision of the *Manual* to describe the category of challenge, the CMA held "no doubt exists as to his true intent."[96] The CMA concluded defense counsel challenged the member under paragraph 62f(13), which provided for challenge "in the interest of having the trial and subsequent proceedings free from substantial doubt as to legality, fairness, and impartiality."[97] The Court went on to hold that the president of the panel should have been excused under

[82] A MANUAL FOR COURTS-MARTIAL, UNITED STATES ARMY ch. XII, para. 58e (1928) [hereinafter 1928 MCM]. I could find no indication in either the 1928 MCM or any other relevant publication as to the reasoning behind why this language was added other than the Introduction to the 1928 MCM which states:

> The Articles of War of 1920 introduced many changes in the procedure before courts-martial. In 1923, feeling that sufficient time had elapsed to permit of fair observation, suggestions were invited from all commanding officers with a view to the correction of such defects as experience has disclosed. Constructive criticisms and suggestions were received from practically every command in the Army. They were especially valuable as coming from those most intimately associated with carrying the articles into present execution. These suggestions were carefully studied, and the present edition of the manual is to some extent a composite of all the ideas so received.

Id. intro.

[83] MCM, *supra* note 3, R.C.M. 912(f)(1)(N).

[84] *Compare* 1928 MCM, *supra* note 82, ch. XII, para. 58e, *with* MCM, *supra* note 3, R.C.M. 912(f)(1), discussion. The examples provided in the 1928 MCM, ch. XII, para. 58e include:

> That he will be a witness for the defense; that he testified or submitted a written statement on the investigation of the charges, unless at the request of the accused; that he has officially expressed an opinion as to the mental condition of the accused; that he is a prosecutor as to any offense charged; that he has a direct personal interest in the result of the trial; that he is in any way closely related to the accused; that he participated in the trial of a closely related case; that he is decidedly hostile or friendly to the accused; that not having been present as a member when testimony on the merits was heard, or other important proceedings were had in the case, his sitting as a member will involve an appreciable risk of injury to the substantial rights of an accused, which risk will not be avoided by a reading of the record.

Id.

[85] 17 C.M.R. 44 (C.M.A. 1954).

[86] *Id*. at 47–48.

[87] *Id*. at 44, 48.

[88] *Id*.

[89] *Id*. at 48.

[90] *Id*.

[91] *Id*.

[92] MANUAL FOR COURTS-MARTIAL, UNITED STATES ch. XI, para. 62f(1) (1951) [hereinafter 1951 MCM].

[93] *Deain*, 17 C.M.R. at 49.

[94] *Id*.

[95] *Id*. (internal citations omitted).

[96] *Id*.

[97] *Id*.

these grounds.[98] Further, in his concurring opinion, Judge Latimer touched on the reasons why the implied bias doctrine exists in military law, stating "there are certain matters found in this record which cast such doubt on the validity of the findings and sentence that no appellate court could find reasonably that this accused was granted a fair trial within the letter or spirit of the Code."[99]

The CAAF re-affirmed the implied bias doctrine in *United States v. Harris*.[100] In *Harris*, the president of the panel wrote or endorsed the fitness reports of three other members of the court.[101] He also worked with two of the victims of appellant's larcenies, and talked about these larcenies with the victims before the trial.[102] Additionally, he had an official interest in discouraging larcenies like the ones appellant had committed by virtue of his position.[103] The CAAF held the military judge erred in denying defense counsel's challenge for cause by relying solely on the panel member's disclaimers during voir dire, and that the military judge should have presumed bias based on these factors.[104] First, the court found "such a challenge raises disturbing questions not only as to the existence of actual bias against appellant by the challenged member but also as to the perception of fairness which reasonable men would draw from his sitting on this court."[105] Second, echoing the Supreme Court justices' concurrences in *Smith*, the court noted that where circumstances are present which raise "an appearance of evil" in the eyes of disinterested observers, sincere declarations of impartiality are insufficient by themselves to "ensure legal propriety."[106] Third, the CAAF concluded the military judge was "not free as a matter of military law to ignore these facts and circumstances in reaching her decisions simply because she found the member's disclaimer sincere . . . we find her decision erroneous as a matter of law on the question of implied bias."[107]

Harris began the real confusion surrounding the standard of review for implied bias cases in the military. On the one hand, the CAAF talked about implied bias in terms of the perception of fairness from the perspective of "reasonable men."[108] On the other hand, the CAAF also linked appellate review of implied bias cases to "an *appearance* of evil in the eyes of disinterested observers."[109] Thus, the CAAF put forward two different standards of review for implied bias challenges. The first standard was based on whether the average "reasonable" person in the challenged member's position would be biased against the accused based on all of the facts presented. Indeed, the Court remarked, "all three judges of the Court of Military Review implied that as reasonable persons they might have decided this challenge for cause differently under the same facts and circumstances which faced the trial judge."[110] The second standard was based on the "appearance of evil" or "public's perception" of the military justice system were the challenged member allowed to sit on the panel.[111] However, the Court never cited any supporting authority for its use of the "appearance of evil" language.

Thus, the CAAF in *Harris* accomplished two things. First, the Court followed *Deain* and gave notice to military justice practitioners that implied bias can be used to enforce a military accused's constitutional and regulatory right to a fair and impartial panel.[112] Second, the Court put out two competing and different standards of review to address implied bias challenges, with the amorphous public perception of the military justice system ultimately winning out. As discussed more below, this inevitably led to a series of confusing and unpredictable decisions in implied bias cases at the CAAF "in an on-going attempt to explain the

[98] *Id*. at 53. *See also id*. at 49 ("An accused is still entitled to have his guilt or innocence determined by a jury composed of individuals with a fair and open mind.").

[99] *Id*.

[100] 13 M.J. 288 (C.M.A. 1982). *See also* United States v. Daulton, 45 M.J. 212, 217 (C.A.A.F. 1996) (acknowledging that *Harris* "recognized the concept of implied bias"). However, "in support of his implied bias argument, Judge Fletcher relied on *United States v. Deain*, 17 C.M.R. 44 (C.M.A. 1954) and *Irvin v. Dowd*, 366 U.S. 717 (1961). These two cases reinforced the basic criminal law concept that an accused is entitled to be judged by one who is impartial, that is, one who has an open mind and is fair." United States v. Wiesen, 56 M.J. 172, 179 (C.A.A.F. 2001).

[101] *Harris*, 13 M.J. at 292.

[102] *Id*.

[103] *Id*. at 290 (As part of his regularly assigned duties, the President of the panel served as the chairman of a base resources protection committee. The committee was responsible for surveying areas of the base that had personal or government property losses.).

[104] *Id*. However, the court made the important point that "while a military judge is certainly not bound by such assurances, in a given case they may be highly persuasive." *Id*. at 293.

[105] *Id*. at 291 (citing United States v. Deain, 17 C.M.R. 44 (C.M.A. 1954); United States v. Haynes, 398 F.2d 980, 983–86 (2d Cir. 1968), *cert. denied*, 393 U.S 1120 (1969)).

[106] *Id.* at 292 (citing *Deain*, 17 C.M.R. at 53).

[107] *Id*. (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES ch. XI, para. 62f (13) (1969) [hereinafter 1969 MCM] (stating a military judge must also consider "any other facts indicating that he should not sit as a member. . . . in the interest of having the trial and subsequent proceedings free from substantial doubt as to legality, fairness, and impartiality"). Additionally, the Analysis to RCM 912 (f)(1) specifically states "subsection (1) is based on Article 25 and paragraph 62f of MCM, 1969 (Rev.)." Thus, this language as a grounds for challenge for cause, which first appeared in the 1928 MCM, was carried forward to all subsequent *MCM*s and is presently codified in RCM 912(f)(1).

[108] *Id*. at 291.

[109] *Id*. at 292 (emphasis added).

[110] *Id*. n.4.

[111] *Id*. at 291.

[112] "As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel." United States v. Wiesen, 56 M.J. 172, 174 (C.A.A.F. 2001). *But see* United States v. Porter, 17 M.J. 377 (C.A.A.F. 1984) (Court held the fact that trial counsel and court member ran together did not constitute grounds for removing court member for implied bias.).

fundamentals of implied bias in challenges for cause,"[113] and is one the main reasons why the current standard of review needs to be changed.

IV. Recent CAAF Decisions Addressing Implied Bias

A close examination of recent CAAF cases addressing implied bias reveals an amorphous, confusing, and impractical standard of review to implied bias challenges which needs to be changed. Under the current appellate framework, appellate courts give military judges, "great deference when deciding actual bias challenges because it is a question of fact, and the judge has observed the demeanor of the challenged member."[114] However, the military judge is somehow afforded less deference for implied bias challenges despite the fact he or she has observed the very same challenged member.[115] The reason for the difference given by the CAAF is because implied bias is objectively "*viewed through the eyes of the public, focusing on the appearance of fairness*."[116] As such, implied bias challenges are reviewed under an amorphous "de novo plus" standard, that is, "less deferential than abuse of discretion but more deferential than de novo."[117] Even more confusing is the fact that "a military judge who addresses implied bias by applying the liberal grant mandate on the record will receive more deference on review than one that does not."[118] Thus, despite the fact appellate courts never observe the demeanor of a challenged member as opposed to the military judge, the court nonetheless: (1) gives *less* deference to the military judge on an implied bias challenge; (2) gives *even less* deference if they fail to address the liberal grant mandate on the record; and (3) conducts its review based on the public's perception of the military justice system somewhere between de novo and abuse of discretion. This standard of review is too amorphous, confusing, and impractical for military justice practitioners. A closer examination of recent decisions by the CAAF overturning convictions on implied bias grounds supports this argument.

In *United States v. Bragg*,[119] the CAAF used this amorphous and confusing standard of review to set aside the findings and sentence on implied bias grounds.[120] In *Bragg*, appellant was a Marine recruiter who had been charged with raping two female high school students, as well as committing other inappropriate acts.[121] During voir dire, one member, Lieutenant Colonel (LtCol) W, volunteered that he had learned information about the case outside of the trial proceedings.[122] Lieutenant Colonel W stated that in his former role as the deputy assistant chief of staff for recruiting, he "usually" read the relief for cause (RFC) packets that would have been submitted for any recruiters accused of misconduct under his jurisdiction.[123] While he lacked specific memory of most of the particulars of the case, LtCol W was able to recall several facts, including the nature of the offense, the general identity of the victim, and investigatory measures undertaken by the police.[124] Lieutenant Colonel W stated that he was unsure whether he had gained his knowledge of the case through reading the RFC packet or through reading the newspaper.[125] However, after recalling what he knew of the case, he later stated, "so, based off that, I believe I read the investigation as opposed to reading the newspaper accounts and all that kind of stuff."[126] When asked whether he would have made a recommendation on the case, LtCol W equivocated, then stated, "I probably would have recommended relief if it had come up in front of me."[127] However, LtCol W also stated he could be impartial in sitting as a member of appellant's court-martial.[128]

Defense counsel challenged LtCol W for cause, but the military judge denied defense counsel's challenge, specifically 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.[129] However, despite the fact the military judge followed the CAAF's guidance and made explicit findings on the record, the court *still* set aside the findings and sentence on implied bias grounds.[130] The CAAF found that a member of the public would nonetheless somehow have *substantial* doubt that it was fair for LtCol W to sit on a panel because he had *likely* already reached a judgment as to whether the charged misconduct occurred.[131] The court also

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[113] Major Charles S. Neill, *There's More to the Game than Shooting: Appellate Court Coaching of Panel Selection, Voir Dire, and Challenges for Cause*, ARMY LAW., Mar. 2009, at 72.

[114] United States v. Napolitano, 53 M.J. 162, 166 (C.A.A.F. 2000).

[115] *Id*.

[116] United States v. Dale, 42 M.J. 384, 386 (C.A.A.F. 1995) (emphasis added).

[117] United States v. Downing, 56 M.J. 419, 422 (C.A.A.F. 2002).

[118] United States v. Clay, 64 M.J. 274, 277 (C.A.A.F. 2007) ("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.") (citation and quotation marks omitted).

[119] 66 M.J. 325 (C.A.A.F. 2008).

[120] *Id*. at 327.

[121] *Id*. at 326.

[122] *Id*.

[123] *Id*.

[124] *Id*.

[125] *Id*.

[126] *Id*.

[127] *Id*.

[128] *Id*.

[129] *Id*.

[130] *Id*. at 328.

[131] *Id*.

concluded the perception of unfairness is "compounded" when that member has *likely* reached such a conclusion based on information gained prior to trial.[132] However, the problem with the decision in *Bragg* is that military justice practitioners have no idea how much deference the court gave to the military judge, who put his observations and findings on the record. In other words, it is impossible to understand in clear terms, let alone apply, a "less than abuse of discretion but more than de novo" standard of review to implied bias challenges. In reality, as Judge Crawford correctly predicted in her dissent in *United States v. Rome*[133]: "this subjective 'I know it when I see it' approach to the theory of implied bias by appellate courts can lead to inconsistent results, which leaves the bench and bar without clear guidelines."[134]

This confusing "subjective public perception"[135] standard of review was also applied by the CAAF in *United States v. Townsend*,[136] only this time the court rendered a unanimous decision *rejecting* a member challenge on implied bias grounds.[137] In *Townsend*, appellant was convicted of attempted unpremeditated murder and reckless endangerment.[138] On appeal, appellant argued the military judge abused his discretion by failing to grant appellant's challenge to Lieutenant (LT) B on the grounds of implied bias.[139] During voir dire, LT B indicated he had taken the "Non-Lawyer Legal Officer Course" at the Naval Justice School where he received "just basics" on legal defenses which included the concept of self-defense.[140] At the time of trial, LT B was enrolled in a criminal law class as a night law student.[141] Lieutenant B stated he wanted to become a prosecutor to "put the bad guys in jail," and "keep the streets safe."[142] Nonetheless, LT B stated that he was not biased towards the Government's case and that he could "absolutely" set aside anything he may have learned elsewhere and follow the instructions as given by the military judge.[143] Following up on questions about why LT B wanted to be a prosecutor, defense counsel asked LT B, "What are your opinions of defense counsels?"[144] Lieutenant B responded that he had a "mixed view."[145] Specifically, LT B had high regard for military defense counsel who were military officers and individuals of high ethical and moral standards.[146] However, LT B had "[less respect] for some of the ones you see on TV, out in the civilian world."[147] Lieutenant B also stated his father, with whom he was close, was a member of law enforcement community and, as a result, LT B had a "healthy respect for law enforcement, and people in authority,"[148] adding he would hold the testimony of law enforcement personnel in higher esteem than other witnesses.[149] However, despite LT B's personal relationship and favoritism towards law enforcement and professional desire to put bad guys in jail, the CAAF concluded there was *no* implied bias concern because 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 [appellant] received something less than a court-martial of fair and impartial members."[150] Further, the court came to its conclusion despite giving *less* deference to the military judge because he failed to address the liberal grant mandate on the record.[151]

If the concern behind the implied bias doctrine is the public's perception of the military justice system, then it is almost impossible to reconcile its application in *Bragg* and *Townsend*. In each case, the military judge made findings on the record concerning the demeanor and credibility of the challenged member.[152] Further, as mentioned above, the military judge in *Townsend* was given less deference because he failed to address the liberal grant mandate.[153] Yet, under this analytical framework, the CAAF held an outside observer would not have substantial doubt about the legality, fairness, or impartiality of the court-martial with a challenged member sitting on the panel who is clearly "pro law enforcement" or "pro-prosecution," but would have substantial doubt if he had some knowledge or recollection of the facts of the case. Judge Baker even highlighted this

[132] *Id*.

[133] 47 M.J. 467 (C.A.A.F. 1998).

[134] *Id*. at 472.

[135] *Id*.

[136] 65 M.J. 460 (C.A.A.F. 2008).

[137] *Id*. at 462.

[138] *Id*. at 461.

[139] *Id*. at 462.

[140] *Id*.

[141] *Id*.

[142] *Id*.

[143] *Id*.

[144] *Id*.

[145] *Id*.

[146] *Id*.

[147] *Id*. This reference to television lawyers arose from the fact that Lieutenant B was a regular viewer of the television show *Law and Order*. *Id*.

[148] *Id*.

[149] *Id*. Lieutenant B responded that he would try to be objective about everything, but that if he had a "gut decision" to make, "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." *Id*.

[150] *Id*. at 465.

[151] *Id*. at 464 ("The ruling denying the challenge of LT B did not reflect whether he considered either implied bias or the liberal grant rule. Therefore, we accord less deference to his ruling than we would to one which reflected consideration of implied bias in the context of the liberal grant mandate.") (internal citation omitted).

[152] *Id*. at 463; United States v. Bragg, 65 M.J. 325, 326 (C.A.A.F. 2008).

[153] *Townsend*, 65 M.J. at 464.

exact point concerning the existing confusing nature of appellate review of member challenges in his concurring "dubitante"[154] opinion in *Townsend* when he wrote that "appellate review of member cases is an ungainly, if not impractical, tool to uphold and reinforce the importance of RCM 912."[155] Judge Baker made his position clear in the first sentence of his concurring opinion: "[T]he liberal grant mandate exists for cases like this."[156] To Judge Baker, while the military judge did not abuse his discretion by rejecting the implied bias challenge, he would have granted it in the military judge's position: "In my view, this case presented an easy trial level call to dismiss the member and avoid any issues of implied bias on appeal."[157] However, Judge Baker's positions are irreconcilable from an appellate perspective. On the one hand, Judge Baker concluded the military judge did not err, but on the other hand he also concluded the judge should have granted the challenge on implied bias grounds. In reality, Judge Baker's concurring opinion in *Townsend* reads as a dissent, and reflects why a change in the standard of review to implied bias challenges is needed.

The confusing and impractical nature of the current standard of review to implied bias challenges was also shown in *United States v. Elfayoumi*,[158] where the CAAF rejected an implied bias challenge when the facts actually supported the conviction being overturned on implied bias grounds. In *Elfayoumi*, appellant was convicted of forcible sodomy, assault and battery, and three specifications of indecent assault against other men.[159] The indecent assault specifications were based on touching other men while watching pornography.[160] During voir dire, Major (MAJ) G stated he had strong moral and religious objections to homosexuality.[161] When defense counsel asked MAJ G to explain, he stated: "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."[162] MAJ G also stated he had a moral aversion to pornography.[163] Defense counsel challenged MAJ G for cause, but the military judge denied the defense request.[164] As in *Townsend*, the CAAF upheld the military judge's decision to deny defense counsel's challenge against MAJ G, despite the fact the judge failed to address the liberal grant mandate.[165] The court held:

> It would not be unusual for members to have strongly held views about lawful conduct involving sex or pornography. Indeed, in today's society it will be hard to find a member who does not hold such views, one way or another. . . . 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.[166]

Thus, the CAAF had no issue with the member's strong moral and religious objections to homosexuality and pornography, or the judge's repeated questioning, even though the military judge never differentiated between actual or implied bias nor discussed the liberal grant mandate.[167] Under these circumstances, it is extremely difficult, if not impossible, to read *Bragg*, *Townsend*, and *Elfayoumi* in concert with each other.[168] Indeed, these cases are but three examples of the lack of definitive guidance to military judges as to what the legal parameters are in an implied bias analysis which results in inconsistent and unpredictable outcomes on appeal.[169] Judge Crawford correctly highlighted this point in her dissent in *United States v. Rome*,[170] when she remarked: "[W]hat are the parameters of the majority's implied-bias rule? How is it to be applied by the trial judge? I suggest that the majority's invocation of the implied-bias theory is too vague to be workable."[171]

In protecting a military accused's constitutional and regulatory right to a fair and impartial panel, the CAAF has improperly shifted the focus from the alleged bias of the member himself to the public's perception of the military

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[154] Dubitante is a latin word meaning "having doubts." *See* Dictionary.com, *available at* http://dictionary.reference.com/browse/dubitante (last visited Mar. 4, 2010). It is used by judges to express doubt about [object] but does not dissent from a decision reached by a court. *Id*.

[155] *Townsend*, 65 M.J. at 467.

[156] *Id*. at 466.

[157] *Id*. at 467.

[158] 66 M.J. 354 (C.A.A.F. 2008).

[159] *Id*. at 355.

[160] *Id*.

[161] *Id*.

[162] *Id*.

[163] *Id*.

[164] *Id*. at 356.

[165] *Id*. at 356, 358.

[166] *Id*. at 357.

[167] *Id*. In *Townsend*, the court also concluded that extensive rehabilitative questioning could be grounds for an implied bias challenge: "There is a point at which numerous efforts to rehabilitate a member will themselves create a presumption of unfairness in the mind of a reasonable observer." United States v. Townsend, 65 M.J. 460, 465 (C.A.A.F. 2008).

[168] Neill, *supra* note 113, at 89 ("Looking at all three implied bias cases from the CAAF's last term, it is difficult to read the cases in concert.").

[169] United States v. Wiesen, 26 M.J. 172 (C.A.A.F. 2001) ("A subjective 'I know it when I see it approach to the theory of implied bias by appellate courts can lead to inconsistent results, which leaves the bench and bar without clear guidelines."); Neill, *supra* note 113, at 90 ("Perhaps most important, the CAAF suggested that implied bias is a fluid concept that may yield disparate results.").

[170] 47 M.J. 467 (C.A.A.F. 1998) (Crawford, J., dissenting).

[171] *Id*. at 471 (Crawford, J., dissenting).

justice system. In doing so, military justice practitioners are forced to determine implied bias under RCM 912(f)(1)(N) on an "ad hoc" basis with zero guidance as to when the public would have "substantial doubt" about the court-martial's legality, fairness, or impartiality.[172] As discussed *supra*, the language from RCM 912(f)(1)(N) is rooted in the English common law "principal" challenge which disqualified prospective jurors as a matter of law based on the individual voir dire responses and/or their relationship to the case. However, this absolute disqualification was never based on the "public's perception" of the English judicial system if the challenged member were to sit on the jury. Rather, it was designed to guarantee the individual's right to a fair and impartial jury by preventing the biased juror from judging his guilt or innocence. Further, there is no written documentation supporting the position that the public's perception of the military justice system was ever a consideration when RCM 912(f)(1)(N)'s language was added to the 1928 MCM.[173] Additionally, there is no evidence it was ever a consideration when the language remained in all subsequent versions of the *MCM* and was ultimately codified in the 1951 MCM. Rather, jury disqualification at common law, upon which RCM 912(f)(1)(N) derives, focused on the prospective member's bias and its potential effect on the accused's right to a fair and impartial jury.

In reality, the CAAF has "read in" the public's perception of the military justice system in interpreting RCM 912(f)(1)(N).[174] Judge Crawford correctly noted this fact in her dissent in *Wiesen* that "unlike other courts, the majority finds that implied bias is an issue of public perception and the appearance of fairness in the military justice system, not one of individual court member disqualification based on that member's bias."[175] This is unfortunate because the CAAF, like other federal circuit courts, reviewed implied bias challenges under RCM 912(f)(1)(N) based on whether a similarly situated member would be biased, and not the public's perception of the military justice system.[176] However, inexplicably, the court's implied bias analysis slowly but gradually shifted from a focus on the panel member's alleged bias or partiality to the public's perception of the military justice system. Regardless of when exactly this shift occurred, it is now complete.[177]

I propose reversing course and returning appellate review of implied bias challenges to the following simple but more practical and realistic standard: "Implied bias exists when, regardless of an individual member's disclaimer of bias, most people in the same position would be prejudiced [i.e., biased]."[178] Returning appellate review to whether an average person, similarly situated, would be biased creates a more realistic and practical approach, is a concept widely understood by military justice practitioners, and will bring greater certainty and uniformity of decision to the military justice system. At the outset, there is no disagreement that the standard of review should not be based solely on the prospective panel member's responses. However, beyond that, the CAAF has left the military justice system in the dark concerning what standard to apply in

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[172] Judge Baker directly addressed this point in *Wiesen* which was raised by Judge Crawford in her dissent in *Rome*. Writing for the majority, Judge Baker remarked:

> The dissent in *Rome* argued that this Court has adopted a Justice Potter Stewart—'I know it when I see it' standard when it comes to implied bias . . . . Whether one agrees with appellant that the panel would constitute a "brigade staff meeting" or not, we have no doubt that "viewed through the eyes of the public," serious doubts about the fairness of the military justice system are raised when the senior member of the panel and those he commanded or supervised commanded a two-thirds majority of members that alone could convict the accused. This is not "knowing it when you see it," or appellate judges attempting to extrapolate "public perceptions" from the bench. This is a clear application of law to fact, and illustrates well why this court recognizes a doctrine of implied bias, as well as one of actual bias, in interpreting RCM 912.

Id. at 175-177; *but see* United States v. Minyard, 46 M.J. 229, 235 (C.A.A.F. 1997) (Crawford, J., dissenting) ("As I warned in [*United States v. Dale*, 42 M.J. 384, 386-88] 'The Court seems to be establishing a *per se* rule against law enforcement personnel sitting as court members. Now a majority has extended that rule to spouses of law enforcement agents. Where goest thou?'").

[173] 1928 MCM, *supra* note 82, ch. XII, para. 58e.

[174] *See* United States v. Dale, 42 M.J. 384, 386 (C.A.A.F. 1995) ("RCM 912(f)(1)(N) provides that a court member should not sit where his service would raise 'substantial doubt' on the 'legality, fairness, and impartiality' of the proceedings. The focus of this rule is on the perception or appearance of fairness of the military justice system."). However, the CAAF cites no authority in support of its position that the focus of RCM 912(f)(1)(N) is on the public's perception of the military justice system.

[175] United States v. Wiesen, 56 M.J. 172, 179 (C.A.A.F. 2001) (Crawford, J., dissenting). Judge Crawford added:

> In the two decades that this Court has wrestled with the doctrine of implied bias, the focus of this Court has shifted from examining whether an average person, sitting in the position of the court member in controversy, would be fair and open-minded, to a concern about the impartiality of our military judicial system in the eyes of the public at large. Justice O'Connor's admonition in *Smith v. Phillips*, 455 U.S. 209, 222 (1982) (O'Connor, J., concurring), that implied bias be reserved for only the most exceptional circumstances seems to have been forgotten, or like some unfortunate aspects of our society, what used to be the exception has now become routine.

Id. (Crawford, J., dissenting) (internal citations omitted).

[176] *See* United States v. Deain, 17 C.M.R. 44, 53 (C.M.A. 1954).

[177] *Wiesen*, 56 M.J. at 175 ("While this Court's application of the implied bias may evolve with case law, at its core remains a concern with public perception and the appearance of the military justice system.").

[178] United States v. Napolitano, 53 M.J. 162, 167 (C.A.A.F. 2000) (citation and internal quotations omitted).

determining when the public would have this substantial doubt.[179] Returning appellate review to whether an average person, similarly situated, would be biased will eliminate this problem entirely. Further, it will also eliminate the CAAF's current implied bias analysis approach of creating per se rules for challenges for cause that is solely within the province of the Executive or Legislative Branches to decide. Senior Judge Sullivan summed up this argument the best in his dissenting opinion in *Wiesen*:

> The majority's holding in this case creates new law, and it is law which Congress or the President should make, not the judiciary. . . . Congress has been aware that, for years, commanders have sat on panels with their subordinates. Congress could have prohibited this situation by law but failed to do so. A court should not judicially legislate when Congress, in its wisdom, does not.[180]

Senior Judge Sullivan correctly added that, "RCM 912(f)(1)(N) does not contemplate mandatory exclusion rules such as that fashioned by the majority. . . . instead it calls for discretionary judgment by the trial judge, based on all of the circumstances of the case."[181] My proposal will allow the judge to do just that.

I also propose Congress amend Article 41(a), UCMJ, such that a military judge's denial of a challenge for cause on actual or implied bias grounds is reviewed for an abuse of discretion. As discussed *supra*, the current standard of review is too confusing and unworkable for military justice practitioners, especially at the appellate level. Further, the CAAF in fact used to apply a *clear* abuse of discretion standard when reviewing implied bias cases. In *Deain*, the CMA actually adopted a clear abuse of discretion standard for military appellate courts to apply when reviewing implied bias challenges.[182] Chief Judge Quinn stated "there must be a clear abuse of discretion in resolving the conflict before an appellate tribunal, which lacks the power to reweigh the facts, will reverse a decision."[183] However, without explanation, the court slowly changed the standard of review for implied bias cases from "clear" abuse of discretion to somewhere less than an abuse of discretion but more than de novo.[184] Thus, while the CAAF openly stated it would give military judges great deference when reviewing implied bias decisions, in reality they wound up doing just the opposite. Judge Crawford summed up this point the best in *Rome*:

> In effect, the majority applies the liberal-grant mandate at the appellate level rather than at the trial level. While we have indicated that the implied-bias rule is to be rarely invoked, this Court has frequently applied the rule to set aside convictions in the last two terms. While at first blush the majority action may appear to be laudible in terms of public perception, it raises serious questions about the standards to be employed in the military justice system. Certainly, undermining these standards does not enhance public perception or confidence in the military justice system.[185]

The logical and practical solution is to return the implied bias standard of review to just an abuse of discretion. First, there is no significant difference between "clear" abuse of discretion and an abuse of discretion. Second, and more importantly, the change will bring greater certainty and uniformity to the military justice system, especially at the appellate level. An abuse of discretion

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[179] *See* Colonel Louis J. Puleo, *Bulletproof Your Trial: How to Avoid Common Mistakes that Jeopardize Your Case on Appeal*, ARMY LAW., Aug. 2008, at 64–66 ("The court, however, does not provide any specific guidance on the issue. Rather, *Clay* appears to invite a prophylactic approach to the issue.").

[180] *Wiesen*, 56 M.J. at 182 (Sullivan, S.J., dissenting).

[181] *Id*. at 183 (Sullivan, S.J., dissenting) (emphasis in original). In her dissent in *United States v. Rome*, 47 M.J. 467 (C.A.A.F. 1998), Judge Crawford stated "while the majority denies invoking the theory of implied bias to establish *per se* rules for challenges for cause, the result of its recent decisions appears to do just that." *Id*. at 471 (Crawford, J., dissenting) (emphasis in original). *See also* United States v. Smart, 21 M.J. 15, 20 (C.M.A. 1985) ("Prejudice must be suspected when most people in the same position would be prejudiced.") (internal citation omitted).

[182] *Deain*, 17 C.M.R. at 49. *See also Smart*, 21 M.J. at 19 ("There are few aspects of a jury trial where we would be less inclined to disturb a trial judge's discretion, absent clear abuse, than in ruling on challenges for cause in the empaneling of a jury.") (citing United States v. Ploof, 464 F.2d 116, 118-19 n.4 (2d Cir.), *cert. denied*, 409 U.S. 952 (1972)); *Wiesen*, 56 M.J. at 181 (Sullivan, J., dissenting) ("We have forgotten our observation in *Smart*."). *See generally* United States v. White, 36 M.J. 284 (C.M.A. 1993) (Court discussed clear abuse of discretion standard for actual and implied bias challenges.).

[183] *Deain*, 17 C.M.R. at 49 ("There must be a clear abuse of discretion in resolving the conflict before an appellate tribunal, which lacks the power to reweigh the facts, will reverse a decision.") (internal citations omitted).

[184] *See generally* United States v. Townsend, 65 M.J. 460 (C.A.A.F. 2008).

[185] *Rome*, 47 M.J. at 471. *See also* Puleo, *supra* note 179 at 53–55:

> Until the court provides definitive guidance, trial counsel should ensure that when a defense's challenge for cause is denied, the military judge applies the *Clay* analysis. Specifically, the military judge should recognize his duty to address the challenge under the implied bias standard and the court's liberal grant mandate. The military judge should state on the record what facts, other than the member's assurances of impartiality and the credibility of such assertions, he relied upon it determining that a member of the public, who is familiar with military justice matters, would not substantially doubt the fairness or impartiality of the court-martial given the members' presence on the panel.

Id. (emphasis in original).

standard of review will do away with the confusing "more deference" versus "less deference," or "more than de novo but less than abuse of discretion" implied bias standards military appellate courts currently use. Third, military judges will have a clear understanding that their decisions on member challenges are subject to an abuse of discretion standard regardless of the basis of the challenge. As such, this change will significantly improve the legal framework appellate courts use presently to address implied bias challenges.

V. Counterarguments: Maintaining the Status Quo or Liberally Granting Implied Bias Challenges

One counterargument to this proposal is to maintain the status quo and continue to apply the current standard of review to implied bias challenges. The supporting argument is that, while not perfect, the current standard of review is simply the product of the difficult yet necessary application of the implied bias doctrine to uphold a military accused's constitutional and regulatory right to a fair and impartial panel.[186] Indeed, the CAAF has acknowledged its struggle to define or agree what the scope should be: "[T]his Court has struggled to define the scope of implied bias, or perhaps just disagreed on what that scope should be."[187] However, this struggle does not mean the current standard of review for implied bias challenges isn't necessary. Moreover, this standard of review arguably derives from the creation of RCM 912(f)(1)(N). On the one hand, the common law principal challenge on which RCM 912(f)(1)(N) is based required the judge to make an implied bias determination based on the circumstances of the case. On the other hand, in the absence of definitive guidance to the contrary, it is the duty of judges to interpret and apply the law as written.[188] Rule for Court-Martial 912(f)(1)(N) states "A member shall be excused whenever it *appears* that the member should not sit in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality."[189] A reasonable interpretation of the word "appears" in RCM 912(f)(1)(N) could be as it appears to the public.

The strongest argument in support of the current implied bias standard of review is the importance of public perception of the military justice system given its differences with the civilian criminal justice system. In *United States v. Lavender*,[190] then Judge Effron emphasized this exact point, and did not agree with the majority opinion view that implied bias under RCM 912(f)(1)(N) required an "exceptional circumstance" as Justice O'Connor articulated in *Smith*.[191] Rather, Judge Effron described the future prevailing view of the court, namely that important differences between both systems justified a different standard for determining implied bias under RCM 912(f)(1)(N).[192] Judge Effron correctly pointed out that, while there are certain similarities between civilian jurors and court-martial panel members, there also are important differences.[193] For example, members of a court-martial panel are not randomly selected like civilian jurors, but are personally selected by the command.[194] Also, in contrast to the multiple peremptory challenges in most civilian jurisdictions, each side has only one peremptory challenge in a court-martial.[195] Further, military judges are required to apply the liberal-grant mandate to causal challenges to court-martial panel members.[196] Based on these differences, Judge Effron concluded that the military justice system should not adopt a standard of review in which the doctrine of implied bias would be rarely applied.[197] Admittedly, Judge Effron highlights important differences between the military and civilian criminal justice systems. However, contrary to Judge Effron's conclusion, they simply do not rise to the level justifying maintaining the current implied bias standard of review because it has become too amorphous and confusing in its application. Further, as discussed above, the Supreme Court's case law makes clear that the doctrine of implied bias should be "invoked sparingly."[198]

A second counterargument to the proposal is to amend RCM 912(f)(1)(N) to specifically state actual and implied bias challenges for cause will be liberally granted by the military judge in order to ensure the court-martial will be free from substantial doubt as to legality, fairness, or

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[186] United States v. Mack, 41 M.J. 51, 54 (C.M.A. 1994).

[187] *Wiesen*, 56 M.J. at 175.

[188] *Id*. at 177 n.5. The court wrote:

> Senior Judge Sullivan renews his opposition to this Court's precedent regarding implied bias as an interpretive framework for applying RCM 912. Senior Judge Sullivan may disagree with the majority view that where the President of a panel commands or supervises a two-thirds majority of court members sufficient to convict, serious doubts about the fairness of military justice are raised, but that does not make the majority view *ultra vires*. The duty of judges is to say what the law is.

Id. (citing Marbury v. Madison, 5 U.S. 137, 177 (1803)).

[189] MCM, *supra* note 3, R.C.M. 912(f)(1)(N) (emphasis added).

[190] 46 M.J. 485, 489 (C.A.A.F. 1997) (Effron, J., concurring) ("I do not agree, however, with the paragraph in the majority opinion that implicitly embraces *Hunley's* view of implied bias necessarily as a 'rare exception' found in 'the very unique facts stated [t]herein' and reflecting a test that 'should rarely apply.'").

[191] *Id*. at 489 (Effron, J., concurring).

[192] *Id*. at 489–90. (Effron, J., concurring).

[193] *Id*. at 489.

[194] *Id*. at 490.

[195] *Id*.

[196] *Id*.

[197] *Id*. ("That concept does not appear to have been endorsed in the past by this Court; it is not suggested in any of our recent cases, and it is not necessary to the disposition of this case.").

[198] United States v. Strand, 59 M.J. 455, 458 (C.A.A.F. 2004).

impartiality. In other words, the liberal grant mandate would be incorporated into RCM 912(f)(1)(N) regardless of the party making the challenge. The reasoning behind this argument is that it does not matter if government or defense counsel asserts a challenge under RCM 912(f)(1)(N) because the very purpose behind both the Rule and the liberal grant mandate is identical—protecting the public's perception of the military justice system. In fact, the liberal grant mandate has been recognized since the promulgation of the 1951 MCM.[199] It was designed to address historic concerns about the real *and perceived* potential for command influence on members' deliberations, as well as protecting society's interest in the prompt and final adjudication of criminal accusations.[200] Given these important considerations, a proponent of this change would argue that challenges for cause should be liberally construed under RCM 912(f)(1)(N) regardless of who makes the challenge or whether or not it is a "close call." Further, even absent a challenge by either party, the military judge has a *sua sponte* duty to excuse a member under RCM 912(f)(1)(N) in the interest of justice should a valid challenge for cause exist.[201] Thus, a proponent of this change would also argue the military judge should be allowed in the interest of justice to liberally grant challenges for cause in order to protect the appearance or fairness of the military justice system. Finally, and perhaps most importantly, the military judge is in the best position to make this determination. As the CAAF pointed out in *United States v. Clay*:

> 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.[202]

Admittedly, military judges are in the best position to make implied bias determinations because they have the incalculable benefit of observing the challenged member. However, changing the implied bias standard of review to whether an average person, similarly situated, would be prejudiced based on all the known facts and circumstances will do nothing to change this important consideration. To the contrary, this clearer standard of review will allow military judges to make more comprehensive implied bias determinations because they will be able to more accurately determine if an average person, similarly situated, would be biased as opposed to an amorphous public perception of the military justice system. Further, applying a liberal grant mandate to both actual and implied bias challenges would also undermine the convening authority's power to personally select panel members under Article 25, UCMJ. Indeed, Congress has specifically given power to the convening authority to detail such members that he or she feels are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.[203] Further, applying a liberal grant mandate standard of review to causal challenges will not "protect" the public's perception of the military justice system. As Judge Crawford eloquently summarized in her dissent in *Wiesen*: "The American public with which I am familiar is both perceptive and informed. When presented with all the facts, it is most capable of making a fair and reasoned judgement."[204] Judge Crawford correctly pointed out the public's perception is not limited to a handful of individuals dedicated either to vilifying or lionizing the role of a convening authority in the selection of court-martial members.[205] Judge Crawford also correctly noted an informed public understands the differences between courts-martial with members and trials in the civilian sector with civilian jurors.[206] Further, Judge Crawford noted that: "American citizens are also capable of understanding the differences between the military justice system and the various civilian criminal law systems, and knowing that in the military justice system, a convening authority selects court-martial members "by reason of age, education, training, experience, length of service, and judicial temperament."[207] Indeed, court-martial members have been referred to as "blue ribbon" panels due to the quality of their membership.[208] Thus, under these circumstances, the

[199] United States v. White, 36 M.J. 284, 287 (C.A.A.F. 1993) ("The liberal-grant mandate was expressly set out in paragraph 62*h*(2) of the 1951 MCM, and carried forward in paragraph 62 *h* (2) of the 1969 revised edition of the *MCM*. While RCM 912(f)(3) of the 1984 MCM did not contain an express statement of the liberal-grant mandate, the deletion of the express language was not intended to change the policy expressed in that statement.") (citing the MANUAL FOR COURTS-MARTIAL, UNITED STATES drafter's analysis, at A21-54 (1982)).

[200] United States v. Clay, 64 M.J. 274, 276–77 (C.A.A.F. 2007) (emphasis added).

[201] Rule for Court-Martial 912(f)(4) states: "Notwithstanding the absence of a challenge or waiver of a challenge by the parties, the military judge should, in the interest of justice, excuse a member against whom a challenge for cause would lie." Further, trial counsel also has an affirmative duty to "state any ground for challenge for cause against any member of which the trial counsel is aware." MCM, *supra* note 3, R.C.M. 912(c).

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

[203] UCMJ art. 25(d)(2) (2008).

[204] United States v. Wiesen, 56 M.J. 172, 179 (C.A.A.F. 2001) (Crawford, J., dissenting).

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

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

[207] *Id*. (Crawford, J., dissenting) (citing UCMJ art. 25(d)(2) (2008)).

[208] *Id*. at 180 (Crawford, J., dissenting). In her dissent in *Rome*, Judge Crawford highlighted some sources who have found a military panel of court members to be (?) a "blue ribbon" panel due to the quality of its members. United States v. Rome, 47 M.J. 467, 471 (C.A.A.F. 1998) (citing Jesse Birnbaum, *A New Breed of Brass: From the Ashes of Vietnam, the Pentagon Has Shaped a Sophisticated Military that Speaks Well and Fights Smart*, 1991 WL 3118757, TIME MAG., Mar. 11, 1991, at 58 and David

CAAF's preoccupation with protecting the public's concern of the military justice system, while noble, has been exaggerated. The public will have just as much confidence in the military justice system regardless of any change to appellate review of implied bias challenges. As such, while each counterargument makes valid legal points, they do not undermine or present better solutions than the proposal of an appropriate standard of review for implied bias challenges.

VI. Conclusion

The President should amend RCM 912(f)(1)(N) to specifically state implied bias challenges must be granted by the military judge only if the average person in the challenged member's position would be biased against the accused based on all of the facts presented, and not on the public's "perception" of the military justice system were the challenged member allowed to sit on the panel. Congress should also amend Article 41(a), UCMJ, such that a military judge's denial of a challenge for cause on implied bias grounds is reviewed for an abuse of discretion which will bring greater certainty and uniformity to the military justice system. The Constitution and the Supreme Court's relevant case law support military appellate courts applying the doctrine of implied bias to preserve a military accused's constitutional and regulatory right to a fair and impartial panel under RCM 912(f)(1)(N), but only in very limited circumstances. The CAAF's "read in" of the public's perception of the military justice system in interpreting RCM 912(f)(1)(N) has unnecessarily forced military justice practitioners to determine implied bias on an "ad hoc" basis with little if any guidance as to when the public would have substantial doubt about the court-martial's legality, fairness, or impartiality. The CAAF's current implied bias analysis approach also creates per se rules for challenges for cause that is solely within the province of the Executive or Legislative Branches to decide. Further, the significant differences between the military and criminal justice systems do not justify a different standard of review for appellate courts to determine implied bias under RCM 912(f)(1)(N).

An abuse of discretion standard of review will also bring greater certainty and uniformity to the military justice system, particularly at the appellate level, because it will do away with the confusing "more deference than de novo but less deference than abuse of discretion" implied bias standard military appellate courts currently use. As *Bragg*, *Townsend*, and *Elfayoumi* show, this standard is simply too subjective at the appellate level to be applied consistently, and leads to unpredictable outcomes. A simple abuse of discretion standard of review to both actual and applied bias challenges will largely eliminate this problem because it will bring one clear standard of review for appellate courts to apply. In addition, military judges will have one uniform standard under which they are judged.

Simply maintaining the status quo will only ignore this problem which needs a practical solution. Further, amending RCM 912(f)(1)(N) to specifically state both actual and implied bias challenges for cause will be "liberally" granted by the military judge regardless of the party making the challenge will also not fix this problem. Admittedly, the military judge is in the best position to make an implied bias determination because he has the incalculable benefit of observing the challenged member. However, this proposed solution undermines too greatly the convening authority's power to personally select panel members under Article 25, UCMJ. Thus, while this proposal may not be the perfect solution, it will certainly work much better than the implied bias legal framework military courts presently use.

The Constitution and our military justice system require vigilance in protecting a military accused's right to a fair and impartial panel regardless of the circumstances. The protection of these rights is so fundamental to our system of government that the law must presume a juror is biased in limited situations based on the totality of the circumstances. At the same time, it is for this very reason a consistent and uniform application of implied bias law is needed in the military justice system to not only protect a service member's constitutional rights, but also the very fabric of military law as well. However, as Justice O'Connor stated in *Smith*, determining whether a juror is biased is difficult to determine, especially when the juror may not even know it. This proposal is the best solution to address this difficult determination at the appellate level.

In perhaps the most famous criminal trial in American history, Chief Justice Marshall recognized the important role the implied bias doctrine plays in American jurisprudence. Riding circuit and presiding over the trial of Aaron Burr for treason in the killing of Alexander Hamilton, Chief Justice Marshall wrote:

> The end to be obtained is an impartial jury; to secure this end, a man is prohibited from serving on it whose connection with a party is such as to induce a suspicion of partiality. The relationship may be remote; the person may never have seen the party; he may declare that he feels no prejudice in the case; and yet the law cautiously incapacitates him from serving on the jury because it suspects prejudice, *because in general persons in a similar situation would feel prejudice*.[209]

Gergen, *Bringing Home the "Storm"; What the Victorious American Military Could Teach the Rest of Us*, 1991 WL 2142956, WASH. POST, Apr. 28, 1991)). Judge Crawford also noted that, "arguably, this difference is such that invocation of the doctrine of implied bias should be even rarer in the military." *Rome*, 47 M.J. at 471.

[209] United States v. Burr, 25 F. Cas. 49, 50 (D. Va. 1807) (emphasis added).

Even in a criminal trial as popular as Aaron Burr's trial for treason, Justice Marshall properly recognized the focus of implied bias review should be based on whether an average person, similarly situated, would be prejudiced against the accused based on all the known facts and circumstances. It is time for the military justice system to follow Justice Marshall's position and adopt the same standard of review to challenges based on implied bias grounds. In doing so, the public will not lose any confidence in the military justice system. To the contrary, changing the implied bias standard of review to be in-line with its civilian counterpart will do just the opposite, and inspire confidence in the military justice system.[210]

[210] *See* Weiss v. United States, 510 U.S. 163, 194 (1994) (Ginsburg, J., concurring) ("Today's decision upholds a system of military justice notably more sensitive to due process concerns than the one prevailing through most of our country's history.").